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MADHYA PRADESH STATE JUDICIAL ACADEMY
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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The qualities that one should look for in a judge are a burning desire to be fair and impartial, the courage to uphold the law and strike down injustice, compassion, coupled with an understanding of human frailties, and lastly, love for the law.

– Wee Chong Jin, the First Chief Justice of Singapore

FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director Incharge

Respected Judges,

Technological Developments in the field of information and communication have brought a paradigm shift in the history of human civilization. It has resulted in enhanced efficiency, productivity and quality of output in every walk of life. Computers as well as electronic communication devices such as facsimile machines, electronic mail and video conferencing provide the ability to process large volumes of data with speed and accuracy, exchange of useful information between different locations and support higher quality of decision making. This revolution adds huge new capacities to human intelligence and constitutes a resource which changes the way we work together and the way we live together.

What relevance is this revolution to a judicial system? If the way people work, live and interact is changing this world, no doubt it affects the administration of justice also. While the technology revolution arrived in India some years ago, automation has not transformed all facets of life in equal measure. It has not permeated to the Subordinate judiciary, in particular, where the old work methods based on manual systems being continued even now. The problems faced by the Courts, judiciary and public seeking justice in terms of backlogs, delays and expense are well known. They can be partly resolved by the effective implementation of automation in the courts. The Judiciary ought to take advantage of the new developments that may enhance the delivery of its own services.

While the internet technology enhances freedom of expression by allowing for free and effectively unregulated communication, it has also facilitated a great deal of crime. The dissemination of child pornography, not to mention fraud, gambling, blackmail and cyber stalking are all on the rise. The misuse of technology is involved in almost every crime. Even incitement to suicide and murder is occurring over the internet. New challenges are being thrown before us every day.

It is duty of the judicial system to prepare and meet these challenges. And at the same time it is opportunity for the judiciary to take advantage of the new avenues provided by information technology to offer a professionally excellent service to the community. Nothing less is expected of us.

Considering the improvements in operational efficiency, coordination, accessibility and speed which IT could bring, we wish to acquaint our esteemed readers with the usage of Video Conferencing tools and procedure by publishing the Guidelines prescribed by the High Court of Madhya Pradesh. Further, an extensive article on admissibility, proof and probative value of the CCTV footage will help the readers in appreciating the electronic evidence involving CCTV audio visuals of crime.

This issue comprises of latest judgments on various nuances of law enunciated by the Supreme Court and the High Courts. Let us have a glimpse of the latest trend of law laid down in various judgments.

In case of ***Kerala State Electricity Board,*** the Apex Court observed that referring the parties to arbitration has serious civil consequences as Arbitration Tribunal shall not be bound by the Code of Civil Procedure and Indian Evidence Act and once the award is passed, the award shall be set aside only under limited ground. Therefore, in absence of specific arbitration agreement between the parties, the Court should not refer the parties to arbitration without a joint memo or a joint application of the parties.

In case of ***Dr. Subhash Kashinath Mahajan,*** the Apex Court has laid down that arrest of a public servant in cases under the Atrocities Act can only be made after approval of the appointing authority and of a non-public servant, after approval by Senior Superintendent of Police of the district and such approval may be granted in appropriate cases if considered necessary for the reasons to be recorded and such reasons must be scrutinized by the Magistrate for permitting further detention. It was also directed that any violation of this directive will be actionable by way of disciplinary action as well as contempt.

The Supreme Court while dealing with default bail under section 167 (2) of CrPC, held in case of ***Rakesh Kumar Paul*** that if the right for default bail has ripened in favour of the accused, it cannot be denied on any pretext. The Court cannot keep the application pending so as to allow filing of chargesheet. Written application or oral submission makes no difference with regard to default bail.

In case of ***Rajendra Rajoria***, the Supreme Court has observed that power under section 398 of CrPC to order further enquiry are concomitant with the powers under sections 399 and 400 of CrPC. The Revisional Court while passing an order of remand cannot direct the Magistrate to keep the findings made by it in mind while considering the case on merit.

In case of ***Atma Singh,*** it was held by the Supreme Court that Hindu Succession Act, 1956 shall have an overriding effect over the Hindu Widows' Remarriage Act, 1856. Therefore, a widow can claim right in the property of her son received by him from her first husband even after remarriage.

The Academy in the past two months has conducted Advance Course for the District Judges Entry Level promoted in the year 2018 in two batches, Regional Workshops on Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 for Judicial Magistrates at Bhopal and on Family Laws for Principal & Additional Principal Judges of Family Courts as well as Judges dealing with matrimonial cases at Guna.

In addition to the above programmes, the Academy also conducted Specialized Educational Programmes at Medico-Legal Institute, Bhopal and at Forensic Science Laboratory, Sagar for the newly appointed/promoted Judges of HJS cadre.

The Academy conducted two Sensitization Programmes on – Juvenile Justice (Care & Protection of Children) Act, 2015 for other stakeholders working under the Juvenile Justice System i.e. Probation Officers of the Juvenile Justice Boards and Chairmen/Members of Child Welfare Committees with the objective to ensure proper implementation of the Act.

Apart that, the Academy also conducted Educational Programmes for other stakeholders that include workshops for Advocates, Prosecutors and Special Police Establishment for the Investigators of Lokayukt, Economic Offences Wing & Judges dealing with corruption cases.

The Academy also conducted Specialised Educational Programme on – Professionalism at Workplace for the Administrative Staff of the District Courts and Specialised Accounts Training Programme for the Accountants and Assistant Accountants of the District Courts.

I sincerely hope that the content of this issue will enlighten and guide the readers in discharge of their duties. Your valuable contributions and response are always welcome.

Keep blessing our pursuit for judicial excellence.

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"Without justice being freely, fully and impartially administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value, and men may as well return to a state of savage and barbarous independence".

MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Regional workshop on - Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994
(03.02.2018 at Bhopal)

Advance/Orientation Course for the District Judges
(Entry Level) (I Batch)
(14.02.2018 to 24.02.18)

MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Advance/ Orientation Course for the District Judges
(Entry Level) (II Batch)
(05.03.2018 to 16.03.2018)

Workshop on – Juvenile Justice (Care & Protection of Children) Act, 2015
for the Probation officers of the Juvenile Justice Boards
(09.03.2018 & 10.03.2018)

MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Specialized Educational Programme on – Professionalism at Workplace for the Office Superintendents of District Courts (19.03.2018 & 20.03.2018)

Regional Workshop for Advocates (Jabalpur) (19.03.2018 to 22.03.2018)

MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Specialized Accounts Training Programme for the Accountants/Asst. Accountants of District Courts (22.03.2018 & 23.03.2018)

Specialized Training Programme for Prosecutors (22.03.2018 & 23.03.2018)

MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Sensitization Programme on – Juvenile Justice (Care & Protection of Children) Act, 2015 for the Chairman/Members of the Child Welfare Committees (26.03.2018 & 27.03.2018)

Workshop for Investigators of Special Police Establishment (28.03.2018)

HON'BLE SHRI JUSTICE RAJENDRA KUMAR MAHAJAN
DEMITS OFFICE

Hon'ble Shri Justice Rajendra Kumar Mahajan demitted office on His Lordship's attaining superannuation.

Hon'ble Shri Justice Rajendra Kumar Mahajan was born on March 7, 1956 at Khargone, Madhya Pradesh. After obtaining degrees of M.Sc. (Chemistry) and LL.B. with good academic records, joined M.P. State Judicial Services as Civil Judge Class II on 21st October, 1981. Promoted to Higher Judicial Services as Additional District & Sessions Judge in the year 1995 and as District Judge in the year 2007. Granted Selection Grade Scale in the year 2001 and thereafter, Super Time Scale in the year 2008.

Worked in different capacities as Law Officer to M.P. State Bureau of Economic Offences Wing, Principal Judge, Family Court, Bhopal and District & Sessions Judge, Neemuch and Katni. Was District & Sessions Judge, Mandsaur prior to elevation.

As Judge of District Judiciary, was sent to New Delhi as Group Leader for study of productivity and best practices under the Exchange Programme for Judges and to various other training programmes including training at SVP National Police Academy, Hyderabad.

Took oath as Additional Judge, High Court of Madhya Pradesh on 25.10.2014 and as Permanent Judge on 27.02.2016.

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

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PART – I

CCTV FOOTAGE : ADMISSIBILITY, PROOF & PROBATIVE VALUE

– By Yashpal Singh
O.S.D., M.P.S.J.A.

INTRODUCTION

The use of computers and communication technology is all- pervasive now. Almost all data is digital these days and most communications are exchanged electronically through SMS, Email, Whatsapp, Facebook, Twitter etc. Use of mobile communication has become indispensable and one will hardly find any person who is not using mobile phones these days. In Civil as well as Criminal Cases, the courts are frequently called upon to rule on whether 'electronic evidence is admissible or not', and, if it is admissible what is the mode of proving such electronic record and what is its probative value. Sooner or later, with pace of advancement of technology, we are going to witness an era where almost every traditional document with be replaced by electronic records. Every case before the trial court would require recording of evidence which is in electronic form.

However, two most important scientific advancements affecting the law of evidence in our country are – CCTV Footages and Call Data Records. This article will deal with the issues relating to admissibility, recording of evidence, appreciation and probative value of CCTV footages.

CLOSE CIRCUIT TELEVISION CAMERAS (CCTV)

Close Circuit Television Cameras (CCTV) can be seen all over the globe. Almost all pathway, public places, private properties, public offices and markets in the urban India have been covered by CCTV cameras. The stills and videos captured by these cameras serve as important piece of evidence in trials. Therefore, availability of CCTV footage of the incident in a particular case may be the best and direct evidence to prove that incident. CCTV footages contain important evidence and it may lead the court to a definite conclusion of their own without any other corroborative evidence. The High Court of Delhi in ***Kishan Tripathi @ Kishan Painter v. State, 2016 LawSuit (Del) 1160,*** had relied upon the CCTV footage of crime recorded on the DVR of a shop where CCTV was installed and upheld the conviction under Sec. 302 of IPC. It was held that - *"When we see the CCTV footage, we are in the same position as that of a witness, who had seen the occurrence, though crime had not occurred at that time when the recording was played, but earlier."*

WORKING OF CCTV CAMERAS

The best part of technology is that it provides best evidence (provided it is not tampered with). The majority of CCTV cameras in use today are usually for surveillance and security purposes. However, it is important to understand the

working of this technology so that we can appreciate the evidence generated through it.

CCTV uses one or more video cameras to transmit video and sometimes audio to a computer server or digital/network video recorder. The difference between CCTV and standard TV is that standard TV openly broadcasts signals to the public. CCTV signals are not openly transmitted to the public. They are routed through a server or recording device.

A CCTV system has four major components namely : the camera, lens, monitor and digital/network video recorder. Among these components, the camera is most important because it is the one that collects the images. The camera works the same way that an ordinary camera does, only that it can be left to operate on its own. The camera comes with a motor that helps it to move, rotate and zoom in or zoom out. The ability of the camera to zoom in and out is determined by the type of lens it has.

Once an image or video has been picked by the camera, it is taken to the monitor and then recorded on DVR (Digital Video Recorder) or NVR (Network Video Recorder). They can also use wireless transmission to send images or videos to monitors. Once the monitor has received the images, it sends them to the DVR or NVR. Images or videos are stored in DVR when the CCTV uses analogue/digital cameras and in NVR when CCTV uses IP (internet protocol) based cameras which can transmit the image or video over the internet.

The CCTV footage is captured by the cameras and can be stored in the computer where files are created with serial numbers, date, time and identification marks. These identification marks/ details are self generated and recorded, as a result of pre-existing software commands. The recording was as a result of commands or instructions, which had already been given and programmed. There is no human intervention in capturing of images or videos and the system works automatically.

ADMISSIBILITY OF CCTV FOOTAGES IN EVIDENCE

Digital evidence or electronic evidence is any probative information stored, generated or transmitted in digital form. With the enactment of Information Technology Act, 2000 several necessary amendments were also made in CrPC, IPC and Evidence Act and electronic records were accorded legal recognition in India. Section 3 of Evidence Act was amended to include electronic records in documentary evidence. Now, evidence includes any electronic records produced for the inspection of the Court[1]. Although the term “electronic evidence” has not been defined in any law, but its meaning may be deduced from the definition of electronic record defined under Section 2 (t) of the Information Technology Act, 2000[2] and the definition of evidence.

Any electronic record which is produced for the inspection of court is also a document and such electronic record actually is electronic evidence. Electronic record means an information of probative value in electronic form. It may be

understood as any information stored, generated, sent or received in an electronic device which is intangible and is in electronic form.

The original device in such a case which produced the electronic record is 'primary evidence'. For eg : The sound recorder/CCTV Camera and attached hard disk used to record a video/audio clip are primary evidence of its contents. The copy created or obtained from the original device is 'secondary evidence'. For eg : An extract of video footage created from CCTV Recorder copied on a CD or pendrive.

Thus, there can not be any iota of doubt that the contents of CCTV footage are in electronic form. Therefore, it qualifies the definition of electronic record and when produced for the inspection of Court, may be classified as electronic evidence.

The general rule of law of evidence contained under Sections 61 to 65 of the Evidence Act is that when primary evidence is available, secondary evidence is not admissible. However, the same principle cannot be strictly applied in cases of electronic records. Large Servers/Original devices cannot be expected to be brought before the court in each case. Therefore, secondary evidence in the form of a output such as printout or soft copy in the form of CD/DVD etc. is admissible in a court of law, provided certain conditions are complied with.

Law relating to admissibility of electronic evidence has been settled by a three Judges Bench of Hon'ble Supreme Court in ***Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473,*** by overruling the earlier judgment in case of ***Navjot Sandhu, AIR 2005 SC 3820.*** It has been held that if an electronic record is produced as a primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions regarding certification as per Section 65B of the Evidence Act, 1872. That evidence would take the colour of primary evidence, subject no doubt to its credibility based on forensic examination and cross examination.

Therefore, when original DVR/NVR (hard drives) of the CCTV footage is available with the party who sought to produce it, it can be produced directly as any other document. The contents may be played before the court and court may record such facts in deposition, as it may deem fit, treating it to be primary evidence.

However, it may not be possible to produce original DVR/NVR in every case. The cost of DVR/NVR is very high. Production in court may affect the use of CCTV system in future. A stranger who has no interest in the outcome of litigation may be reluctant in providing his DVR for production in courts and there are many such reasons.

Whenever original DVR/NVR is either not available or cannot be produced and its output in CD or DVD or flash drive is sought to be produced in evidence, it has to be admitted in accordance with the procedure of Sections 65A and 65B of the Evidence Act.

Section 65A provides that contents of electronic records may be proved in accordance with the provisions of Section 65B.

Section 65B is divided into five sub-sections. Sub-section (1) provides that output of an electronic record shall also be deemed to be a document and shall be admissible in evidence as proof of the contents of original if the conditions relating to information contained in electronic record as well as computer in question are satisfied. Sub-section (2) provides four conditions referred to in sub-section (1). First two conditions relate to the integrity of data to ensure that there has been no unauthorised access to the data in question. Later two conditions ensure that the computer was functioning properly and therefore the reproduction of data is accurate and genuine. Sub-section (3) of Section 65B provides that the information may be stored, processed, generated, transmitted or received on a network of computers which shall be treated as a single computer.

Sub-section (4) is the most important provision which provides for the certificate in lieu of statement. According to sub-section (4), where it is desired to give a statement in evidence about an output of an electronic record, a certificate purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate. Such certificate must confirm doing any of the following things -

(a) identify the electronic record containing the statement and describe the manner in which it was produced;

(b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) deal with any of the matters to which the conditions mentioned in sub-section (2) relate.

It shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate. Sub-section (5) is explanatory provision.

While interpreting Section 65B of the Evidence Act in ***Anvar P.V. v. P.K. Basheer*** (supra), the Supreme Court has held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, printout etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

Therefore, whenever extract of a CCTV footage is sought to be produced in evidence, it has to be accompanied with a certificate issued by a person occupying a responsible official position in relation to the operation of the CCTV device or the management of the CCTV recording.

Recently, in case of ***Shafhi Mohammad v. Himachal Pradesh, AIR 2018 SC 714,*** a question arose before the Supreme Court as to admissibility of electronic

evidence in a situation where the person producing the electronic evidence was not in control of the device producing it. The Court held that it cannot be universal law that certificate will always be mandatory for admissibility of electronic evidence. The certificate is only required where situation is such, which is covered by the special law of Section 65B i.e. where the party presenting the evidence is in control of the device producing it and is in position to present the certificate. In a situation where the party is not in a position to produce certificate because he is not in control of the device or the control is with the opposite party, than certificate is not mandatory.

However, in case of CCTV footages, the electronic device would generally be in control or access of the person desiring to produce it and it would be in a rare situation when CCTV device would be available with other party. In criminal cases, if prosecution wishes to rely on CCTV evidence, then it has either to procure original DVR/NVR or has to obtain certificate(s) from competent persons alongwith the output of DVR/NVR.

MODE OF PROOF OF CCTV FOOTAGES : RECORDING OF EVIDENCE

Whenever a CCTV footage is sought to be produced in evidence, several persons may be required to be examined to prove its contents, its veracity and the fact that it is genuine. Certificate under Sec. 65B(4) of the Evidence Act would also be required when primary electronic record is not produced before the court. We have several examples where CCTV footage has been found to be the best evidence and they are the best source to learn how evidence should be recorded when CCTV footage is sought to be produced in evidence.

In ***K. Ramajayam @ Appu v. Inspector of Police, 2016 Cr.L.J. 1542 (Mad),*** incident of robbery and murder was captured by CCTV installed in the shop of deceased. Original DVR were seized during investigation, it got forensically examined by State FSL and the facial image of suspect in CCTV footage was compared with that of accused by Scientific Officer (Anthropology). To prove the contents of CCTV footage, prosecution examined the person who had installed CCTV system in shop, the technician who had removed the DVR on the request of police, the Scientific Officer of State FSL who had examined the DVR and reported minute to minute details of incident, Scientific Officer (Anthropology) of FSL who had compared the image of suspect in CCTV footage with that of accused and the investigating officer.

> It was observed by the Madras High Court in para 36 that – *"The CCTV recordings show the accused wearing a horizontally striped T-Shirt (MO-4) entering the shop at 11:19:57 hours and is talking to the deceased Ganaram. While the accused and the deceased are seriously discussing, at 11:36:08 hours Budharam (PW-6) enters the shop and after talking to the deceased, he leaves the shop at 11:37:15 hours. Thereafter the accused and the deceased resume their discussion. At 11:38:21 hours the deceased enters the Locker room and is taking some jewels from the vault.*

At 11:38:59 hours the accused enters the Locker room; takes out a knife from his pant pocket; pounces upon the deceased, who is squatting on the floor; holds him tight by his neck; saws his neck with the knife and stabs him repeatedly until he is satisfied that the man is dead. At 11:40:16 hours the accused wipes the knife and keeps it in his pant pocket. He comes out of the Locker room and picks up the jewels from the display desk and puts it in his bag. At 11:41:27 hours, the accused walks out of the shop." Ultimately, the High Court upheld the conviction based on CCTV footage alongwith other incriminating circumstances.

Another fine example of use of CCTV footage in criminal trial is ***Kishan Tripathi*** (supra). A murder took place within the premises of a factory where two CCTV cameras were installed, one on entrance and another on basement. The entry of accused was captured in the entrance camera and the penultimate incident on the camera installed in basement. No other evidence was available. CCTV footages were examined during investigation in the presence of owner of premises with the help of a technician and police personnel. Owner identified the perpetrator in CCTV footage as accused being one of his workers. Thus, original DVR was seized, copies were made and were presented before the Court with chargesheet. Court relied upon the original DVR. Extract of the incident from original DVR was copied in presence of Court in two pen drives, then was played in the Court during examination of prime witness (who identified the accused), the technician (who played the CCTV recording) and the police personnel who investigated the case. The snap shots (still photos) from the CCTV footage were also taken on record to ensure the identity of accused.

Although there was no forensic examination of the DVR to ensure that it is genuine and not tampered with, but the Delhi High Court went forward to observe that -

"We are satisfied that the recorded CCTV footage has not been interpolated or tampered in the light of the original hard drive, which has been played before us. The footage recorded consists of 405 files starting from 2:06 P.M. on 21.02.2009 till 2:14 P.M. on 23.02.2009, with self generated numbers. Time and date are mentioned on the files and the video. These are not one, two or three files, but more than 400 files, created over a span of several hours. This "internal evidence" establishes its genuineness."

Ultimately, the High Court relied upon the CCTV footage and held that – *"These depositions, do not show that the appellant is innocent or the prosecution evidence in the form of CCTV footage is of doubtful integrity and fabricated. The core evidence i.e. CCTV footage nails the appellant, Kishan Tripathi."*

In ***State of Maharashtra v. Rajesh, 2016 (2) Crimes (HC) 592 (Bom),*** CCTV footage played an important role in establishing the last seen theory. The deceased was seen sitting in between the two accused on a motorcycle in a CCTV camera installed at a petrol pump. Trial court examined the technical expert of Kores India Ltd. (company which installed CCTV Systems in all the petrol pumps of BPCL) who removed the original DVR from the system, the father of deceased who identified the deceased and accused from CCTV footage, the panch witness before whom CCTV footage was played to identify the accused during investigation, the manager of the petrol pump where CCTV system was installed and two Scientific Officers of the Forensic Science Laboratory who had analysed the contents of CCTV footages copied from original NVR to CDs.

It is pertinent to note that in this case, original NVR were seized but the forensic expert (Scientific Officer of the Forensic Science Laboratory) was unable to retrieve its content. The relevant portion of CCTV footage were copied in CD which was forensically examined. He had carried out analysis on the C.D. by creating image and by adopting the process generating the hash value the process of file signatures. During analysis of C.D., six video files were detected in the extension which were of type "video file (.avi)". All the six files were continuous and not edited at all. The forensic expert concluded the same after its examination by "framing and timing method" and by "hue saturation view method."

Since primary electronic record was not produced in court, three different witnesses produced three different certificates under Section 65B(4) of the Evidence Act, viz. the manager of the petrol pump, the employee of the CCTV service provider who created copy of the CCTV footage in CD and the Scientific Officer of FSL who opined that the contents were genuine.

Delhi High Court in ***Kishan Tripathi*** (supra) has compared the CCTV footages with time machine in fictional art of HG Wells in "The Time Machine". It has been observed by their Lordships of Division Bench that –

> *"Time machine is fiction, albeit seeing the CCTV footage with your own eyes as a judge gives you an insight into the real world in the past. In the present case, the court has itself seen the CCTV footage, and has travelled back in time to the time when the occurrence took place and thereby has seen the occurrence in the same position as that of a witness, who would have seen the occurrence, if he was present. There cannot be a more direct evidence. This video recording which captures the occurrence, would be per se and mostly discerningly reliable and compellingly conclusive evidence, unless its authenticity and genuineness is in question." (emphasis supplied)*

Thus, it can be concluded that contents of CCTV footages may be proved by original DVR/NVR as well as their extracted copies. However, courts must ensure that the contents of CCTV footage should be played while recording

evidence of witnesses and it must also be recorded in deposition sheet. The manner in which a person is identified, the actions taken by suspect and minute details of the incident should also form part of deposition or record as observation of court. At the same time, forensic examination is not the only method to prove that the CCTV footage are genuine and untampered with. It is a fact which can be inferred from other circumstances too. Courts should also ensure that the requirement of certificate under Section 65B(4) is complied with, when necessary. Thus, the trial courts have to be vigilant while recording evidence.

PROBATIVE VALUE OF CCTV FOOTAGES

There are lot of differences between electronic records generated without human intervention and electronic records generated by human intervention. The probative force of such electronic records is thus determined. For example, CDR, CCTV footage, which are auto generated without human intervention have greater force attached to them in comparison to photographs or videos captured by a person.

The issue of the probative value of electronic records came before the Delhi High Court in ***Kundan Singh v. State, 2015 LawSuit (Del) 5843,*** wherein it was observed that the courts must rule out that the records have not been tampered and read the data or information as it originally existed. These are aspects which are not codified as such, for probative value is examined on the case to case basis keeping in mind the relevant facts.

In ***Kundan Singh*** (supra), the Delhi High Court considered the probative force that can be attached to call data records (CDR). It was observed that electronically generated record is entirely a product of functioning of a computer system or computer process, like call record details which shows the number from and to which the call were sent, time etc. is generated electronically. It does not contain any assertion. Therefore, it is not hearsay. These are not writings made by a person. Computer generated telephone records are not similar to a statement by a human declarant and therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved.

In ***K. Ramajayam @ Appu*** (supra), the Madras High Court has held that one should bear in mind that a digital image cannot be manipulated easily. Every digital image has a meta data stored in it. The meta data are structured as coded data, which gives every image its own character. The observation of the High Court is worth reproduction –

> *"Defence will always complain of manipulation, but Courts can reject fanciful objections bearing in mind the principle underlined in Section 114 of the Indian Evidence Act, 1872. De omnibus dubitandum (doubt everything) philosophy may be a road to scientific discoveries, but not for judicial enquiries, where perfect proof is utopion."*

Normally non-assertive conduct is more reliable, provided there has been no fraud and interpolation in the preparation of the record. CCTV recordings are also non-assertive and self generated through preset commands. It does not involve any human intervention except for power on or power off the machine. Therefore, if proved to be untampered with, the contents of CCTV footage carries a very high compellingly conclusive evidence.

Whether it is necessary to play the video of CCTV footage in Court while recording evidence?

The Madras High Court in ***K. Ramajayam @ Appu*** (supra) has observed that without viewing the CCTV footage, how can any Court, "consider the matter before it" to conclude that a fact has been 'proved' or 'disproved' ? It has been held in the judgment that –

> *"During the hearing of the case, we noticed that the trial Court had not played the DVR (MO-2) and seen the CCTV footages in the presence of the accused. In this regard we propose to dispel misgivings, if any, in the mind of trial Judges about their power to view such evidences. Therefore, we hold that a Court has the power to view CCTV footage and video recordings, be it primary or legally admissible secondary evidence, in the presence of the accused for satisfying itself as to whether the individual seen in the footage is the accused in the dock. The trial Court should also specifically put questions to the accused when he is examined under Section 313 Cr.P.C. about his overt acts appearing in the footage and record his answers."*

Whether forensic examination of CCTV footage (DVR or copy) is mandatory?

Forensic examination may opine that the CCTV recordings are original and not tampered with, but it is not the only way to ensure genuineness. There may be situations where other attending circumstances could be sufficient to prove that the CCTV footage is original and untampered. See ***Kishan Tripathi*** (supra).

Whether it is necessary to examine the person who has issued certificate under Section 65B(4) of the Evidence Act ?

Opportunity to cross examine a witness who has given some evidence against the accused is a salient feature of fair trial. But sometimes, accused either admits or chooses not to challenge certain facts. In those cases there is no need to call the person to formally prove the facts and then give accused an opportunity of cross examination. The Madras High Court has also, in ***K Ramajayam @ Appu*** (supra), held that it is not mandatory to call the person issuing the certificate under Section 65B(4) of the Evidence Act, unless the contents of electronic record is objected to or its integrity is otherwise doubtful.

Who will give the certificate under Section 65B(4) of the Evidence Act alongwith CCTV footage?

Section 65B(4) of the Evidence Act provides that the certificate must be signed by a person occupying a responsible official position either in relation to the operation of the relevant device or in management of the relevant activities. He need not be an expert or the person feeding the information. However, Chain of custody may require multiple certificates from multiple witnesses. ***State of Maharashtra v. Rajesh*** (supra) is a prime example where one certificate was given by the manager of petrol pump where CCTV cameras were installed as a person occupying official responsible position in relation to the relevant activities. Another certificate was issued by the person who was incharge of the services of CCTV system. Third certificate was given by the Scientic Officer who conducted forensic examination of the CCTV footage. Thus, the requirement of certificate will depend up on the facts of the case.

CONCLUSION

1. CCTV footage are one of the best kind of evidence that may be available in any case.
2. The CCTV footage is direct evidence & not circumstantial.
3. If proved to be genuine & untampered, the contents of CCTV footage may form conclusive proof of incidence.
4. Where original DVR/NVR are seized and produced before the Court, that is a primary evidence and there is no need of certificate u/s 65B(4) of the Evidence Act, 1872. The contents of original DVR/NVR may be proved by playing them in Court and its authenticity and genuineness may be proved by the witnesses.
5. Where copy of extract of the original DVR/NVR is prepared, it may also be produced in evidence without calling original, provided the chain of custody is proved alongwith certificate(s) u/s 65B(4) of the Indian Evidence Act.
6. The Court should also play the CCTV footage while recording evidence. It may have to be played several times. Court should also observe & note material facts with relevant time while watching the CCTV footage, in the deposition.
7. It is not mandatory to get the DVR/NVR or copies to be forensically examined to ensure its genuineness. Genuineness may be inferred from attending circumstances and it should not be doubted unless some clinching material affecting its truthfulness is brought on record.

उपसंहार

1. सी.सी.टी.वी. फुटेज किसी भी मामले में उपलब्ध होने वाली सर्वोत्तम साक्ष्य में से एक है।
2. सी.सी.टी.वी. फुटेज प्रत्यक्ष साक्ष्य है न कि परिस्थितिजन्य साक्ष्य।

3. यदि सी.सी.टी.वी. फुटेज को असली एवं अपरिवर्तित होना प्रमाणित कर दिया जाए तो यह किसी घटना का निश्चायक प्रमाण भी हो सकता है।

4. जहां मूल डी.वी.आर./एन.वी.आर. जप्त किए जाते हैं और न्यायालय में प्रस्तुत किए जाते हैं, वहां यह प्राथमिक साक्ष्य के रूप में ग्राह्य होंगे और साक्ष्य अधिनियम, 1872 की धारा 65बी(4) के अनुसार प्रमाणपत्र प्रस्तुत करना आवश्यक नहीं होगा। डी.वी.आर./एन.वी.आर. की अंतर्वस्तु उसे न्यायालय में चलाकर देखकर साबित की जा सकती है तथा उसकी सत्यता एवं अपरिवर्तित होना साक्षियों द्वारा साबित किया जा सकता है।

5. जहां मूल डी.वी.आर./एन.वी.आर. के विशिष्ट भाग की कापी तैयार की जाती है वहां उसे बिना मूल को आहूत किए साक्ष्य में प्रस्तुत किया जा सकता है, परन्तु यहां साक्ष्य अधिनियम, 1872 की धारा 65बी(4) के प्रमाण पत्र के साथ ऐसी कापी तैयार कर प्राप्त करने में मूल की अभिरक्षा की कड़ियों (chain of custody) को भी प्रमाणित करना होगा।

6. न्यायालयों को साक्ष्य लेखबद्ध करते समय सी.सी.टी.वी. फुटेज को चलाकर देखना चाहिए। इसे कई बार दोहराना पड़ सकता है। इसके साथ-साथ न्यायालयों को सी.सी.टी.वी. फुटेज देखते हुए तात्विक तथ्यों को सुसंगत समय के साथ बयान में लेखबद्ध करना चाहिए।

7. डी.वी.आर./एन.वी.आर. अथवा उनसे बनाई गई कापी की सत्यता प्रमाणित करने के लिये उनकी फारेन्सिक जांच कराना प्रत्येक मामले में आज्ञापक नहीं है। उनकी सत्यता का अनुमान उपस्थित परिस्थितियों से भी लगाया जा सकता है। इसके साथ-साथ इन पर अनावश्यक संदेह नहीं करना चाहिये जब तक कि उनकी विश्वसनीयता को प्रभावित करने वाला कोई ठोस प्रमाण अभिलेख पर न लाया जाये।

* * *

1 "Evidence"- "Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matter of fact under inquiry:
Such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

2 "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong -
Theodore Roosevelt

FOLLOW OR NOT TO FOLLOW : THE LAW OF PRECEDENT

– By **Vidhan Maheshwari,**
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One of the basic principles of administration of justice is “like cases should be decided alike”. Judicial discipline and judicial propriety require the District Courts to follow the binding decisions of the superior Courts, i.e. the Supreme Court and the High Courts.

With the easy availability of the thousands of case laws online and through various softwares, the number of cases referred by the parties at bar have increased. Bunch of case laws are presented to the judge in support of the plea and it is the ultimate duty of the judge to apply the right law. As Courts often come across conflicting opinions of the higher Courts, it is essential for the judges of the District Court to have sufficient knowledge of law relating to precedent. Many a times, classical judgments having precedential value are ignored in the race of finding latest judgments.

The article tries to explain binding nature of the higher Courts' judgments but much emphasis has been laid on various terminology used in law of precedent and circumstances in which a judgment of the higher Court is not binding. The aim of the article is to be a comprehensive statement of current doctrine of precedent in India from the perspective of District Courts.

To begin, the doctrine of precedent is intimately connected with the hierarchy of Courts and based upon the principle of *“stare decisis”* which literary means *“to stand by decided matters”.* Another legal maxim which is often quoted is *“stare decisis et non quieta movere”* which literally means *“to stand by decision and not to disturb settled matters”.* In the celebrated judgment of the High Court of Madhya Pradesh of ***Jabalpur Bus Operators Association v. State of Madhya Pradesh, AIR 2003 MP 81,*** it was observed:

> *“Every Court is bound to follow any case decided by a Court above it in the hierarchy and appellate Court is bound by precedents. A case is regarded as a precedent when it furnishes rules which may be applied in settling the rights of the parties. The doctrine “Stare-decisis”, commonly called “The doctrine of precedent” means adherence to decide cases on settled principles and not to disturb matters which have been established by judicial decisions. The precedent should serve as a rule for future guidance in deciding analogous cases (Words and Phrases, Permanent Edition Vol. 33 P, 372-373).”*

The merits of the doctrine of precedent were recognised by the Constitution Bench of the Supreme Court in the case of ***Union of India v. Raghubir Singh, AIR 1989 SC 1933,*** where in it was observed:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."

The doctrine of precedent was adopted by Indian Courts before independence as developed by the Courts of equity in England. But it is a matter of fact the *"Shishtas"* were long recognised practice in India even before the formal english Courts were setup. After the Constitution came into force the hierarchy of Courts was established. The Supreme Court was made the Apex Court. It was stated in Article 141 of the Constitution of India that the "law declared" by the Supreme Court shall be binding on all Courts within the territory of India. The High Courts were established and recognised as the Courts of record and were given power of superintendence over all the Courts within the states i.e. over the District Courts. It is no longer in dispute that India is governed by a judicial system identified by a hierarchy of Courts, where the doctrine of binding precedent is a cardinal feature of its jurisprudence and judges of the higher Courts while interpretating the law and executing it in its true spirit, also make law.

Before proceeding further and understanding the precedential value of the judgments of the higher Courts it would be appropriate to refresh our memory as to various terms used in law of precedent.

Ratio Decidendi:

It basically means the principle upon which the case has been decided. This ***ratio decidendi*** can be assesed only after the analysis of facts. The Constitution Bench of the Supreme Court in the case of ***Krishena Kumar Vs. Union of India and Others, AIR 1990 SC 1782,*** has held as follows:-

"The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a preexisting rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration."

The ***ratio decidendi*** is the formula of the law that was applied in given facts of the case. It basically refers to the principle of law applicable to the legal problems disclosed by the facts.

Obiter Dicta:

Whenever the Court writes its judgment, it is required to give comprehensive and justiciable reasoning for the conclusion arrived. In this process or in the way to it, Courts also pronounce statements of law which go beyond the requirements of the case at hand. These statements are called *obiter dicta*. The value of the *obiter dicta* will be discussed later, but a difference between *ratio decidendi* and *obiter dicta* that must be appreciated is that the probabilities are that obiter dicta must have received less serious consideration than that devoted to a proposition of law put forward as a reason for the decision i.e. *ratio decidendi.*

Per incuriam:

The Latin expression *per incuriam* means through inadvertence. A decision can be said generally to be given *per incuriam* when the Supreme Court/High Court has acted in ignorance of previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court on the same point. An element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature is necessary for a judgment to become *per incurium*.

Sub-silentio:

The concept of *sub silentio* which literally means "in silence", has been explained by the High Court of Allahbad in the case of ***Dharmesh & others. v. State, Cri. Appeal No. 428 of 1982,*** judgment dated 17.02.2016 where it has been observed:

> *"A decision passed sub silentio means in the technical sense that when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."*

Overruled:

The judgments rendered by the higher Court are final but not infallible. Recognising the social change or ignorance to the true spirit of law, there might be a need to examine the previous decision rendered by the same or lower Court. Courts have the authority to correct by the act of overrule, rendering the previous judgment of the same Court or lower Court as not binding. This act might be express or implied in circumstances in which judgment was passed.

No longer a good law:

When because of any prospective law, the judgment or its statement of law is recognised as no longer of binding effect, than it is said to be “no longer a good law.” There might be various reasons for it which may include overruling, change in statute or recognition as being *per incurium*.

Persuasive value:

According to Black’s Law Dictionary persuasive precedent is a precedent that is not binding on a Court, but that is entitled to respect and careful consideration. Persuasive value is nine out of ten of the authoritative value. The Court is under the heavy burden to give legally sound and clear justification if it decides not to go with the persuasive precedent. A persuasive precedent depends for its influence upon its own merits.

Reffered, Relied, Reversed, Distinguished, Disapproved, Disagree, Dissented and Concurrence:

Various phrases are used by the higher Courts in determining applicable law and they may be understood as follows:

Reffered: It means to look at a previous judgment expounding on similar legal problems disclosed by facts in hand. It may be done to emphasise on any statement of law as well.

Relied upon: It means the subjective satisfaction of the Court is based upon the same set of principles enunciated in previous judgment. The Court impliedly accepts the precedential value or the legal principle and submits to the same.

Reversed: Black’s Law Dictionary defines it as “to overturn (a judgment) on appeal”. It evidently means to set aside or nullify, the previous statement of law or conclusion arrived at by a lower Court. This is only where a higher Court departs from the decision of the lower Court on appeal.

Distinguished: Black’s Law Dictionary defines it as “to note a significant factual, procedural, or legal differences in (an earlier case), to minimise the case’s precedential effect or to show that it is inapplicable”. It is more than identifying factual differences or the dissatisfactory or restrictive nature of the legal principle it established. It is also a justification for departing from the ruling in the earlier case.

Disapprove: It means to find unacceptable or to reject. This is where higher Court or larger Bench declines to approve or sanction a statement of law or principle enunciated in previous case. A Court lower in hierarchy cannot use this terminology.

Disagree: To disagree is similar to disapprove but it is where an equal Court/Bench in hierarchy does not accept or decline to approve statement of law or principle delivered by another Court previously. One High Court may disagree with the view of another high Court. A bench of equal stregnth may disagree with previous judgment, which may occassion a reference to higher Bench.

Dissented: It means disagreement with the majority opinion among judges. A dissenting opinion also explains the reasons of not agreeing to the majority judgment. Although it does not carry any precedential value, but it is not useless as it is said that "it is an appeal to the brooding spirit of the law, to the intelligence of a future day."

Concurrence: Black's Law Dictionary defines it as "A vote cast by a judge in favor of the judgment reached, often on grounds differing from those expressed in the opinion or opinions explaining the judgment." It is where the judges agree with the conclusions of the other judges in the case but rely on different reasons to reach the same conclusion.

PRECEDENTIAL VALUE OF THE DICTUMS OF HIGHER COURTS:

Supreme Court of India:

In light of the Article 141 of the Constitution of India, it goes without saying that the law declared by the Apex Court has binding effect for lower Courts. There has been a gradual erosion of the distinction between *ratio* and *obiter* from the perspective of Courts in lower tier because "the law declared" includes both. The position as to the binding nature of *obiter dicta* for the purpose of District Courts is also no longer *res integra*. Way back in 1975 in the case of ***Municipal Committee v. Hazara Singh, AIR 1975 SC 1087,*** the Supreme Court approved the following passage of a judgment & the High Court of Kerala:

> *"Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected."*

Both the *ratio decidendi* and *obiter dicta* of the Supreme Court are binding on the Courts of the lower tier. It is necessary to keep in mind that before acting upon it and the judgment must be read as a whole. It has to be remembered that judgments cannot be read or interpreted as statutes and the context in which they are made are equally important.

High Court of Madhya Pradesh (Superintending High Court):

Though, there is no specific provision like Article 141 with reference to High Courts in the Constitution of India, but under Article 227 the High Courts are vested with the power of superintendence over the Courts and Tribunals of

the State. It has been held that it is implicit in the power of supervision conferred upon the High Court that all Courts subject to its supervision should conform to the law laid down by it. In ***M/s. East India Commercial Co. Ltd., Calcutta v. The Collector of Customs, Calcutta, AIR 1962 SC 1893,*** it was observed as following:

> *"Under Art. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate Courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority, signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction."*

Therefore, the District Courts of Madhya Pradesh are bound by the statement of law and legal principles delivered by the High Court of Madhya Pradesh.

As far as the *obiter dicta* of the High Court is concerned, there is a difference with regard to it. While *obiter dicta* of the Supreme Court being "law declared", is binding by virtue of Article 141 of the Constitution of India, there is no such provision for the High Courts. The position with regard to *obiter dicta* of the High Court has been observed the Gujarat High Court in the case of ***Food Corporation of India v. Viramgam Nagar Palika, AIR 2000 Guj. 91*** as follows:

"the obiter dicta of a High Court may it be contained in the judgment of the Full Bench or a Division Bench is not binding on the single Judge of that Court nor such obiter dicta of the Full Bench, Division Bench or single Judge is binding on all Courts subordinate to a particular High Court. It is only the ratio of a particular case decided by the High Court is binding on all the Courts subordinate to it."

High Court of Judicature at Nagpur:

The present state of Madhya Pradesh was originally created as Central Province on 02/11/1861, as Judicial Commission's territory and was administered by the Judicial Commissioner. The Judicial Commissioner's Court at Nagpur was, at that time, the highest Court of the territory. It was converted into a Governor's province in 1921, but the Letters Patent by which High Court of Judicature at Nagpur was created for the area of Central Province and Madhya Bharat was issued on 02.01.1936. The Letters Patent under which the High Court of Judicature at Nagpur was constituted and invested with jurisdiction, continued in force after the adoption of the Constitution of India on 26th January, 1950, by virtue of Articles 225 and 372 of the Constitution. On 1st November, 1956 State of Madhya Pradesh was constituted and in view of provisions of Sections 49 and 50 of the States Reorganisation Act, 1956, the High Court of Madhya Bharat State and the Courts of Judicial Commissioners for Bhopal and Vindhya Pradesh ceased to function and were abolished and High Court for Madhya Pradesh was constituted. By legal fiction High Court of Judicature at Nagpur became High Court of the new state with its seat at Jabalpur.

Therefore, being the parent High Court for the period between 02.01.1936 to 01.11.1956, the decisions rendered by the High Court of Judicature at Nagpur have binding effect on the District Courts of Madhya Pradesh as if that was the superintendent Court under Article 227 of the Constitution of India. In this regard the judgments of the High Court of Madhya Pradesh in ***Harlal Gulla v. Kanchhedilal, 1998 (1) MPLJ 115*** and ***Indore Development Authority, Indore v. Satpal Anand, AIR 2000 MP 74,*** may be easily referred.

Similarly, before the issuance of the Letters Patent by which High Court of Judicature at Nagpur was created i.e. before 02.01.1936 the judgments rendered by the Nagpur Judicial Commissioners Court also have authoritative value for the District Court of Madhya Pradesh.

Other High Courts:

It is settled law that the judgments of the High Courts other than the Superintending Court have persuasive value. The Court before which a judgment of other High Court is presented will first look for the judgment of the Superintendent High Court. In case there is no judgment of the Superintendent

High Court, the judgment of the other High Court will have persuasive value. It means that the Court is almost bound by the judgment unless it has pressing and cogent reasons to rule otherwise.

In case of conflicting judgments of different High Courts, the Court may by giving detailed reasons, adhere to one and not accept the other.

High Court of Madhya Bharat:

The state of Madhya Pradesh although consist of parts of Madhya Bharat, but the High Court of Judicature at Nagpur was deemed to be the High Court for the present state of Madhya Pradesh. Section 49 of the States Reorganisation Act, 1956 provided that the High Court of Judicature at Nagpur shall, with effect from 1st November 1956, be deemed to be the High Court of Madhya Pradesh. Under Section 50 of the Act, the High Court of Madhya Bharat and the Judicial Commissioner's Court at Bhopal and Vindhya Pradesh were abolished. The High Court of new State of Madhya Pradesh was not constituted by amalgamation of two or more High Courts. Therefore, the High Court of Madhya Bharat not being the parent High Court does not have binding authority for the purpose of District Court of Madhya Pradesh but only persuasive value. In ***Radhabai v. Kamalchand, 1962 LawSuit (MP) 210,*** it was observed as follows:

> *"It is indisputable that the present Madhya Pradesh High Court is only bound by the decisions of the Nagpur High Court, and not any of the regional Courts, such as, the Madhya Bharat High Court, the Vindhya Pradesh Judicial Commissioner's Court, or the Bhopal Judicial Commissioner's Court, although such decisions may be entitled to due weight and respect as an expression of opinion by any other High Court. This is the position arising on account of the provisions of Sections 49 to 69 of the States Reorganisation Act (Act No. 37 of 1956), according to which the Nagpur High Court becomes the predecessor of the Madhya Pradesh High Court. Therefore I am of opinion that although the decision of the Madhya Bharat High Court (Ex. D-1) is entitled to all respect as an expression of opinion on an earlier occasion, it cannot be cited as a judicial precedent for the simple reason that the expression of opinion is not legally binding on a Bench of the Madhya Pradesh High Court. If a conflict arises, this Court will have to consider the question on its own merits giving due weight to the expression of opinion of the Madhya Bharat High Court. Therefore, I am of opinion that the said decision cannot be cited as a judicial precedent, although it is entitled to all respect and due weight."*

Privy Council:

Before independence, the Judicial Committee of Privy Council was the final appellate authority for all Courts in British India. The judgments delivered by it, being the judgments of the apex authority had authoritative value. The Government of India Act, 1935 also recognised that the law declared by any judgment of the Privy Council shall be recognised as binding and shall be followed by all the Courts in British India. After the independence the judicial authority over the Court in India was ended with the Abolition of Privy Council Jurisdiction Act, 1949. The precedential value of the judgments of the Privy Council was decided and observed as follows by the High Court of Bombay in the case of ***State of Bombay v. Chhaganlal, AIR 1955 Bombay 1,*** which was approved by the Supreme Court in the case of ***Pandurang Kalu Patil v. State of Maharashtra, AIR 2002 SC 733:***

> *"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decision of the Privy Council is still binding upon High Courts. What is binding is not merely the point actually decided but an opinion expressed by the Privy Council which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."*

The decisions rendered by the Privy Council before the Supreme Court came into existence, would be binding on the High Courts and District Court unless they are in contradiction with the judgments of the Supreme Court. However, for the Supreme Court the judgments of Privy Council are only of persuasive nature.

Foreign Courts:

As far as foreign judgments are concerned, they are merely of persuasive value for the Indian Courts. While relying upon them or accepting their principle, the Courts must see whether the foreign statute relied upon is similar to the Indian statute. The Courts must proceed with caution and carefully examine the structural similarities before applying a decision of the foreign Court to a domestic question. As held in ***State of West Bengal v. B.K. Mondal, AIR 1962 SC 779,*** the assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and more importantly the Indian conditions.

BINDING PRECEDENTS WITHIN THE JUDGMENTS OF THE SAME HIGHER COURT:

We have seen that how the *ratio* or the *obiter* of the higher Courts are binding for the lower Courts. But, the understanding of the precedential value of the judgments of the same Court is also very important. Many a times conflicting

judgments of the same higher Court are presented and therefore, the Court must understand which judgment is having binding value. A question that also arises most frequently before the Courts is that, what if there are conflicting judgments of co-ordinate benches of the same Court. There is a lot of confusion in relation to this as there are conflicting opinions on this point. One opinion suggests that the previous judgment of the co-ordinate bench has binding effect and the proper course for later bench is to refer to larger bench. Another opinion suggests that if the later coordinate bench discusses and then differs from the previous judgment of the coordinate bench, the judgment of the later bench is binding. We may look at this point in light of the various judgments of the Supreme Court having precedential value.

In this regard, firstly, we may refer to the Constitution Bench judgment of the Supreme Court in the case of ***Central Board of Dawoodi Bohra Community v. State of Maharashtra, AIR 2005 SC 752,*** where basic principles were summarised as follows:

> *"12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-*
>
> *(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.*
>
> *(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.*
>
> *(3) The above rules are subject to two exceptions :*
>
> *(i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and*

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in ***Raghubir Singh, (1989) 2 SCC 754 and Hansoli Devi, (2002) 7 SCC 273".***

In ***Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors., (2011) 1 SCC 694,*** it was observed that the analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on the judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength.

In ***State of Tripura v. Tripura Bar Association and Ors., (1998) 5 SCC 637,*** it was held that if the later bench wants to take a view different than that taken by the earlier Bench, the proper course for them would be to refer the matter to a larger Bench.

This principle has again been reiterated recently by the Constitution bench of the Supreme Court in the case of ***National Insurance Company Limited v. Pranay Sethi and ors., 2017 (13) Scale 12,*** as follows:

"A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in Rajesh's case was delivered on a later date, it had not apprised itself of the law stated in Reshma Kumari but had been guided by Santosh Devi. We have no hesitation that it is not a binding precedent on the co-equal Bench."

Hence, in light of the above judgments including two judgments of the Constitution bench of ***Central Board of Dawoodi Bohra Community*** (supra) and ***National Insurance Company Limited*** (supra) it can be concluded that when there is conflicting opinion of the co-ordinate benches of the same Court, then the previous judgment will have precedential value. The only option that later bench has, is to refer the matter for consideration by larger bench. It cannot contradict or by way of giving reasons avoid to follow it.

Another situation, that may arise before Court is, Where the correctness of a judgment of the higher Court is doubted and it is referred to a larger bench. Whether the judgment whose correctness has been doubted will lose its precedential value? In the case of ***Oriental Insurance Company Limited v. Sanju Bai & ors., 2016 ACJ 1000,*** a full bench of the High Court of Madhya Pradesh has dealt with this question. At the time of deciding the matter, two judgments of Supreme Court i.e. ***National Insurance Company v. Sinitha and others, 2012 ACJ 1 and United India Insurance Company v. Sheela Datta, 2011 ACJ 2729,*** were referred to larger bench for consideration. The Court held:

> *"Indeed, in the subsequent decision of coordinate Bench of the Supreme Court in the case of* ***United India Insurance Company Vs Sunil Kumar, 2013 ACJ 2856,*** *the correctness of the view expressed in* ***Sinitha's case and United India Insurance Company Vs. Sheela Datta, 2011 ACJ 2729,*** *has been doubted and the question is referred to the larger Bench of the Supreme Court. Nevertheless, it is well settled position that so long as the decision of the Supreme Court on the point is in force, the same will be binding on all the subordinate Courts. The fact that the issue has been referred to larger Bench of the Supreme Court, that cannot be the basis to ignore the decision of the Supreme Court cited on the subject, which is still holding the field and will be, therefore, binding precedent until overturned by a larger Bench of the Supreme Court."*

Hence, even if a judgment of the previous co-ordinate bench is doubted and reffered to larger bench, till the time the larger bench delivers its judgment, the previous judgment will have binding effect for the lower Courts.

WHEN JUDGMENTS OF HIGHER COURTS ARE NOT BINDING:

The *ratio decidendi* and *obiter dicta* of the Supreme Court and *ratio decidendi* of the Superintendent High Court is binding for the District Court. But there might be circumstances in which a decision loses its authoritative value because of one or more reasons. The lower Court is not bound to follow it after assigning relevant reasons. Following are the examples of such reasons:

1. Per incurium:

When the judgment cited at the Bar is *per incurium,* the Court is not bound by it. The application of the principle may be understood by referring to a paragraph of ***Thota Sesharathamma and another v. Thota Manikyamma (Dead) by L.Rs. and others, (1991) 4 SCC 312,*** where a two Judge Bench of Supreme Court held that the three Judge Bench decision in the case of ***Mst. Karmi v. Amru, (1972) 4 SCC 86,*** was ***per incuriam*** and observed as under:

"...It is a short judgment without adverting to any provisions of Section 14 (1) or 14 (2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in ***Badri Pershad v. Smt. Kanso Devi.*** *The decision in* ***Mst. Karmi*** *cannot be considered as an authority on the ambit and scope of Section 14 (1) and (2) of the Act."*

The judgment cited may lose its precedential value on mainly two grounds under this category.

Firstly, that it was passed in ignorance of the previous judgment of the same Court or higher Court having authoritative value for that Court. – In ***Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others, (2009) 15 SCC 458,*** it was held that the settled legal position is that benches of lesser strength are bound by the judgments of the Constitution Bench and any bench of smaller strength taking contrary view is *per incuriam*.

As discussed earlier when a judgment cited as precedent is passed in ignorance of the judgment of a co-ordinate bench, then it is *per incurium* and not binding upon the lower Court. However, the District Court in all propriety while not relying upon it must not be critical of the subsequent judgment but merely state the reason for not following it.

Secondly, when a judgment is passed in disregard to any statutory provision –. In the case of ***Balwant Saheblal Khawse v. State of Madhya Pradesh, 2001 (3) MPLJ 414,*** it was observed as follows:

"A sub-silentio order or assumption in disregard of a clear and unambiguous statutory provision is not a precedent. If a provision in a statute is construed or interpreted one way or the other that would be a precedent for the future and would be binding on co-ordinate benches. But something which has been assumed and not decided cannot be considered as authoritative binding precedent.

Where a certain point of law is not brought to the view of the Court in determining a cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court. In ***Goodyear India Ltd. v. State of Haryana, AIR 1990 SC 781,*** *it has been observed by the Supreme Court that a decision on a question which has not been argued can not be treated as a precedent. If an ingredient of a section was neither argued nor was considered, the passing reference based on the phraseology of the section cannot be said to be the dictum. Failure to consider a statutory provision is one of the clearest cases in which the Court is not bound to follow its own*

decisions. In ***Young v. Bristol Aeroplane Co. Ltd., 1944 (2) All ER 293,*** *it has been observed by Lord Greene, M.R. that :*

"Where the Court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam." It has been held by a Division Bench of this Court in ***United India Insurance Company v. Mahila Ramshree, 1996 JLJ 691****, that a judgment is per incuriam if the relevant law has not been considered and it has no binding effect."*

In ***State through S.P. New Delhi v. Ratan Lal Arora, (2004) 4 SCC 590,*** it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered *per incuriam*.

The mere fact the earlier higher Court misconstrued a statute or ignored a rule of construction is not sufficient for impugning the authority of precedent.

Thus, a judgment of a higher Court may not be binding being *per incurium*. But, it must be remembered that a decision should not be treated as given *per incuriam* because of a deficiency of parties or because the Court had not the benefit of the best argument. Even if a decision of the authoritative value has been misinterpreted by subsequent decision, the Courts must follow it and leave it to the higher Courts to rectify the mistake.

2. Sub Silentio:

A judgment without pondering upon the point argued will not be binding precendent in regard to the point argued. A precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned and it is total absence of arguement which vitiates precedent. In ***M/s. Goodyear*** (supra), it was held:

"It is well-settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follow from it."

"A decision on a question which has not been argued cannot be treated as a precedent."

The Court before which a judgment is cited, may not follow it on the ground of *sub silentio*, but it must clearly spell the reasons for it and specially the arguement that was not dwelled upon.

3. Subsequent change of law:

A decision ceases to be binding because of subsequent enactment of statute changing the law. The Constitution Bench of the Supreme Court in the case of ***State of Punjab v. Devans Modern Breweries Limited, (2004) 11 SCC 26,*** held:

> *"However, although a decision has neither been reversed nor overruled, it may cease to be 'law' owing to changed conditions and changed law. This is reflected by the principle 'cessante ratione Legis cessat ipsa lex'."*

"Cessante Ratione Legis Cessat Ipsa Lex" means "reason is the soul of the law and when the reason of any particular law ceases, so does the law itself." If a decision on facts is rendered by applying the relevant provisions of the law to the facts, the binding nature of the decision on that point will come to an end when the law is changed subsequently. That is because the law as then stood alone was interpreted in relation to the facts and when the law is changed, the cause of action itself is changed.

Even in cases where guidelines are issued by the higher Courts, they have authoritative value till the time a law in this regard is passed by the legislature. The age of the guidelines is limited to it. A relevant paragraph of ***Vineet Narain v. Union of India, AIR 1998 SC 889,*** may be quoted as follows:

> *"There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role."*

4. Concession:

A precedent is binding when the higher Courts in their wisdom has given due consideration on a point of law. In course of arguments a party may makes concession, in order to end a disinterment. Many a times Courts pronounce their conclusion based upon the arguments and concessions. Judgments made on the basis of these concession is not binding as precedent. A Constitution Bench of the Supreme Court in the case of ***Superintendent Legal Remembrancer, State of West Bengal v. Corporation of Calcutta, AIR 1967 SC 997,*** has observed as follows:

> *"The decision made on a concession made by the parties even though the principle conceded was accepted by the Privy Council without discussion, cannot be given the same value as one given upon a careful consideration of the pros and cons of the question raised."*

In ***Kulwant Kaur v. Gurdial Singh Mann (D.) thr. L.Rs., (2001) 4 SCC 262,*** the counsel of the party attracted the attention of the Court towards the concession in previous decision of ***Banarsi Das v. Brig. Maharaja Sukhjit Singh, (1998) 2 SCC 81,*** and the Court held as follows:

> *"The concession thus recorded in **Banarsi Das's** case as noticed above obviously renders the submissions of Mr. Mehta of some substance. Concession, if made and in the event the Court proceeds on the basis of such a concession, the decision cannot by any stretch be termed to be a binding precedent and as such the previous decision **(1998) 2 SCC 81** does not and cannot have the sanctity and solemnity of a binding precedent."*

Similarly, in the case of ***K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin, (1997) 3 SCC 721,*** the Supreme Court has held that wrong concession, in particular on the question of law, does not have a binding effect.

The Court while not following the judgment of higher Court on the basis that it was passed on concession made by party must first point out the concession made and then referring to the relevant law, refuse to adhere to it.

5. Overruled:

A legal principle enunciated in one judgment, when overruled by a larger bench or superior Court does no longer remain a good law in the eyes of law. It is important to note that in one judgment, many legal principles in the shape of *ratio* or *obiter dicta* may be recognised, but only one or more of it may be overruled by subsequent judgment.

A ratio of a case might be overruled expressly, impliedly or in substance. While the express overruling of a legal principle does not leave much thinking to be done on our side, the doctrine of implied overrule need a cautious approach. There might be situation when a judgment of larger bench or superior Court is presented on a legal principle which does not expressly overrule the previous judgment, but in substance suggests the other view. In that situation, the Court will have to determine whether the previous judgment has been impliedly overruled. To begin, the Court will presume that the larger bench has not overruled the previous judgment unless the ratio of the subsequent decision of the superior Court is shown to be inconsistent with, or contrary to, that of the decision of the inferior Court. In ***Narasimhachar v. Assistant Settlement Officer, (1971) 2 Andh LT 17,*** it was held:

> *"The doctrine of implied overruling can be resorted to only when there is no means of reconciling two pronouncements. An overruling is implied when the ratio of the later decision of a superior court is inconsistent with that of the inferior court. The inconsistency becomes material only when it is attributable or is implicit in the ratio of the later decision. The mere existence of dicta suggestive of an inconsistency is insufficient foundation for invoking the rule of implied overruling."*

Thus, only after spelling out the conflict between the two judgments, the Court may refuse to follow the judgment of the smaller Bench or inferior Court giving previous judgment.

6. Consent:

When Courts make an order on the basis of consent of the parties, it does not adjudicate upon the rights and duties of the parties. Therefore, a direction or order passed on the basis of the consent of the parties or compromise between them does not have binding effect for subsequent decisions. The case of ***Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38,*** may be easily reffered in this regard.

7. Distinguish:

It is clear from the discussion till now that the major consideration for application of a precedent is similarity of the facts of the case. Only same case are to be decided alike. Therefore, when the facts of the case are different, the legal principle of the higher Court is not binding. The Court may distinguish the facts and decline to follow the cited judgment.

8. Specific Exclusion:

Many a times the higher Court in peculiar facts of the case in its extra ordinary jurisdiction provides relief to the parties. The District Court cannot exercise the same powers and as a result, it does not have binding effect. Also, many a times this exclusion is made by the higher Court itself, where it states that the judgment will not have precedential value. In such cases although the judgment of the higher Court is on merits, it does not have any precedential value for the District Courts. In ***Regional Manager, Bank of Baroda v. Presiding Officer, Central Government Industrial Tribunal and another, (1999) 2 SCC 247,*** the Court held as follows:

> *"We make it clear that this order of ours is rendered in the peculiar facts and circumstances of the case as mentioned earlier and will not be treated as a precedent in future."*

In ***Kendriya Vidyalaya Sangathan v. Ram Ratan Yadav, (2003) 3 SCC 437,*** the Supreme Court held that the above judgment does not have any value as precedent and disapproved the act of the High Court in relying upon it.

9. Special Leave Petitions:

Article 136 of the Constitution of India, empowers the Supreme Court in its discretion to allow special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any Court or Tribunal in the territory of India. Many petitions filed in the shape of Special leave petitions are dismssed without being admitted, devoid of any detailed discussion on merits. On the other hand, some petitions are dismissed after assigning reasons for it.

Where a Special leave petition is dismissed without assigning reasons, it will not operate as binding precedent to other Courts. The only effect of such a dismissal is, for that particular High Court, the decision has become final. But, where the Supreme Court assigns reasons for dismissal of SLP, it becomes law declared and, therefore binding as per Article 141 of the Constitution. The Supreme Court in the case of ***Union of India v. All India Services Pensioners Association, AIR 1988 SC 501,*** has observed as follows:

> *"The special leave petitions were not dismissed without reasons. This court had given reasons for dismissing the special leave petitions. When such reasons are given the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India."*

Position of dismissal of appeal without assigning reasons is different from Special leave petition. While the Supreme Court may dismiss Special Leave Petition because stakes are too small or the law has changed after the judgment or on the ground of delay, dismissal of appeal implies affirmation of the High Court's view on merits. In this regard, the Supreme Court in the case of ***V M Salgaocar and Bros. Pvt. Ltd. v. Commissioner of Income Tax, AIR 2000 SC 1623,*** observed as follows:

> *"Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed.' In the former case it has been laid by this Court that when special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the*

Constitution. That certainly could not be so when appeal is dismissed though by a non speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under Clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court."

CRIMINAL CASES AND PRECEDENT:

Decisions in criminal cases are predominantly fact based and the precedent value in criminal cases especially on the aspect of appreciation of evidence would be minimum since each case is to be decided on its own merits. Since, how a person reacts in a particular situation may be the determinative factor for that case, it cannot be of universal application. In ***Lalliram v. State of M.P., (2008) 10 SCC 69,*** it was held:

"In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence."

In ***Rahim Khan v. Khurshid Ahmed, AIR 1975 SC 290,*** it was held that precedents on legal propositions are useful and binding, but the variety of circumstances and peculiar features of each case cannot be identical with those in another and judgments of Courts on when and why a certain witness has been accepted or rejected can hardly serve as binding decisions.

Similarly, a decison on question of sentence can never be "law declared" or of precedential value as it depends upon the aggravating and mitigating factors of the particular case. In ***Dalbir Singh v. State of Punjab, AIR 1979 SC 1384,*** it was held as follows:

"Decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less 'law declared' within the meaning of Art. 141 of the Constitution so as to bind all Courts within the territory of India."

Also, the orders relating to bail depends upon the discretion of the Court in given facts and circumstances. An order of the higher Court exercising its discretion in one way or the other cannot be considered of precedential value. The facts and circumstances of each case governs the exercise of judicial discretion in granting or rejecting bail. In ***Gajanand Agarwal v. State of Orissa, AIR 2006 SC 3248,*** it was observed that:

"It is fairly well settled that orders of bail are not necessarily orders of any precedent value."

Miscellaneous:

While the law of precedent is very wide and every aspect could not be covered, some remaining points from practical perspective may be considered as follows:

1. Requirement of discussing presented case laws: Case laws in the nature of precedent are commonly cited before the Courts by the parties. It is the duty of the Court to discuss the facts and the law of the cited cases and then state whether the principle enunciated in it is actually applicable on the facts of the case in hand. Court cannot ignore its duty by merely mentioning the names of the cases cited. But at the same time it must be remembered that this duty is only restricted to relevant case laws. Where irrelevant case laws are presented before the Court, it is not under an obligation to discuss them. In this regard, one may rely upon the case of ***Kishore Kumar & anr. v. Mohd. Hussain, ILR 2011 M.P. 1487,*** where the Madhya Pradesh High Court has observed as follows:

> *"Next submission by the learned counsel for the petitioner, though with an undertone but have an element of complaint that the judgments which are being cited are not addressed at by the Court, we attach no significance to this submission as it is not unusual for the parties, and counsel to cite innumerable judgments without confining to the ratio attracted and applicable in the matter where it is being cited. No party or counsel is, therefore, entitled to make a grievance that the judgments which are being cited are not relied upon or adverted; as unless the judgments which are being cited has any relevance and if the ratio laid down therein is attracted in the case, we are of the considered opinion that non-reproduction of all the judgments cited are not warranted."*

2. Headnotes: While applying any principle delivered in any judgment of authoritative value, the Court cannot rely upon headnotes and act upon it. The headnotes are not part of the judgments and are made by the publishers publishing the journal. They do not have any authoritative value. A Court will only be able to appreciate whether a case cited has to be applied to the case in hand when it goes through the whole text of the judgment. In ***Pavitra Kuer Thakur Ram Jayaswal v. State of Bihar, AIR 2003 Pat. 54,*** it observed as follows:

> *"In my opinion a judgment is an authority for what it decides. It is not an authority for what it does not decide. The wisdom of a Judge is reflected in his judgment. A judgment when interprets law it becomes a binding authority. The summary of the judgment or the understanding of an editor certainly would not be a binding precedent. The wisdom of an editor would never bind even a Munsif what of the coordinate Bench of the High Court."*

The High Court of Madhya Pradesh on administrative side has also deprecated the practice of citing and relying on headnotes through Memo no. 649/2017 III-2-9/40 Pt.I(F.No.-9), dated 27.04.2017.

3. Short Notes: Many a times short notes published in various journals are cited before the Court. The Court cannot act upon or rely upon these short notes unless the whole judgment has been presented before the Court. In ***Kalekhan v. State of M.P., 1990 Cri.L.J. 1119 (M.P.),*** it has been held that it is highly desirable that short notes, as precedents, should be avoided, as they lack in facts.

4. Presenting overruled cases: The Supreme Court has deprecated the practice of presenting overruled case laws. In the case of ***State of Orissa v. Nalinikanta Muduli, AIR 2004 SC 4272,*** it was observed as follows:

> *"Members of the Bar are officers of the Court. They have a bounden duty to assist the Court and not mislead it. Citing judgment of a Court which has been overruled by a larger Bench of the same High Court or this Court without disclosing the fact that it has been overruled is a matter of serious concern."*

Presentation of an overruled case with the clear intention to mislead the Court may also amount to contempt.

EFFECT OF PRECEDENT:

In normal course, the law declared by the Supreme Court is assumed to be from the inception and unless expressly stated, it is presumed that the judgment has retrospective effect. In Article 141 there is nothing like any prospective operation alone of the law laid down by Supreme Court. The law laid down by the Court applies to all pending proceedings. As far as High Courts are concerned, all judgments of the High Courts have retrospective effect and High Courts cannot declare its decision to be prospective.

METHOD OF APPLYING PRECEDENT:

It is mandatory that the Courts must carefully scrutinise the precedents cited before applying them to the case in hand. The practice of mechanically applying the precedents, without referring to the whole text and going into the history of law must be deprecated. According to the well-settled theory of precedents every decision contains three basic ingredients:

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element. It is the decision for it which determines finally their rights and liabilities in relation to the subject-matter of the action. However, for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision. Therefore, the Courts must understand "statements of the principles of law applicable to the legal problems disclosed by the facts" before applying it.

One of the lacuna that was pointed out by Shri Ravish Agarwal, former Advocate General, Madhya Pradesh, in one of his lectures at the Academy, was that Courts today first know law, then mould facts according to the law and then apply it. Rather, it should be other way round. First, the Courts must come out with the proved facts and then search for precedent which applies in the case.

Also, as held in the case of ***Union of India v. Dhanwanti Devi, (1996) 6 SCC 44:***

> *"Every judgment must be read as applicable to the particular facts provided, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein."*
>
> *"No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents."*

In this regard Supreme Court in the case of ***Commissioner of Income Tax v. M/s. Sun Engineering Works (P) Ltd., AIR 1993 SC 43,*** has held as follows:

> *"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced*

from the context of the questions under consideration by this Court, to support their reasoning. In ***Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India, (1971) 3 SCR 9,*** *this Court cautioned:*

"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

Therefore, it is most important that context must be understood before applying the precedent and it will only be done when the judgment is read in full text. One additional or different fact, can make a world of difference between conclusions in two cases. Also, the proper course for any Court is to try to find out and follow the opinions expressed by larger benches of higher Court in preference to those expressed by smaller benches.

EPILOGUE:

The doctrine of precedent serves the purpose of maintaining judicial certainty which is essential for rule of law adopted under Article 14 of the Constitution of India. The right to equality before law and equal protection before law can only be guaranteed by following this doctrine. Citing precedents has become an essential tool for judges to deal with various nuances of law. But, the Courts must be very careful in applying this doctrine and it should not lack precedent consciousness while delivering its decision. The doctrine of precedent also becomes very crucial when the judgments of the Courts are in easy public scrutiny. It should be endeavour of every Court to not merely cite a long list of the case laws but to give due recognition to the true doctrine of precedent in true spirit, which is a cardinal feature of judicial system in India.

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"In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same."

– Albert Einstein

PART – II

NOTES ON IMPORTANT JUDGMENTS

***51. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 31 and 34 CIVIL PRACTICE**

Arbitral award – Service of – Appellant was head of his family and was person directly connected with, involved in and in control of arbitration proceedings – Appellant would have been the best person to understand and appreciate arbitral award and to take decision as to whether application under Section 34 of Act was required to be filed or not – Service of arbitral award on appellant amounted to service on other family members and they could not plead non-service of arbitral award separately on them and non-compliance of Section 31(5) of the Act.

माध्यस्थम् और सुलह अधिनियम**, 1996 -** धाराएं **31** एवं **34**

सिविल प्रथा

माध्यस्थम् अधिनिर्णय - निर्वहन - अपीलार्थी अपने परिवार का मुखिया था और मध्यस्थता कार्यवाही से सीधे जुड़ा हुआ, उसमें सम्मिलित एवं उसके नियंत्रण में था - ऐसी स्थिति में अपीलार्थी माध्यस्थम् अधिनिर्णय को अच्छी तरह से समझने एवं यह निर्णय लेने कि धारा 34 के अधीन आवेदन करने की आवश्यकता है अथवा नहीं, के लिये सर्वोत्तम व्यक्ति था - ऐसी स्थिति में अपीलार्थी पर माध्यस्थम् अधिनिर्णय का निर्वहन परिवार के अन्य सदस्यों पर निर्वहन माना जायेगा और वे स्वयं पर माध्यस्थम अधिनिर्णय का पृथक निर्वहन न किये जाने एवं धारा 31(5) का पालन न किये जाने का बचाव नहीं ले सकते हैं।

Anilkumar Jinabhai Patel (D) Through L.Rs. v. Pravinchandra Jinabhai Patel and ors.

Judgment dated 27.03.2018 passed by the Supreme Court in Civil Appeal No. 3314 of 2018, reported in AIR 2018 SC 1627

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52. CIVIL PROCEDURE CODE, 1908 – Section 151, Order 1 Rule 10, Order 7 Rule 14 and Order 13 Rule 10

(i) Impleadment of necessary party, considerations for – At the stage of deciding application for impleadment of a person, Court is only required to see whether the presence of such person before Court may be necessary in order to enable it to effectually and completely adjudicate upon and settle all questions involved in the suit – At this stage, appreciation of evidence is not required.

Whether Court can implead any person in a suit under Order 1 Rule 10 even without application of either party? Held, Yes.

(ii) Whether documents produced before Court to be taken on record should be legible and readable and be produced with a prescribed list of documents? Held, Yes – Provision of Order 7 Rule 14 (3) is not a hollow formality but is an essential Rule of Court – If a party does not comply with the rule, Court can refuse to take such documents on record exercising its discretion.

(iii) Sending for Court record, requirements of application for – Person making application under Order 13 Rule 10 of the Code is required to show on affidavit as to how the record is material to the suit in which the said application is made.

सिविल प्रक्रिया संहिता**, 1908 -** धारा **151,** आदेश **1** नियम **10,** आदेश **7** नियम **14** एवं आदेश **13** नियम **10**

(i) आवश्यक पक्षकार के संयोजन हेतु विचारणीय तथ्य - किसी व्यक्ति को पक्षकार बनाये जाने के आवेदन के निराकरण के प्रक्रम पर न्यायालय को केवल यह देखने की आवश्यकता होती है कि क्या ऐसे व्यक्ति की न्यायालय के समक्ष उपस्थिति वाद में अंतग्रस्त सभी प्रश्नों को प्रभावी और पूर्ण रूप से न्यायनिर्णीत किए जाने हेतु आवश्यक हो सकती है - इस प्रक्रम पर साक्ष्य का मूल्यांकन अपेक्षित नहीं है। क्या न्यायालय किसी वाद में दोनों में से किसी भी पक्ष के आवेदन के बिना भी आदेश 1 नियम 10 के अंतर्गत किसी व्यक्ति को पक्षकार बना सकता है? अभिनिर्धारित, हां।

(ii) क्या न्यायालय के समक्ष अभिलेख पर लिये जाने हेतु प्रस्तुत किये गये दस्तावेज सुवाच्य और पठनीय होने चाहिए एवं विहित दस्तावेज सूची के साथ प्रस्तुत किये जाने चाहिए?अभिनिर्धारित, हां - आदेश 7 नियम 14 (3) के प्रावधान मात्र औपचारिकता नहीं हैं वरन् न्यायालय का आवश्यक नियम है - यदि कोई पक्ष इस नियम का पालन नहीं करता है, तो न्यायालय अपने विवेक का प्रयोग करते हुए ऐसे दस्तावेजों को अभिलेख पर लेना अस्वीकार कर सकता है।

(iii) न्यायालय के अभिलेख को बुलाने के आवेदन की अपेक्षाएं - संहिता के आदेश 13 नियम 10 के अंतर्गत आवेदन प्रस्तुत करने वाले व्यक्ति के लिये शपथ पत्र पर यह दर्शित करना आवश्यक है कि कैसे वह अभिलेख उस वाद, जिसमें ऐसा आवेदन प्रस्तुत किया गया है, के लिये तात्विक है।

Ashok Choudhary v. Gwalior Dairy Ltd. and another

Order dated 13.11.2017 passed by the High Court of M.P. (Gwalior Bench) in Writ Petition No. 8307 of 2015, reported in 2018 (2) MPLJ 301

Relevant extracts from the order:

1. This Court is of the opinion that at the stage of an application under Order 1 Rule 10 Civil Procedure Code the Court is only required to see that name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit be added.

Thus, the provisions of Order 1 Rule 10(2) Civil Procedure Code can be resorted to even without application of either party. Thus the issue of vesting of the title in favour of such Piyush Thapak is an issue to be decided on adjudication of the case and appreciation of the evidence which was not the stage while considering application under Order 1 Rule 10 Civil Procedure Code.

2. As far as application under Order 7 Rule 14 (3) CPC is concerned, same has been partially rejected in respect of those documents which were not readable namely certified copies of the statements of Chandrakant, Suresh, Anand and Prakash. Similarly, application which was filed for mutation and certified copy of Khasra panchshala. It was always open to the petitioner to have obtained readable copies of the documents and to produce them before the trial Court. Since the plaintiff has failed to discharge this burden and this Court has already held that provisions under order 7 Rule 14 (3) CPC is not a hollow formality but the rule of the Court is essential, therefore, the Court was very much within its right to exercise his discretion in refusing such leave on the ground that such documents were not readable. No explanation has been given as to why legible copies could not be produced and what prevented the plaintiff from filing it earlier at the time of filing of this suit and why such documents were not mentioned in the list to be produced under the provisions of Order 7 Rule 14 (2) CPC. Therefore, in absence of such documents being entered into in terms of the provisions contained in Order 7 Rule 14 (1) or Order 7 Rule 14 (2), the Court was required to exercise its jurisdiction and discretion while granting leave. This Court is of the opinion that leave could not have been granted for admitting illegible documents and therefore that has been rightly discarded.

3. Order 13 Rule 10 CPC vests the Court with discretion to send for papers from its own record or from other Courts. Such discretion has been bestowed upon the Court to do complete justice between the parties and the person making such application is required to show on affidavit that how the record is material to the suit in which the application is made. In the present case, since such justification could not be given by the plaintiff to show that the record is material to the suit specially when the trial Court has recorded a finding that the title of defendant No.1 has been established up to the Supreme court, there is no fault, shortcoming or imperfection in rejecting the application under Order 13 Rule 10 read with Section 151 CPC.

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***53. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2 and Order 20 Rule 4**
EVIDENCE ACT, 1872 – Section 3

(i) Pleading and proof – No extraneous evidence can be looked into in the absence of specific pleadings in that regard – Evidence has to be tailored strictly according to pleadings and cannot be a probing adventure in the dark, filing surprise to the opposite party.

(ii) Documentary evidence – The receipts regarding payment of taxes like water tax or property tax in relation to housing property or receipts of payment of land revenue regarding agricultural lands are not evidence of title as relating records are kept only for fiscal purposes of recovery of taxes or service.

सिविल प्रक्रिया संहिता, **1908 -** आदेश **6** नियम **2** एवं आदेश **20** नियम **4**

साक्ष्य अधिनियम, **1872 -** धारा **3**

(i) अभिवचन एवं साक्ष्य - विशिष्ट अभिवचनों के अभाव में कोई बाहरी साक्ष्य उसके संबंध में नहीं देखी जा सकती है - साक्ष्य को कठोर रूप से अभिवचन के आधार पर ही देखा जाना चाहिये और इससे विपक्षी पक्षकार को अंधेरे में रखकर चकित नहीं किया जा सकता है।

(ii) दस्तावेजी साक्ष्य - मकान से संबंधित जल कर या संपत्ति कर के भुगतान की रसीदें अथवा कृषि भूमि की दषा में लगान अदा करने की रसीद स्वत्व की साक्ष्य नहीं हैं क्योंकि ये अभिलेख केवल करों या सेवाओं के भुगतान के प्रयोजन मात्र से संधारित किए जाते हैं।

Kamlabai v. State of M.P. through Collector, Gwalior
Judgment dated 15.02.2018 passed by the High Court of Madhya Pradesh in First Appeal No. 46 of 2001, reported in 2018 (II) MPJR 90

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***54. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 and Order 43Rule 1**
Whether appeal against an order rejecting application under Order 7 Rule 11 is maintainable ? Held, No – Order under Rule 10 of Order 7 returning a plaint to be presented to the proper Court is appealable under Order 43 Rule 1(a) whereas order rejecting application under Order 7 Rule 11 CPC is not covered, therefore, miscellenous appeal under that provision is not maintainable.

सिविल प्रक्रिया संहिता, **1908 -** आदेश **7** नियम **11** एवं आदेश **43** नियम **1**

क्या वाद नामंजूर किये जाने हेतु आदेश 7 नियम 11 के आवेदन को अस्वीकार करने के आदेश के विरूद्ध अपील संधारणीय है? अभिनिर्धारित, नहीं - आदेश 7 नियम 10

के अधीन समुचित न्यायालय में प्रस्तुति हेतु वाद पत्र लौटाए जाने का आदेश, आदेश 43 नियम 1 (क) के तहत अपील योग्य है जबकि आदेश 7 नियम 11 सी.पी.सी. के अधीन आवेदन की अस्वीकृति का आदेश इससे आवृत्त नहीं है, अतएव, इस प्रावधान के अधीन विविध अपील संधारणीय नहीं है।

Fulbassan v. Prem Singh & ors.

Judgment dated 24.08.2017 passed by the Chhattisgarh High Court in W.P. No. 474 of 2017, reported in 2018 (II) MPJR (CG) 5

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55. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 1, Order 23 Rule 3, Sections 34 and 89

ARBITRATION AND CONCILIATION ACT, 1996 – Section 7

(i) Execution of money decree – Appropriation of payments – General rule is that payments shall be adjusted strictly in accordance with directions in the decree – If decree is silent then adjustments be made firstly towards interest, thereafter towards costs and afterwards towards principal amount – However, this rule is subject to any agreement between the parties.

(ii) Future interest – Where decree is silent as to future interest, it must be deemed that court has refused such interest.

(iii) Reference of dispute to arbitration – Requirement of – Held, in absence of previous arbitration agreement between parties, court cannot refer them to arbitration without joint memo or joint application – Oral consent of counsel is not sufficient.

(iv) Application to record compromise in a civil suit – Must be in writing and signed by both the parties – Courts must insist on parties to reduce the terms into writing.

सिविल प्रक्रिया संहिता, **1908** - आदेश **21** नियम **1,** आदेश **23** नियम **3,** धाराएं **34** एवं **89**

माध्यस्थम् और सुलह अधिनियम, **1996** - धारा **7**

(i) धन की आज्ञप्ति का निष्पादन - भुगतान का विनियोजन - सामान्य नियम यह है कि भुगतान का समायोजन आज्ञप्ति में दिये गये निर्देशों के अनुसार ही होना चाहिये - यदि आज्ञप्ति में कोई निर्देश नहीं हैं तब भुगतान का समायोजन प्रथमतः ब्याज के लिये, तदुपरांत खर्चों के लिये और अंत में मूल धन के लिये होना चाहिये - परन्तु, यह नियम पक्षकारों द्वारा तय किसी अनुबंध के अधीन है।

(ii) भविष्यवर्ती ब्याज - जहां आज्ञप्ति में भविष्यवर्ती ब्याज का कोई उल्लेख नहीं हो, वहां यह माना जाना चाहिये कि न्यायालय द्वारा ऐसे ब्याज को अस्वीकार कर दिया गया है।

(iii) विवाद को माध्यस्थम् कार्यवाही हेतु निर्देशित किया जाना - आवश्यकता - अभिनिर्धारित, पक्षकारों के मध्य किसी पूर्ववर्ती माध्यस्थम् अनुबंध के अभाव में, न्यायालय उन्हें संयुक्त ज्ञापन अथवा संयुक्त आवेदन के अभाव में माध्यस्थम् हेतु प्रेषित नहीं कर सकता है - अधिवक्ता की मौखिक सहमति पर्याप्त नहीं है।

(iv) सिविल वाद में समझौता आवेदन - ऐसा आवेदन पत्र लिपिबद्ध कर दोनों पक्षकारों द्वारा हस्ताक्षरित किया जाना चाहिये - न्यायालय को पक्षकारों से शर्तों को अभिलिखित करने की अपेक्षा करनी चाहिये।

Kerala State Electricity Board v. Kurien E. Kalathil

Judgment dated 09.03.2018 passed by the Supreme Court in Civil Appeal No. 3164 of 2017, reported in AIR 2018 SC 1351

Relevant extracts from the judgment:

As held in Constitution Bench judgment in ***Gurpreet Singh v. Union of India, 2006 AIR SCW 5813*** followed in ***BHEL v. R.S. Avtar Singh and Co. AIR 2013 SC 252,*** if there is a direction in the decree as to the mode of appropriation of payment, then appropriation of any payment made by the judgment debtor has to be strictly in accordance with the direction contained in the decree. If there is no such direction in the decree, then the general principle is that where a judgment debtor makes payment without making any indication as to how the payment is to be adjusted, it is the option of the creditor to make adjustment firstly towards the interest and then towards the principal. But if the judgment debtor has indicated the manner in which the appropriation is to be made, then the creditor has no choice to apply the payment in a different manner. The general principle of mode of appropriation firstly in payment of interest and thereafter in payment of principal amount is subject to the exception i.e. the parties may agree to the adjustment of the payment in any other manner despite the decree.

In the present case, since there is no direction for future interest, in view of sub-section (2) of Section 34 CPC, it must be deemed that the Court has refused such interest. The respondent-contractor cannot claim further interest on the amount payable under Ex.P20 beyond the date of judgment of the High Court (02.04.1998) and in any event not beyond the date of judgment of this Court (19.07.2000).

Emphasizing that under Section 89 CPC, referring the parties to arbitration could be made only when the parties agree for settlement of the dispute through arbitration by a joint application or a joint affidavit before the Court, in ***Afcons Infrastructure Ltd. and anr. v. Cherian Varkey Construction Co. (P) Ltd. and ors., (2010) 8 SCC 24 : (2010 AIR SCW 4983, Para 23),*** this Court held as under:-

> "Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the Court under Section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit

before the Court, or by record of the agreement by the Court in the order sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under Section 89 of the Code; and on such reference, the provisions of the AC Act will apply to the arbitration, and as noticed in ***Salem Advocate Bar Association, T.N. v. Union of India (I) (2003) 1 SCC 49 : AIR 2003 SC 189,*** the case will go outside the stream of the Court permanently and will not come back to the Court."

Referring the parties to arbitration has serious civil consequences. Once the parties are referred to arbitration, the proceedings will be in accordance with the provisions of Arbitration and Conciliation Act and the matter will go outside the stream of the Civil Court. Under Section 19 of Arbitration and Conciliation Act, the arbitral tribunal shall not be bound by the Code of Civil Procedure and the Indian Evidence Act. Once the award is passed, the award shall be set aside only under limited grounds. Hence, referring the parties to arbitration has serious civil consequences procedurally and substantively. When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High Court ought not to have referred the parties to arbitration.

In the case of ***Gurpreet Singh v. Chatur Bhuj Goel, (1988) 1 SC 207 : AIR 1988 SC 400,*** it has been said: (SCC p. 276, para 10) : (at p. 403 of AIR):-

"Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The Court must therefore insist upon the parties to reduce the terms into writing."

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56. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27

Additional evidence – Procedure to be adopted by Appellate Court after admission of additional evidence – When documents are taken in additional evidence, an opportunity ought to have been given to other party to lead evidence in rebuttal.

सिविल प्रक्रिया संहिता, **1908 -** आदेश **41** नियम **27**

अतिरिक्त साक्ष्य - अपीलीय न्यायालय द्वारा अतिरिक्त साक्ष्य स्वीकार करने के बाद अपनाई जाने वाली प्रक्रिया - जब अतिरिक्त साक्ष्य में दस्तावेज ग्रहण किए जाते हैं तो दूसरे पक्षकार को उसके खण्डन में साक्ष्य प्रस्तुति का अवसर दिया जाना चाहिये।

Akhilesh Singh @ Akhileshwar Singh v. Lal babu Singh & ors. Judgment dated 21.02.2018 passed by the Supreme Court in Civil Appeal No 2108 of 2018, reported in (2018) 4 SCC 659.

Relevant extracts from the judgment:

Order XLI Rule 27 of CPC, which deals with the provision of additional evidence in Appellate Court provides for the grounds and circumstances on which the Appellate Court may allow such evidence or documents or witnesses to be examined. Order XLI Rule 27 sub-rule (2) further provides that wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record a reason for its admission. Order XLI Rule 27 is silent as to the procedure to be adopted by the High Court after admission of additional evidence. Whether after admission of additional evidence, it is necessary for the Appellate Court to grant opportunity to the other party to lead evidence in rebuttal or to give any opportunity is not expressly provided in Order XLI Rule 27.

One provision, which is part of Order XLI, which also needs to be noted is Order XLI Rule 2.

Order XLI Rule 2 provides that the appellant shall not, except by leave of the court, be allowed to urge any ground in the appeal, which is not set forth in the memorandum of appeal. The proviso to Order XLI Rule 2 en-grafts a rule, which obliged the Court to grant a sufficient opportunity to the contesting party, if any new ground is allowed to be urged by another party, which may affect the contesting party. The provision en-grafts rule of natural justice and fair play that contesting party should be given opportunity to meet any new ground sought to be urged. When Appellate Court admits the additional evidence under Order XLI Rule 27, we fail to see any reason for not following the same course of granting an opportunity to the contesting party, which may be affected by acceptance of additional evidence.

In the present case, additional evidence, which were brought on the record were registered sale deeds, which were executed by present appellant and his other co-sharers and what was relied before the High Court was that the appellant admitted in the sale deeds that the partition has been taken place in the family. The main issue in the First Appeal before the High Court was as to whether the finding of the trial Court that no partition by metes and bounds has taken place in the family is correct or not. The additional evidence which was admitted has been relied by the High Court while allowing the appeal. It was in the interest of justice that High Court ought to have allowed opportunity to the plaintiffs, who were respondents to the First Appeal to either lead an evidence in rebuttal or to

explain the alleged admissions as relied by the defendants. The mere fact that no counter affidavit was filed to the I.As. was not decisive. Since I.As. having not been admitted, occasion for counter affidavit did not arise at any earlier point of time. The High Court on the same day, i.e. 08.03.2017 has allowed the I.As.as well as the First Appeal. The fact that contesting respondents to the First Appeal, who are appellant before us were not represented at the time of hearing of the First Appeal, was not a reason for not giving opportunity to them to lead evidence in rebuttal.

The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the Appellate Court before which any statement in sale deeds is relied ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. We thus are of the opinion that the High Court erred in simultaneously proceeding with the hearing of the appeal after admitting additional evidence on record. The High Court ought to have given opportunity to contesting respondents in the First Appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done, the order and judgment of the High Court deserves to be set aside.

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***57. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 31**

Contents of judgment of Appellate Court – Order 41 Rule 31 is obligatory – Reasons for the decision is must – Judgment of Appellate Court without reasons is legally unsustainable.

सिविल प्रक्रिया संहिता**, 1908 -** आदेश **41** नियम **31**

अपीलीय न्यायालय के निर्णय की अंतर्वस्तु - आदेश 41 नियम 31 बाध्यकर है - विनिश्चय के कारण आवश्यक हैं - बिना कारणों के अपीलीय न्यायालय का निर्णय विधिक रूप से स्थिर रखे जाने योग्य नहीं है।

Kanailal and ors. v. Ram Chandra Singh and ors.

Judgment dated 23.08.2017 passed by the Supreme Court in Civil Appeal No. 4165 of 2008, reported in AIR 2017 SC 5677

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58. COURT FEES ACT, 1870 – Section 7 (iv) (c)

Leviable Court fees, determination of – Suit filed for the relief of permanent injunction to restrain the defendant from dispossessing from the suit house and not to sell and transfer it – Plaintiff is required to establish his rights of ownership and possession over the property to get the relief sought – Also, the plaintiff has not

sought relief of cancellation of sale deed executed in favor of defendants – Unless that sale deed is declared void, the plaintiff is not entitled for any relief – Relief of injunction found to be consequential of declaration of ownership of suit property – No declaratory relief sought – Held, the suit would fall under Section 7 (iv) (c) and not under Section 7 (iv) (d) of the Act – Plaintiff has cleverly drafted the claim and relief to avoid the payment of *ad valorem* court-fees.

न्यायालय फीस अधिनियम**, 1870 -** धारा **7 (iv**) (ग)

प्रभार्य न्यायालय फीस का निर्धारण - वादग्रस्त भवन से प्रतिवादी को आधिपत्यच्युत करने से रोकने और उसे अंतरित व विक्रय न करने के शाश्वत व्यादेश के अनुतोष हेतु वाद प्रस्तुत किया गया - वांछित अनुतोष प्राप्ति हेतु संपत्ति पर आधिपत्य व स्वामित्व के अपने अधिकारों को स्थापित करना वादी से अपेक्षित है - यह भी कि, वादी द्वारा प्रतिवादीगण के पक्ष में निष्पादित विक्रय पत्र को निरस्त किये जाने के अनुतोष की वांछा नहीं की गई - जब तक इस विक्रय पत्र को शून्य घोषित नहीं किया जाता वादी किसी भी अनुतोष का हकदार नहीं है - व्यादेश का अनुतोष वादग्रस्त संपत्ति के स्वामित्व की घोषणा का परिणामिक पाया गया - किसी भी घोषणात्मक अनुतोष की वांछा नहीं की गई - अभिनिर्धारित, वाद अधिनियम की धारा 7 (iv) (ग) के अधीन आता है न कि धारा 7 (iv) (घ) के - वादी ने मूल्यानुसार न्यायालय फीस के भुगतान से बचने के लिये अनुतोष एवं दावे को चातुर्यपूर्वक प्रारूपित किया है।

Shashi v. Punjab National Bank

Order dated 21.03.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No. 4426 of 2016, reported in 2018 (2) MPLJ 306

Relevant extracts from the order:

The plaintiff has sought the relief of permanent injunction to sustain the defendant from dispossessing them from the suit house and not to sell and transfer the subject house, as they are owner and in possession of the property. The plaintiffs are yet to establish their rights of ownership over the property and in possession of the property. In this suit, unless declaration is granted to the plaintiff that they are owner and the defendant has no right to dispossess them or transfer or sell the suit property, the relief of permanent injunction cannot be granted. The permanent injunction has become consequential relief. The plaintiff has cleverly drafted the claim and relief to avoid the payment of ***ad valorem*** court fees. The plaintiff has not sought relief of cancellation of sale deed between Shri Harprasad Pandey and defendants No. 2 and 3. Unless that sale deed is declared void, the plaintiff is not entitled for any relief. The plaintiff has not disclosed on what basis, he has valued the suit at Rs.4 lacs, whereas the present market value of the property is much more.

The trial Court, on the basis of ` 4,50,000/- valuation has only directed to pay ***ad valorem*** court fees ` 12% *per annum*. The Apex Court in the case of ***Suhrid Singh @ Sardool Singh v. Randhir Singh and others, AIR 2010 SC 2807,*** has held that "if executant of a deed wants it to be annulled, he has to pay *ad valorem* court fee".

The Division Bench of this Court in the case of ***Ishrat Jahan v. Rajia Begum, 2010 (1) MPLJ 50,*** has held that in the suit for declaration that the registered sale deed executed by husband of the plaintiff No.1 and father of plaintiffs No 2 to 7 is illegal and void although the relief clause is couched in declaratory form, the relief sought by the plaintiffs shall have the effect of cancelling or avoiding it and it would be governed by section 7 (iv) (c) and an *ad valorem* court-fees would be payable as setting aside the sale deed is implicit in the declaratory relief sought by the plaintiff. Para 13 is reproduced below :

> "Contrary to this, it is found in the present case that according to the plaint averments themselves, the suit property was owned by Sabdar Hussain, who was husband of plaintiff No.1 and plaintiffs No. 2 to 7. It allegedly devolved upon the plaintiffs after death of Sabdar Hussain. In case, if the registered sale deed executed by Sabdar Hussain on 24.04.2007 is not avoided, the suit property cannot be treated as available for devolution on plaintiffs. Thus, it is obligatory on the part of plaintiffs to seek the cancellation or avoidance of the said sale deed. Although relief clause is couched in declaratory form, relief of avoidance and/or cancellation is implied in the declaratory relief contained in plaint. This being so, the case of the plaintiff is found squarely covered by the Apex Court decision in the case of ***Shamsher Sing v. Rajendra Prasad, AIR 1973 SC 2384.*** The impugned order is thus not found sustainable in law. The same is hereby set aside. Plaintiffs are directed to pay *ad valorem* court-fees on the valuation of the sale deed. Trial Court shall grant reasonable time to pay the deficit court-fees before proceedings further on merits in accordance with law. Petition stands allowed in the aforesaid manner."

Where the relief of permanent injunction and declaration is sought and for the consequential relief of permanent injunction, the suit would fall under section 7 (iv) (c) and not under section 7 (iv) (d) of the Court fees Act, therefore, learned trial Court has rightly exercised its jurisdiction and passed the impugned order.

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59. CRIMINAL PROCEDURE CODE, 1973 – Sections 41, 41A, 438 and 154
SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 3 and 18

(i) Anticipatory bail, bar of – Bar is not absolute in cases under Atrocities Act – Bar of Section 18 applies only when *prima facie* case of commission of offence under this Act is made out – Exclusion of provision for anticipatory bail is not applicable when no case under the Act is made out or allegations are patently false or motivated.

(ii) FIR – Registration of – In cognizable cases – Cases under Atrocities Act also fall in exceptional category where preliminary enquiry must be held within 7 days.

(iii) Arrest – In cases under Atrocities Act – Directions issued to prevent misuse of the Act – If accused is a public servant, he cannot be arrested without written permission of the appointing authority – In other cases, accused cannot be arrested without written permission of Senior Superintendent of Police – Further held, failure to follow these directions will attract disciplinary action as well as contempt.

दण्ड प्रक्रिया संहिता, **1973 -** धाराएं **41, 41**क**, 438** एवं **154**

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, **1989 -** धाराएं **3** एवं **18**

(i) अग्रिम जमानत का वर्जन - अत्याचार निवारण अधिनियम के मामलों में पूर्ण वर्जन नहीं है - धारा 18 का वर्जन तब लागू होता है जब इस अधिनियम के अधीन अपराध कारित किया जाना प्रथम दृष्टया प्रकट होता हो - अग्रिम जमानत के प्रावधान का अपवर्जन वहां लागू नहीं होता है जहां इस अधिनियम के अधीन कोई मामला ही न बनता हो अथवा जहां लगाये गये आक्षेप प्रत्यक्ष रूप से असत्य अथवा प्रेरित हों।

(ii) प्रथम सूचना रिपोर्ट - पंजीयन - संज्ञेय मामलों में - अत्याचार निवारण अधिनियम के मामले भी उस विशिष्ट श्रेणी में आते हैं जहां सात दिवस के भीतर प्राथमिक जांच की जानी चाहिये।

(iii) गिरफ्तारी - अत्याचार निवारण अधिनियम के मामलों में - अधिनियम का दुरूपयोग रोकने के लिये निर्देश जारी किये गये - यदि अभियुक्त लोकसेवक है तो उसकी गिरफ्तारी नियोक्ता प्राधिकारी की लिखित अनुमति के बिना नहीं की जा सकती है - अन्य मामलों में, अभियुक्त की गिरफ्तारी वरिष्ठ पुलिस अधीक्षक की लिखित अनुमति के बिना नहीं की जा सकती है - यह भी अभिनिर्धारित कि, इन निर्देशों का पालन नहीं करना विभागीय जांच के साथ-साथ न्यायालय अवमानना की कार्यवाही को आकर्षित करेगा।

Dr. Subhash Kashinath Mahajan v. State of Maharashtra and another

Judgment dated 20.03.2018 passed by the Supreme Court in Criminal Appeal No. 416 of 2018, reported in AIR 2018 SC 1498

Relevant extracts from the judgment:

We have already noted the working of the Act in the last three decades. It has been judicially acknowledged that there are instances of abuse of the Act by vested interests against political opponents in Panchayat, Municipal or other elections, to settle private civil disputes arising out of property, monetary disputes, employment disputes and seniority disputes. It may be noticed that by way of rampant misuse complaints are largely being filed particularly against Public Servants/*quasi judicial*/judicial officers with oblique motive for satisfaction of vested interests.

Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no *prima facie* case made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution.

Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no *prima facie* case is made out or the case is patently false or *mala fide*. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the Court being part of access to justice and protection of liberty against any oppressive action such as *mala fide* arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where Court finds a case to be *prima facie* genuine warranting custodial interrogation and pre-trial arrest and detention.

It is thus patent that in cases under the Atrocities Act, exclusion of right of anticipatory bail is applicable only if the case is shown to be *bona fide* and that *prima facie* it falls under the Atrocities Act and not otherwise. Section 18 does not apply where there is no *prima facie* case or to cases of patent false implication or when the allegation is motivated for extraneous reasons.

X X X

We are conscious that normal rule is to register FIR if any information discloses commission of a cognizable offence. There are however, exceptions to this rule. In ***Lalita Kumari v. State of U.P., AIR 2014 SC 187,*** it was observed :

"115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

117. In the context of offences relating to corruption, this Court in ***P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : AIR 1971 SC 520,*** expressed the need for a preliminary inquiry before proceeding against public servants.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes
(b) Commercial offences
(c) Medical negligence cases
(d) Corruption cases
(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry."

We are of the view that cases under the Atrocities Act also fall in exceptional category where preliminary inquiry must be held. Such inquiry must be time-bound and should not exceed seven days in view of directions in ***Lalita Kumari*** (supra).

X X X

In absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District. Such permissions must be granted for recorded reasons which must be served on the person to be arrested and to the concerned court. As and when a person arrested is produced before the Magistrate, the Magistrate must apply his mind to the reasons recorded and

further detention should be allowed only if the reasons recorded are found to be valid. To avoid false implication, before FIR is registered, preliminary enquiry may be made whether the case falls in the parameters of the Atrocities Act and is not frivolous or motivated.

Our conclusions are as follows:

(i) Proceedings in the present case are clear abuse of process of court and are quashed.

(ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be *prima facie mala fide*. We approve the view taken and approach of the Gujarat High Court in ***Pankaj D. Suthar v. State of Gujarat, (1992)1 GLR 405*** and ***Dr. N.T. Desai v. State of Gujarat, (1997) 2 GLR 942*** and clarify the judgments of this Court in ***State of M.P. v. Ram Krishna Balothia, (1995) 3 SCC 221: AIR 1995 SC 1583*** and ***Manju Devi v. Onkarjit Singh Ahluwalia, (2017) 13 SCC***.

(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

(iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

(v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

The above directions are prospective.

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60. CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Multiple FIRs of same incident – Permissibility of – Held, lodging of two FIRs by the same complainant or others in respect of same incident is not permissible – But lodging second FIR in the nature of counter-complaint by accused of first FIR or others alleging different version of same incident is permissible.

(ii) More than one FIR in same incident – Rival versions in respect of same incident do take different shapes – Second FIR is permissible in such cases.

दण्ड प्रक्रिया संहिता, 1973 – धारा 154

(i) एक ही घटना की कई प्रथम सूचना रिपोर्ट – अनुज्ञेयता – अभिनिर्धारित, एक ही परिवादी/अभियोगी अथवा अन्य के द्वारा एक ही घटना के संबंध में दो प्रथम सूचना रिपोर्ट लेखबद्ध कराया जाना अनुज्ञेय नहीं है – परन्तु पहली प्रथम सूचना रिपोर्ट के अभियुक्त या अन्य द्वारा उसी घटना के भिन्न वृतांत को प्रकट करती दूसरी प्रथम सूचना रिपोर्ट अनुज्ञेय है।

(ii) एक ही घटना के संबंध में एक से अधिक प्रथम सूचना रिपोर्ट – एक ही घटना के संबंध में परस्पर प्रतिकूल वृतांत भिन्न–भिन्न रूप लेते हैं – ऐसे मामलों में द्वितीय प्रथम सूचना रिपोर्ट अनुज्ञेय है।

P. Sreekumar v. State of Kerala and others

Judgment dated 19.03.2018 passed by the Supreme Court in Criminal Appeal No. 408 of 2018, reported in AIR 2018 SC 1482

Relevant extracts from the judgment:

The question, which fell for consideration before the High Court, was that if two FIRs are filed in relation to the same offence and against the same accused, whether the subsequent FIR was liable to be quashed or not.

In our opinion, the law on the subject which governs the controversy involved in the appeal is no more *res integra* and settled by the decision of this Court (three-Judge Bench) in the case reported in ***Upkar Singh v. Ved Prakash and ors., (2004) 13 SCC 292*** and also by the subsequent decisions.

The aforesaid principle was reiterated by this Court (Two Judge Bench) in ***Surender Kaushik and ors. v. State of U.P. and ors., (2013) 5 SCC 148,*** in the following words:

> "24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three Judge Bench in ***Upkar Singh*** (supra) the prohibition does not cover the allegations made by the

accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible."

Keeping the aforesaid principle of law in mind when we examine the facts of the case at hand, we find that the second FIR filed by the Appellant against Respondent No. 3 though related to the same incident for which the first FIR was filed by Respondent No. 2 against the Appellant, Respondent No. 3 and three Bank officials, yet the second FIR being in the nature of a counter-complaint against Respondent No. 3 was legally maintainable and could be entertained for being tried on its merits.

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***61. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 197 and 300**

(i) Malafide intention of informant, effect of – It is of secondary importance – Material collected and evidence led in Court are deciding factors.

(ii) Result of departmental proceedings – Partial punishment and partial exoneration in departmental enquiry – Effect on criminal proceedings – Of no consequence – Two different entities of different hierarchy – Does not amount to double jeopardy as well.

(iii) Requirement of sanction to prosecute – Allegations of serious financial irregularities against Superintendent of Industrial Training Institute – Acts of baseless withdrawal and fake purchase – Act does not have any reasonable nexus with official duty – Sanction to prosecute is not required.

दण्ड प्रक्रिया संहिता**, 1973 -** धाराएं **154, 197** एवं **300**

(i) सूचनाकर्ता के दुर्भावनापूर्ण आशय का प्रभाव - यह द्वितीयक महत्व का है - संग्रहित सामग्री एवं न्यायालय में प्रस्तुत साक्ष्य निर्णायक कारक हैं।

(ii) विभागीय कार्यवाहियों का परिणाम - विभागीय जांच में भागतः दोषमुक्ति एवं भागतः दण्ड - आपराधिक कार्यवाहियों पर प्रभाव - किसी भी महत्व का नहीं है - दो भिन्न पदसोपान के दो भिन्न संस्थान - दोहरे दण्ड में भी नहीं आता है।

(iii) अभियोजित किए जाने के लिये मंजूरी की आवश्यकता - औद्योगिक प्रषिक्षण संस्थान के अधीक्षक के विरूद्ध गंभीर वित्तीय अनियमितताओं के आक्षेप - आधारहीन आहरण एवं नकली खरीदी के कृत्य - कृत्य का पदीय कर्तव्य से कोई युक्तियुक्त संबंध नहीं - अभियोजन के लिये मंजूरी आवश्यक नहीं है।

Ashok Kumar Verma v. State of M.P.

Order dated 21.06.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 7 of 2012, reported in 2018 CriLJ 671

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62. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)

(i) Default bail – Interpretation of phrase "not less than ten years" – Whether it includes imprisonment up to ten years? Held, No – It means an offence punishable with minimum imprisonment for a period of not less than ten years.

(ii) Indefeasible right – If right for default bail has ripened, it cannot be denied on any pretext – Also, Court cannot keep application pending so as to allow filing of charge sheet.

(iii) Oral request – Matter relates to personal liberty – Indefeasible right – Must not be too technical– Written application or oral submission makes no difference.

(iv) Duty of the Court – Must apprise the accused on expiry of statutory period about entitlement to "default bail".

दण्ड प्रक्रिया संहिता**, 1973 -** धारा **167 (2)**

(i) बाध्यकर प्रतिभूति - पद ''दस वर्ष से अन्यून'' का निर्वचन - क्या उसमें दस वर्ष तक का कारावास समाहित है? अभिनिर्धारित, नहीं - इसका तात्पर्य ऐसे अपराध से है, जो कम से कम दस वर्ष के न्यूनतम कारावास से दण्डनीय है।

(ii) अजेय अधिकार - यदि बाध्यकर प्रतिभूति का अधिकार परिपक्व हो गया है, तो उससे किसी भी बहाने से वंचित नहीं किया जा सकता है - यह भी, न्यायालय आवेदन लंबित रखकर अभियोग पत्र की प्रस्तुति अनुमत नहीं कर सकता है।

(iii) मौखिक निवेदन - वैयक्तिक स्वतंत्रता से संबंधित मामला - अजेय अधिकार - अत्यधिक तकनीकी नहीं होना चाहिये - लिखित आवेदन या मौखिक अनुरोध में कोई अंतर नहीं।

(iv) न्यायालय का कर्तव्य - अभियुक्त को सांविधिक अवधि के अवसान पर ''बाध्यकर प्रतिभूति'' पाने का अधिकारी होने की संसूचना दिया जाना चाहिये।

Rakesh Kumar Paul v. State of Assam

Judgment dated 16.08.2017 passed by the Supreme Court in Special Leave Appeal (Crl.) 2009 of 2017, reported in 2018 CriLJ 155

Relevant extracts from the judgment:

While it is true that merely because a minimum sentence is provided for in the statute it does not mean that only the minimum sentence is imposable. Equally, there is also nothing to suggest that only the maximum sentence is imposable. Either punishment can be imposed and even something in between. Where does one strike a balance? It was held that it is eventually for the court to decide what sentence should be imposed given the range available.

Undoubtedly, the Legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum is laid down, the sentencing judge has no option but to give a sentence "not less than" that sentence provided for. Therefore, the words "not less than" occurring in Clause (i) to proviso (a) of Section 167 (2) of Cr.P.C.

(and in other provisions) must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 167 of Cr.P.C. these words must relate to an offence punishable with a minimum of 10 years imprisonment.

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We may also look at the entire issue not only from the narrow interpretational perspective but from the perspective of personal liberty. Ever since 1898, the legislative intent has been to conclude investigations within twenty-four hours. This intention has not changed for more than a century, as the marginal notes to Section 167 of Cr.P.C. suggest. However, the Legislature has been pragmatic enough to appreciate that it is not always possible to complete investigations into an offence within twenty-four hours.

Therefore initially, in Cr.P.C. of 1898, a maximum period of 15 days was provided for completing the investigations. Unfortunately, this limit was being violated through the subterfuge of taking advantage of Section 344 of the Cr.P.C. of 1898. The misuse was recognized in the 41st Report of the Law Commission of India and consequently the Law Commission recommended fixing a maximum period of 60 days for completing investigations and that recommendation came to be enacted as the law in the Cr.P.C. of 1973. Subsequently, this period was also found to be insufficient for completing investigations into more serious offences and, as mentioned above, the period for completing investigations was bifurcated into 90 days for some offences and 60 days for the remaining offences.

Not with standing this, the basic legislative intent of completing investigations within twenty four hours and also within an otherwise time bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the Legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time limits have been laid down by the Legislature. There is a legislative appreciation of the fact that certain offences require more extensive and intensive investigations and, therefore, for those offences punishable with death or with imprisonment for life or a minimum sentence of imprisonment for a term not less than 10 years, a longer period is provided for completing investigations.

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This Court also dealt with the decision rendered in ***Sanjay Dutt v. State through C.B.I., Bombay (II), (1994) 5 SCC 410,*** and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing

the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.

This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to ***Mohamed Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722,*** wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court.

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In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for 'default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court in which he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact been filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other Constitutional Courts includes petitions for a writ of *habeas corpus* and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

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Section 167 (2)(a)(i) of the Code is applicable only in cases where the accused is charged with (i) offences punishable with death and any lower sentence; (ii) offences punishable with life imprisonment and any lower sentence and (iii) offences punishable with minimum sentence of 10 years;

In all cases where the minimum sentence is less than 10 years but the maximum sentence is not death or life imprisonment then Section 167 (2)(a)(ii) will apply and the accused will be entitled to grant of 'default bail' after 60 days in case charge-sheet is not filed.

The right to get this bail is an indefeasible right and this right must be exercised by the accused by offering to furnish bail.

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63. CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 200, 398, 399 and 401

(i) Extent of powers of revisional Court – Power under Section 398 of Cr.P.C. to order further enquiry must be cumulatively understood alongwith powers under Sections 399 and 401 of Cr.P.C.

(ii) Powers of revisional court while passing an order of remand – A revisional court while passing an order of remand cannot direct a Magistrate to keep the findings made by it in mind while considering the case on merits – Even if such an order is passed, it should only be construed as a justification of revisional court for remand – The same cannot be understood by the Magistrate that revisional court has already made out a *prima facie* case.

(iii) Factors to be considered by a Magistrate while taking cognizance – A Magistrate while taking cognizance is only required to satisfy himself about the satisfactory grounds to proceed with the complaint and he should not consider whether there is sufficient ground for conviction – At this stage, Magistrate is also not required to record elaborate reasons but the order should reflect his application of mind to the material on record.

दण्ड प्रक्रिया संहिता, **1973** - धाराएं **190, 200, 398, 399** एवं **401**

(i) पुनरीक्षण न्यायालय की शक्तियों की सीमा - द.प्र.सं. की धारा 398 के अधीन अतिरिक्त जांच करने का आदेश देने की शक्ति को धारा 399 व 401 के अधीन प्रदत्त अन्य शक्तियों के साथ ही समझा जाना चाहिये।

(ii) प्रतिप्रेषण का आदेश पारित करते समय पुनरीक्षण न्यायालय की शक्तियां - पुनरीक्षण न्यायालय प्रतिप्रेषण का आदेश पारित करते समय मजिस्ट्रेट को यह निर्देश नहीं दे सकता है कि मामले के गुण-दोष पर विचार करने के समय वह उनके द्वारा दिये गये निष्कर्षों पर भी ध्यान दे - यदि ऐसा आदेश पारित किया

जाता है तो उसे इस प्रकार समझना चाहिये कि यह पुनरीक्षण न्यायालय द्वारा प्रतिप्रेषण का आदेश पारित करने का आधार एवं कारण है - मजिस्ट्रेट द्वारा ऐसे आदेश का यह तात्पर्य कदापि नहीं लगाना चाहिये कि पुनरीक्षण न्यायालय ने पहले ही प्रथम दृष्टया मामला मान लिया है।

(iii) संज्ञान लेते समय मजिस्ट्रेट द्वारा विचार में लेने वाले घटक - किसी मामले का संज्ञान लेते समय मजिस्ट्रेट के लिये मात्र यह आवश्यक है कि वह अपना समाधान इस तथ्य पर करे कि परिवाद पर कार्यवाही के लिये पर्याप्त आधार है न कि दोषसिद्धि के लिये पर्याप्त आधार - इस प्रक्रम पर, मजिस्ट्रेट को भी विस्तृत कारणों का उल्लेख करना आवश्यक नहीं है परन्तु उसके आदेश से यह प्रकट होना चाहिये कि उसके द्वारा अभिलेख पर उपलब्ध सामग्री पर अपने मस्तिष्क का प्रयोग किया गया है।

Rajendra Rajoriya v. Jagat Narain Thapak and another

Judgment dated 23.02.2018 passed by the Supreme Court in Criminal Appeal No. 312 of 2018, reported in AIR 2018 SC 1229

Relevant extracts from the judgment:

The extent of the revisionary powers *inter alia*, is provided under Section 399 read with Section 401 of Cr.P.C. It is clear from the aforesaid provisions that Section 398 has to be read along with other Sections which are equally applicable to the revision petitions filed before the Sessions Court. Section 398 only deals with a distinct power to direct further inquiry, whereas Section 397 read with Section 399 and Section 401 confers power on the revisionary authority to examine correctness, legality or propriety of any findings, sentence or order. The powers of the revisionary court have to be cumulatively understood in consonance with Sections 398, 399 and 401 of Cr.P.C.

X X X

The revisional court concluded that the lower court did not appreciate the facts as well as the law in a proper manner and remanded the case in the following manner :-

> "This revision is allowed and order dated 21.04.2012 passed by Court is set aside and case is remanded back with a direction that if necessary, after a further enquiry keeping in view the findings given in this order, proper order be passed with regard to registration of complaint and to summon the respondents and for that directed the parties to remain present before the Court below on 20.12.2012."

On a perusal of the Sessions Court judgment, we are of the opinion that the Sessions Court did not pass an order taking cognizance. The Sessions Court order should have been construed only as a remand order for further enquiry. The observations made by the Sessions Court were only justification

for a remand and the same did not amount to taking cognizance. In view of the above, the High Court clearly misconstrued the Sessions Court order and proceeded on an erroneous footing. On the other hand, the revisional Court was also in error to the extent of influencing the Magistrate Court to keep the findings of Sessions Court in mind, while considering the case on remand. The misconception created before the High Court was due to the fact that the remand order provided discretion for the trial Court to conduct further enquiry and thereafter consider issuing process. The High Court in the case at hand without appreciating the dichotomy between taking cognizance and issuing summons, quashed the complaint itself on wrong interpretation of law. In the light of the above, the impugned order of the High Court cannot be sustained in the eyes of law.

Now coming to the second aspect as to the legality of the order of the learned Magistrate taking cognizance of the matter. The standard required by the Magistrate while taking cognizance is well settled by this court in catena of judgments. In ***Subramanian Swamy v. Manmohan Singh & another, (2012) 3 SCC 64,*** this Court explained the meaning of the word 'cognizance' holding that "...In legal parlance cognizance is taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially". We may note that the Magistrate while taking cognizance has to satisfy himself about the satisfactory grounds to proceed with the complaint and at this stage the consideration should not be whether there is sufficient ground for conviction. It may not be out of context to note that at the stage of taking cognizance, the Magistrate is also not required to record elaborate reasons but the order should reflect independent application of mind by the Magistrate to the material placed before him.

On a perusal of the order of the learned Magistrate taking cognizance, it is apparent that the learned Magistrate observes that the Sessions Court has already made out a *prima facie* case. Such finding would be difficult to sustain as the revisional Court only observed certain aspects in furtherance of remanding the matter. Such observations could not have been made by the Magistrate as he was expected to apply his independent mind while taking cognizance. In the case on hand, we recognize the limitation on the appellate forum to review subjective satisfaction of the Magistrate while taking cognizance, but such independent satisfaction unless reflected in the order would make it difficult to be sustained.

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64. CRIMINAL PROCEDURE CODE, 1973 – Sections 195 (1)(b)(ii) and 340

(i) Bar in taking cognizance – Under Section 195 (1)(b)(ii) CrPC – Law explained.

(ii) Prosecution relating to documents/applications produced in Court – Applicability of S.195 (1)(b)(ii) – Held, for attracting Section 195 (1)(b)(ii), offences enumerated in section must be

committed during the time document was in *custodia legis* – Section 195 does not include documents forged prior to their submission in Court.

दण्ड प्रक्रिया संहिता**, 1973 -** धाराएं **195 (1)(b)(ii)** एवं **340**

(i) संज्ञान लेने पर रोक - अंतर्गत धारा 195 (1)(b)(ii) द.प्र.सं. - विधि समझाई गई।

(ii) न्यायालय में प्रस्तुत किये जाने वाले दस्तावेजों/आवेदन पत्रों से संबंधित अभियोजन - धारा 195 (1)(b)(ii) की प्रयोज्यता - अभिनिर्धारित, धारा 195 (1)(b)(ii) के लागू होने के लिये उक्त धारा में वर्णित अपराध उस समय किये जाने चाहिये जब दस्तावेज न्यायालय की अभिरक्षा में हो - धारा 195 ऐसे दस्तावेजों को आकर्षित नहीं होती है जो न्यायालय में प्रस्तुत करने के पूर्व ही कूटरचित कर लिये गये हों।

Vishnu Chandru Gaonkar v. N.M. Dessai

Judgment dated 06.03.2018 passed by the Supreme Court in Criminal Appeal No. 359 of 2018, reported in 2018 (1) ANJ (SC) 403

Relevant extracts from the judgment:

A Three Judge Bench of this Court in ***Sachida Nand Singh and anr. v. State of Bihar & anr., (1998) 2 SCC 493,*** had occasion to consider Section 195 (1)(b)(ii) and Section 340 (1) Code of Criminal Procedure. Interpreting Section 195 (1)(b)(ii), following was laid down in Paras 8, 11 and 23:

> *"8. That apart it is difficult to interpret Section 195 (1)(b)(ii) as containing bar against initiation of prosecution proceedings merely because the document concerned was produced in a Court albeit the act of forgery was perpetrated prior to its production in the Court. Any such construction is likely to ensue unsavoury consequences. For instance, if rank forgery of a valuable document is detected and the forgerer is sure that he would imminently be embroiled in prosecution proceedings he can simply get that document produced in any long-drawn litigation which was either instituted by himself or somebody else who can be influenced by him and thereby pre-empt the prosecution for the entire long period of pendency of that litigation. It is a settled proposition that if the language of a legislation is capable of more than one interpretation, the one which is capable of causing mischievous consequences should be averted. Quoting from* ***Gill v. Donald Humberstone & Co. Ltd. Maxwell*** *has stated in his treatise (Interpretation of Statutes, 12th Edn., p. 105) that "if the language is capable of more than one interpretation we ought to discard the more natural meaning if it leads to unreasonable result and adopt that interpretation which leads to a reasonably*

practicable result". The Clause which we are now considering contains enough indication to show that the more natural meaning is that which leans in favour of a strict construction, and hence the aforesaid observation is eminently applicable here.

11. The scope of the preliminary enquiry envisaged in Section 340 (1) of the Code is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that Court. In other words, the offence should have been committed during the time when the document was in custodia legis.

23. The sequitur of the above discussion is that the bar contained in Section 195 (1)(b)(ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a Court. Accordingly we dismiss this appeal."

It is also relevant to note that observations have been made by this Court that forgery of a document if committed far outside the precincts of the Court and long before its production in the Court, the same cannot be treated as one affecting administration of justice. In Para 12, following has been held:

"12. It would be a strained thinking that any offence involving forgery of a document if committed far outside the precincts of the Court and long before its production in the Court, could also be treated as one affecting administration of justice merely because that document later reached the Court records."

A contrary earlier view having expressed by another Three Judge Bench in ***Surjit Singh and ors. v. Balbir Singh, (1996) 3 SCC 533,*** being not in accord with the view expressed by this Court in ***Sachida Nand Singh*** (supra), the same was referred to a Constitution Bench for resolving the conflict. The Constitution Bench vide its judgment in ***Iqbal Singh Marwah and anr. v. Meenakshi Marwah and anr., (2005) 4 SCC 370,*** has resolved conflict and approved three Judge Bench judgment in ***Sachida Nand Singh*** (supra). In Para 33, following was laid down:

"33. In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) Code of Criminal Procedure would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in custodia legis."

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***65. CRIMINAL PROCEDURE CODE, 1973 – Sections 205 and 317**

(i) Whether application under Section 205 Cr.P.C. is maintainable even prior to the appearance of accused in the Court? Held, Yes.

(ii) Exemption from personal appearance – Factors – Distance of 1750 kms from Court to the residence of accused – The fact is sufficient to exempt him from personal appearance in Court – The Magistrate, under Section 205 (2) Cr.P.C., is empowerd at any stage to direct personal appearance of accused.

दण्ड प्रक्रिया संहिता, **1973 -** धाराएं **205** एवं **317**

(i) क्या अभियुक्त की न्यायालय में उपस्थिति के पूर्व ही दं.प्र.सं. की धारा 205 के अधीन आवेदन पत्र संधारणीय है ? अभिनिर्धारित, हां।

(ii) वैयक्तिक उपस्थिति से अभिमुक्ति - कारक - अभियुक्त के निवास स्थान से न्यायालय की दूरी 1750 कि.मी. - यह तथ्य उसे न्यायालय में व्यक्तिगत उपस्थिति से उन्मुक्ति प्रदान करने के लिये पर्याप्त है - दं.प्र.सं. की धारा 205 (2) के अधीन मजिस्ट्रेट किसी भी प्रक्रम पर अभियुक्त की वैयक्तिक उपस्थिति के लिये आदेश कर सकता है।

Rameshwar Yadav and another v. State of Bihar and another

Judgment dated 16.03.2018 passed by the Supreme Court in Criminal Appeal No. 387 of 2018, reported in AIR 2018 SC 1435

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66. CRIMINAL PROCEDURE CODE, 1973 – Sections 228, 239, 397 and 401
CONSTITUTION OF INDIA – Articles 21 and 227
CRIMINAL PRACTICE:
Delay in trial – Stay of proceedings by higher Courts – Effects considered – Directions issued by the Apex Court to all trial Courts of the country – In all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from the date of this judgment, i.e. 28.03.2018; unless such stay is extended by a speaking order – In cases, where stay is granted in future, the same will end on expiry of six months from the date of such order; unless similar extension is granted by a speaking order.

दण्ड प्रक्रिया संहिता, **1973 -** धाराएं **227, 239, 397** एवं **401**

भारत का संविधान - अनुच्छेद **21** एवं **227**

आपराधिक प्रथाः

विचारण में विलम्ब - वरिष्ठ न्यायालयों द्वारा कार्यवाहियों का स्थगन - प्रभावों पर विचार किया गया - सर्वोच्च न्यायालय द्वारा देश के समस्त विचारण न्यायालयों को निर्देश जारी किये गये - ऐसे समस्त मामलों में जहां सिविल अथवा आपराधिक विचारण की कार्यवाही में स्थगन प्रभावशील है, वहां ऐसा स्थगन इस निर्णय की तिथि

अर्थात् दिनांक 28.03.2018 से समाप्त हो जायेगा; जब तक कि ऐसा स्थगन सकारण आदेश के द्वारा विस्तारित न कर दिया गया हो - ऐसे मामलों में जहां भविष्य में कार्यवाही स्थगित की जाती है, वहां स्थगन ऐसे आदेश दिनांक से छः माह के अवसान पर समाप्त हो जायेगा; जब तक कि उसे सकारण आदेश के द्वारा विस्तारित न कर दिया गया हो।

Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation

Judgment dated 28.03.2018 passed by the Supreme Court in Criminal Appeal No. 1376 of 2013, reported in AIR 2018 SC 2039

Relevant extracts from the judgment:

In view of situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned *sine die* on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

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67. CRIMINAL PROCEDURE CODE, 1973 – Sections 357 (2), 389 and 421

(i) Compensation and fine – Whether by virtue of Section 357 (2) Cr.P.C., the fine which is part of sentence automatically gets stayed till the decision of the appeal? Held, No – What is prohibited under Section 357 (2) Cr.P.C. is payment of compensation utilising the fine be not paid till the period allowed for presenting the appeal has elapsed, or if an appeal is filed then before the decision of the appeal – It does not involve stay of sentence.

(ii) Suspension of sentence of fine – Power of appellate Court – Appellate Court while exercising power under Section 389 Cr.P.C., can suspend the sentence of imprisonment as well as of fine with or without any condition.

दण्ड प्रक्रिया संहिता**, 1973 -** धाराएं **357 (2), 389** एवं **421**

(i) प्रतिकर एवं अर्थदण्ड - क्या द.प्र.सं. की धारा 357 (2) के प्रभाव से अर्थदण्ड, जो कि दण्ड का भाग है, अपील के निराकरण तक स्वमेव स्थगित हो जाता है? - अभिनिर्धारित, नहीं -द.प्र.सं. की धारा 357 (2) के अधीन यह निषेधित है कि वसूल किये गये अर्थदण्ड में से प्रतिकर का भुगतान तब तक न किया जाये जब तक कि निर्णय के विरुद्ध अपील प्रस्तुत करने की अवधि व्यतीत न हो जाये अथवा जहां अपील की गई हो वहां अपील में निर्णय पारित न किया जाये - यह दण्डाज्ञा के स्थगन को सम्मिलित नहीं करता है।

(ii) अर्थदण्ड का विलंबन - अपीलीय न्यायालय की शक्ति - अपीलीय न्यायालय द.प्र.सं. की धारा 389 की शक्तियों का प्रयोग करते हुये कारावास के साथ-साथ अर्थदण्ड को भी बिना शर्त अथवा कुछ शर्तों के साथ स्थगित कर सकती है।

Satyendra Kumar Mehra v. State of Jharkhand

Judgment dated 23.03.2018 passed by the Supreme Court in Criminal Appeal No. 406 of 2018, reported in AIR 2018 SC 1587

Relevant extracts from the judgment:

All the circumstances in sub-section (1) of Section 357 refer to direction to pay compensation out of the fine imposed. Thus, all the circumstances are circumstances where fine imposed and recovered is to be applied in the above circumstances.

The fine is thus contemplated to be utilised for compensating different circumstances as enumerated in Section 357 (1) Cr.P.C. Sub-section (2) of Section 357 Cr.P.C. has been engrafted in reference to what was stated in sub-section (1) of Section 357 Cr.P.C. Crucial words used in sub-section (2) of Section 357 Cr.P.C. are "no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal". Thus, what is prohibited under Section 357 (2) Cr.P.C. is that payment of compensation utilising the fine be not paid till the period allowed for presenting the appeal has elapsed, or if an appeal is filed then before the decision of the appeal. It does not involve any concept of stay of sentence.

Chapter XXIX deals with the appeals. In the said Chapter Section 389 deals with the subject "suspension of sentence pending the appeal; release of appellant on bail". Section 389 (1) Cr.P.C. empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail. Thus, the power of suspension of sentence emanates from Section 389 Cr.P.C. where Appellate Court is empowered to pass such an order. Sections 357 and 389 Cr.P.C. operate in two different fields. Section 357 Cr.P.C. contains an embargo that on passing a judgment of sentence of fine, the fine be not utilised for payment of compensation till contingency as mentioned therein does not occur. The sentence awarded by the Court including sentence of fine is in no way affected by embargo contained

in Section 357 (2) Cr.P.C. The operation of Section 357 (2) Cr.P.C. is restricted to payment of compensation as contemplated by Section 357 (1) and (3) Cr.P.C. The heading of the Section 357 Cr.P.C. i.e. “Order to pay compensation” as well as contents of the Section lead to only one conclusion that the entire provision has been engrafted regarding payment of compensation out of the fine imposed or when Court imposes sentence the fine is not part of which, the Court may by way of compensation direct payment of such amount to a person who has suffered the injury. We, thus, are of the view that Section 357 Cr.P.C. has nothing to do with suspension of sentence awarded by the trial Court and the sentence of fine imposed on the accused is in no way affected by Section 357 (2) Cr.P.C.

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We, however, make it clear that Appellate Court while exercising power under Section 389 Cr.P.C. can suspend the sentence of imprisonment as well as of fine without any condition or with conditions. There are no fetters on the power of the Appellate Court while exercising jurisdiction under Section 389 Cr.P.C.. The Appellate Court could have suspended the sentence and fine both or could have directed for deposit of fine or part of fine.

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***68. EVIDENCE ACT, 1872 – Section 3**

INDIAN PENAL CODE, 1860 – Sections 201 and 302

Circumstantial evidence – Accused took the deceased with him – Burnt bones of male aged between 20 to 25 years seized from pyre near the house of the accused – Accused seen last time standing next to that pyre – Voluntary extra judicial confession established by the uncontradicted evidence – Blood stains all over in the house of the accused – Accused absconding immediately after the incident – Failure to prove motive is of no consequence in view of other strong circumstances – Also, failure to recover *corpus delicti* is not fatal as other attending circumstances established guilt of the accused – Conviction under Sections 201 and 302 affirmed.

साक्ष्य अधिनियम**, 1872 -** धारा **3**

भारतीय दण्ड संहिता**, 1860 -** धाराएं **201** एवं **302**

परिस्थितिजन्य साक्ष्य - अभियुक्त मृतक को अपने साथ लाया - अभियुक्त के घर के पास के अलाव से 20 से 25 वर्ष के आयु के पुरूष की जली हुई अस्थियां अभिग्रहीत की गईं - अभियुक्त को अंतिम बार उक्त अलाव के पास खड़ा देखा गया - अखंडनीय साक्ष्य के द्वारा स्वेच्छिक न्यायिकेत्तर संस्वीकृति स्थापित - अभियुक्त के पूरे घर में रक्त के धब्बे पाये गये - घटना के तुरंत पश्चात् अभियुक्त का फरार हो जाना - अन्य सुदृढ़ परिस्थितियों के आलोक में हेतु को साबित करने में असफल रहना महत्वहीन है - यह भी, मृतक की देह बरामद करने में असफल रहना घातक नहीं है क्योंकि अन्य विद्यमान परिस्थितियां अभियुक्त की दोषिता स्थापित करती हैं - धारा 201 एवं 302 के अंतर्गत दोषसिद्धि की पुष्टि की गई।

Bhagwan Singh v. State of Madhya Pradesh

Judgment dated 21.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Cr.A.No. 491 of 2010, reported in 2017 Law Suit (MP) 1958

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69. EVIDENCE ACT, 1872 – Sections 3 and 27

(i) Circumstantial evidence – Last seen theory – It is one of the important events in chain of circumstances – But alone is not sufficient to form basis of conviction.

(ii) Circumstantial evidence – Disclosure – Confessional statement under Section 27 resulting in recovery of articles – Is relevant only when the confessional statement leads to the discovery of some new fact – Where the articles recovered have no link with the crime, such statements have no relevance.

साक्ष्य अधिनियम, **1872 -** धाराएं **3** एवं **27**

(i) परिस्थितिजन्य साक्ष्य - अंतिम बार देखे जाने का सिद्धांत -यह परिस्थितियों की कड़ियों में एक महत्वपूर्ण घटना है - परन्तु अकेले ही दोषसिद्धि के निष्कर्ष पर पहुंचने के लिये पर्याप्त नहीं है।

(ii) परिस्थितिजन्य साक्ष्य - प्रकटन - धारा 27 के अधीन की गई संस्वीकृति जिसके आधार पर वस्तुओं की जप्ती होती है - तभी सुसंगत है जब ऐसी संस्वीकृति से किसी नये तथ्य का पता चलता हो - जहां जप्तशुदा वस्तुओं का अपराध से कोई संबंध ही न हो वहां ऐसे कथनों (संस्वीकृति) का कोई महत्व नहीं है।

Navaneetha krishnan v. State by Inspector of Police

Judgment dated 16.04.2018 passed by the Supreme Court in Criminal Appeal No. 1134 of 2013, reported in AIR 2018 SC 2027

Relevant extracts from the judgment:

It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration.

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Section 27 of the Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance is limited as relates distinctly to the fact thereby discovered. In the case at hand, the Yashika Camera which was recovered at the instance of Accused No. 3 was not identified by the father as well as the mother of the deceased. In fact, the prosecution is unable to prove that the said camera actually belongs to the deceased-John

Bosco. Though the mobile phone is recovered from A-1, but there is no evidence on record establishing the fact that the cell phone belongs to the deceased-John Bosco or to PW-8 as the same was not purchased in their name. Further, the prosecution failed to examine the person on whose name the cell phone was purchased to show that it originally belongs to PW-8 to prove the theory of PW-8 that he had purchased and given it to the deceased John-Bosco. Further, the material objects, viz., Nokia phone and Motor Bike do not have any bearing on the case itself. The Nokia phone was recovered from Accused No. 1 and it is not the case that it was used for the commission of crime and similarly the motor cycle so recovered was of the father of Accused No. 3 and no evidence has been adduced or produced by the prosecution as to how these objects have a bearing on the case. In fact, none of the witnesses have identified the camera or stated the belongings of John Bosco. The said statements are inadmissible in spite of the mandate contained in Section 27 for the simple reason that it cannot be stated to have resulted in the discovery of some new fact. The material objects which the police is claimed to have recovered from the accused may well have been planted by the police. Hence, in the absence of any connecting link between the crime and the things recovered, there recovery on the behest of accused will not have any material bearing on the facts of the case.

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***70. EVIDENCE ACT, 1872 – Sections 3 and 106**

Appreciation of evidence – Fact especially within the knowledge of the accused – Death of wife in the house where she was living with the accused husband – Accused husband called and informed the police about the incident – Proof of the fact that relation between accused husband and deceased wife were bitter and not cordial – Death of wife in his house – Reason of death "especially" within his knowledge and burden is on him – Absence of any plausible explanation – Conviction upheld.

साक्ष्य अधिनियम**, 1872 -** धाराएं **3** एवं **106**

साक्ष्य का मूल्यांकन - विशिष्टतः अभियुक्त के ज्ञान का तथ्य - पत्नि की उस घर में मृत्यु जहां वह अभियुक्त पति के साथ रह रही थी - अभियुक्त पति द्वारा पुलिस को बुलाया गया एवं घटना के बारे में सूचित किया गया - इस तथ्य का सबूत कि अभियुक्त पति एवं मृतक पत्नि के बीच संबंध कटु एवं सौहार्दपूर्ण नहीं थे - पत्नि की उसके घर में मृत्यु - मृत्यु का कारण ''विशिष्टतः'' उसके ज्ञान में है एवं भार उस पर है - किसी स्वीकार्य स्पष्टीकरण का अभाव - दोषसिद्धि यथावत्।

Raju @ Rajkishore @ R.K. Singh v. State of Madhya Pradesh

Judgment dated 21.12.2017 passed by the High Court of Madhya Pradesh in Cr.A.No. 418 of 2009, reported in 2017 Law Suit (MP) 1944 (DB)

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***71. EVIDENCE ACT, 1872 – Section 8**

INDIAN PENAL CODE, 1860 – Sections 300, 302 and 304 Part-I

(i) Motive – Proof of motive may supply a link to chain of circumstantial evidence – Absence of it – Cannot be a ground to reject prosecution case.

(ii) Culpable homicide not amounting to murder – Exception (4) under Section 300 – Absence of previous enmity and premeditation – Also, death due to single blow on the vital part – No sign of undue advantage – Falls within the purview of Section 304 Part-I of IPC.

साक्ष्य अधिनियम**, 1872 -** धारा **8**

भारतीय दण्ड संहिता**, 1860 -** धाराएं **300, 302** एवं **304** भाग-**I**

(i) हेतु - हेतु का सबूत परिस्थितिजन्य साक्ष्य की श्रृंखला के लिए कड़ी प्रदान कर सकता है - उक्त का अभाव - अभियोजन मामले को नामंजूर करने का आधार नहीं हो सकता है।

(ii) हत्या की कोटि में न आने वाला आपराधिक मानव वध - धारा 300 के अंतर्गत अपवाद (4) - पूर्व शत्रुता एवं पूर्व चिन्तन का अभाव - यह भी, महत्वपूर्ण भाग पर एक वार के कारण मृत्यु - अनुचित लाभ का कोई संकेत नहीं - धारा 304 भाग-I भारतीय दण्ड संहिता की परिधि में आता है।

Kalyan Kushwah v. State of Madhya Pradesh

Judgment dated 21.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Cr.A.No. 267 of 2000, reported in 2017 Law Suit (MP) 1954 (DB)

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***72. EVIDENCE ACT, 1872 – Sections 30 and 45**

(i) Appreciation of handwriting expert's opinion – Suicide note of inculpatory nature admitting guilt of committing heinous offence – Report of handwriting expert showing strong indication of common authorship but many features remaining unexplained – Held, suicide note was written in disturbed phase of mind with guilty conscious – Variations are bound to occur – Strong indications show that handwriting is of the person in question.

(ii) Admissibility of suicide note of one accused against other co-accused – It is a piece of extra judicial confession in written form – Voluntariness can be concluded looking to the purpose for which it was written – Can be used as corroborative piece of evidence against other accused.

साक्ष्य अधिनियम, **1872 -** धाराएं **30** एवं **45**

(i) हस्तलेख विशेषज्ञ की राय का मूल्यांकन - जघन्य अपराध को कारित किये जाने की दोषिता की स्वीकृति का आत्महत्या लेख - हस्तलेख विशेषज्ञ का समान लेखक होने के मजबूत संकेत को दर्शित करता प्रतिवेदन परन्तु कई लक्षण अस्पष्ट रह गये - अभिनिर्धारित, आत्महत्या लेख विचलित मानसिक अवस्था में दोषी अनभिज्ञता के साथ लिखा गया - भिन्नता आयेगी ही - मजबूत संकेत यह दर्षित करते है कि हस्तलेख प्रश्नाधीन व्यक्ति का है।

(ii) एक अभियुक्त के आत्महत्या लेख की अन्य सह-अभियुक्त के विरूद्ध ग्राह्यता - यह लिखित रूप में न्यायकेत्तर संस्वीकृति का हिस्सा है - स्वेच्छा इसे लिखने के उद्देश्य को देखते हुए निष्कर्षित की जा सकती है - अन्य अभियुक्त के विरूद्ध संपोषक साक्ष्य के रूप में उपयोग किया जा सकता है।

Vijay Balmeek v. State of Madhya Pradesh

Judgment dated 21.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Appeal No. 658 of 2006, reported in 2017 Law Suit (MP) 1968. (DB)

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73. EVIDENCE ACT, 1872 – Sections 63 and 65 (c)

(i) Admissibility of photocopy – Conditions of Section 63 must be satisfied first – Existence of original must be established – Also, it must be shown that it has been made from or compared with original.

(ii) Ground of "lost" under Section 65 (c) – Sufficient proof of search of original and exhaustion of all resources must be given – Averment with certainty must be made in application to establish these facts.

भारतीय साक्ष्य अधिनियम, **1872 -** धाराएं **63** एवं **65 (**ग)

(i) छाया प्रतिलिपि की ग्राह्यता - प्रथमतः धारा 63 की शर्तों की संतुष्टि होना चाहिये - मूल का अस्तित्व स्थापित किया जाना चाहिये - यह भी दर्शित किया जाना चाहिये कि इसे मूल से बनाया गया एवं उससे तुलना की गई।

(ii) धारा 65 (ग) के अंतर्गत ''खोने'' का आधार - मूल की तलाश एवं समस्त साधनों के समाप्त हो जाने का पर्याप्त सबूत दिया जाना चाहिए - इन तथ्यों को स्थापित किये जाने के आवेदन में अभिकथन निश्चित रूप से किए जाने चाहिये।

Santosh Kumar v. Smt. Prabha Bai

Order dated 04.05.2017 passed by the High Court of Madhya Pradesh in W.P. No. 767 of 2013, reported in 2017 Law Suit (MP) 633

Relevant extracts from the order :

Section 63 makes it clear that only such copies which are made from the original by mechanical process and which were compared with the original can

be treated as secondary evidence. The secondary evidence itself must be of the nature described in Section 63. The photocopy of a document will not be admissible under Section 63 unless it is shown that it had been made from or compared with the original. Another aspect emanates from Section 65 (c) on which heavy reliance is placed by Shri Choubey. A plain reading of the said provision shows that secondary evidence is permissible when original has either been 'destroyed' or 'lost'. This aspect is dealt with in Halsbury law in the following manner:

> "Where a document has been lost or destroyed, secondary evidence of its contents is admissible. The court must be satisfied that the document existed, that the loss or destruction has in fact taken place and that reasonable explanation of this has been given. Thus, a bonafide and diligent search must have been made in the place where the instrument would most properly be found, but not necessarily in every possible place; nor need the search have been made recently or for the purpose of the cause."

Thus, one has to establish that the photocopy is of a document which actually existed. For this purpose there must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all resources and means in search of the documents which were available to him.

The Rajasthan High Court in ***Poonamchand v. Motilal and others, AIR 1955 Raj. 179,*** opined as under:

> "Appellant's learned counsel has also referred to a few other documents which are marked Exs.P.3 to P.7. Regarding these documents, it would suffice to say that they are not the original documents. They are only copies. The original documents have not been proved in any manner and, therefore, they are inadmissible in evidence."

In ***Smt. Bobba Suramma v. Smt. Peddireddi Chandramma, AIR 1959 AP 568,*** the High Court considered an earlier judgment ***Ananta Raghuram v. Rajah Bommadevara, AIR 1958 AP 418*** and opined that there must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all resources and means in the search of the document which were available to him. In order to claim the benefits of section 65 of the Indian Evidence Act, there should be credible evidence of the loss of the original.

The same view is taken by Calcutta High Court in ***M/s Parekh Brothers v. Kartick Chandra Saha and others, AIR 1968 Cal. 532.*** This Court in ***Rajesh Kumar v. Rakesh Kumar & anr., 2009 (3) MPJR 211,*** opined that in the case at hand no evidence is brought on record to prove the existence of original on which the document dated 17.5.1975 has been prepared and in absence of such evidence, the same cannot be proved by secondary evidence.

The Apex Court in ***Kaliya v. State of Madhya Pradesh, (2013) 10 SCC 758,*** opined that, the secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced.

In the instant case, the petitioner has failed to prove the existence of original document. In the application filed under section 65 of the Evidence Act also, he has not said with certainty that the document in question has been actually lost. In absence of establishing the existence of original, the photocopy cannot be treated as secondary evidence.

So far the judgment of this court in ***Gwalior Development Authority v. Dushyant Sharma and ors., 2013 (3) MPLJ 173,*** is concerned, it is clear that twin conditions are required to be satisfied for treating the document as secondary evidence. The conditions are (i) the copies are made from original by mechanical process and (ii) copies are compared with original copies. Since petitioner has failed to establish the factum of existence of original document, the question of its comparison with original does not arise.

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***74. EXCISE ACT, 1915 (M.P.) – Sections 34, 42 and 61**

Requirement of complaint – Petitioner made accused on the basis of confession of co-accused for contravention of conditions of licence/permit – Filing of First Information Report – Section 61 mandates a complaint by Collector or authorised District Excise Officer – Absence of any such complaint – Very initiation of prosecution is bereft of authority of law – First Information Report against the accused quashed.

आबकारी अधिनियम**, 1915 (**म.प्र.) - धाराएं **34, 42** एवं **61**

परिवाद की आवश्यकता - सह-अभियुक्तगण की अनुज्ञप्ति/अनुज्ञा की शर्तों के उल्लंघन संबंधी संस्वीकृति के आधार पर याचिकाकर्ता को अभियुक्त बनाया गया - प्रथम सूचना रिपोर्ट की प्रस्तुति - धारा 61 कलेक्टर या प्राधिकृत जिला आबकारी अधिकारी द्वारा परिवाद किया जाना आज्ञापक बनाती है - ऐसे किसी परिवाद की अनुपस्थिति - अभियोजन प्रारंभ से ही किसी विधि की अधिकारिता के अभाव में है - अभियुक्त के विरूद्ध प्रथम सूचना रिपोर्ट अभिखण्डित की गई।

Hari Singh Shivhare v. State of Madhya Pradesh

Judgment dated 22.08.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 2977 of 2017, reported in 2017 Law Suit (MP) 1308

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***75. HINDU MARRIAGE ACT, 1955 – Section 13**

Desertion – There should be a determination to put an end to the marital relations and cohabitation as well – Parties agreeing on filing for mutual divorce on payment of certain sum during Court proceedings – Conduct impliedly indicate willingness to end marital relations – Granting of divorce decree upheld.

हिन्दू विवाह अधिनियम**, 1955 -** धारा **13**

अधित्यजन - विवाह के संबंधों एवं सहवास को समाप्त करने का संकल्प भी होना चाहिए - न्यायालयीन कार्यवाही के दौरान निश्चित राशि के भुगतान पर पक्षकार आपसी विवाह विच्छेद संस्थित/दायर करने हेतु सहमत - आचरण विवक्षित रूप से वैवाहिक संबंध समाप्त करने की रजामंदी इंगित करता है - विवाह विच्छेद की आज्ञप्ति को यथावत रखा गया।

Smt. Rakhi Gupta v. Dr. Nitin Kumar Gupta

Judgment dated 18.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in First Appeal No. 47 of 2016, reported in 2017 Law Suit (MP) 1960

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76. HINDU WIDOW'S RE-MARRIAGE ACT, 1856 – Section 2

HINDU SUCCESSION ACT, 1956 – Sections 4 and 8

Whether a widow can claim right in the property of her son from first husband after re-marriage ? Held, Yes – The estate shall devolve according to Section 8 – The Act of 1956 shall have overriding effect over the Act of 1856.

हिन्दू विधवा पुनर्विवाह अधिनियम**, 1856 -** धारा **2**

हिन्दू उत्तराधिकार अधिनियम**, 1956 -** धाराएं **4** एवं **8**

क्या एक विधवा पुनर्विवाह पश्चात् प्रथम पति के पुत्र की संपत्ति में अधिकार का दावा कर सकती है? अभिनिर्धारित, हाँ - संपदा धारा 8 के अनुसार न्यागत होगी - 1956 का अधिनियम, 1856 के अधिनियम पर अध्यारोही प्रभाव रखेगा।

Atma Singh v. Gurmej Kaur (D) & ors.

Judgment dated 13.09.2017 passed by the Supreme Court in Civil Appeal No. 11094 of 2017, reported in AIR 2017 SC 4604

Relevant extracts from the judgment:

The mother being Class I heir under Section 8 and there being no other Class I heir available to succeed mother, she naturally succeed the estate of Pal Singh by virtue of Section 8 read with the Schedule, Class I. Whether provision of Section 2 of the 1856 Act disentitles the defendant No.1 to succeed the estate of Pal Singh, is the submission forcefully put up by learned counsel for the appellant. It is submitted that on re-marriage, the widow ceases to have any right of maintenance or inheritance to her husband or his lineal successors.

It is submitted that Pal Singh being lineal successor of husband of defendant No.1, she is also disentitled to succeed the estate of Pal Singh.

The consequence of Section 2 on the right of widow, who re-marries has been clearly enumerated. Section 2 provides that all rights and interests, which any widow may have in her deceased husband's property or to his lineal successors shall upon her re-marriage cease and determine as if she had then died. Thus, on re-marriage, the widow is divested with any right which she may have in the husband's property or property of husband's lineal successors.

In the present case, re-marriage took place in the year 1952. Thus, the widow has lost any right in the property of her husband or any lineal descendants on re-marriage. Section 2 further provides that on cessation and determination of rights of widow, the next heirs of her deceased husband or other persons entitled to the property shall succeed the same. The effect of Section 2 was thus confined to rights which the widow was possessing at the time of re-marriage.

In the present case, the succession has opened in the year 1972 when Pal Singh died. The question which had cropped up in the present case regarding succession of estate of Pal Singh and succession of Pal Singh's estate shall be governed by Section 8 of the Hindu Succession Act, 1956. By Section 8, the mother i.e. defendant No.1 being described in Class I of the Schedule shall inherit the property excluding other heirs. Even after re-marriage of defendant No.1, the defendant No.1 shall continue to be the mother of Pal Singh, who was born to her from her first husband Narain Singh. Succession under Section 8 to the estate of Pal Singh by defendant No.1 shall not be controlled or prohibited by Section 2 of the Hindu Widow's Re-Marriage Act, 1856. It is true that all rights in her husband's property or property of lineal successors of her husband were lost by a widow on her re-marriage.

But Section 2 shall not govern or regulate any future succession to which she may be entitled under law. The Hindu Widow's Re-Marriage Act, 1856 has been subsequently repealed by the Hindu Widow's Re-Marriage (Repeal) Act, 1983. Even though, in the year 1972, the 1856 Act was in force but as noted above, the said provision shall not control the succession as ordained by Section 8 of the 1956 Act.

Coming to Section 4 of the 1956 Act, where an overriding effect has been given to the 1956 Act to any other law in force immediately before the commencement of the 1956 Act in so far as it is inconsistent with any of the provisions contained in the 1956 Act. Even for the arguments sake, it is accepted that Section 2 of the 1856 Act have any cascading effect on the right of widow, the same shall be treated to have overridden by virtue of Section 8 read with Schedule to the 1956 Act.

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***77. INDIAN PENAL CODE, 1860 – Sections 96, 149 and 302**

Appreciation of Evidence

Right of Private Defence – Brief Facts:

Injured 'A' went unarmed to the house of 'B' for inviting him for function – Accused persons, who are neighbours of 'B', were standing in front of their houses armed with battleaxe and sticks – They assaulted 'A' and others who tried to intervene – Plea of self-defence was taken on behalf of accused persons – Held, merely because occurrence happened in front of house of accused persons, it cannot be said that members of informant party were aggressors – Plea that accused persons acted in self-defence, not tenable.

Whether prosecution is obliged to explain every injury sustained by accused? Held, No – Before holding that non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions:

(i) that the injury on the person of the accused was of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

In this case the injuries sustained by accused persons were simple in nature – Doctor opined that injuries found on accused could be self-inflicted – Non-explanation of such injuries, not fatal to prosecution.

(*Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145,* relied on)

भारतीय दण्ड संहिता**, 1860 -** धाराएं **96, 149** एवं **302**

साक्ष्य का मूल्यांकन

प्राइवेट प्रतिरक्षा का अधिकार-संक्षिप्त तथ्यः

उपहत 'अ' निहत्था 'ब' के घर उसे कार्यक्रम हेतु आमंत्रित करने गया था - अभियुक्तगण जो कि 'ब' के पड़ोसी थे, अपने घरों के सामने कुल्हाड़ी एवं लाठियों से सुसज्जित खड़े थे - उन्होंने 'अ' पर एवं अन्य व्यक्तियों जिन्होंने हस्तक्षेप का प्रयास किया, पर हमला किया - अभियुक्तगण की ओर से स्वयं की प्रतिरक्षा का बचाव लिया गया - अभिनिर्धारित, केवल इस आधार पर कि घटना अभियुक्तगण के घर के सामने घटित हुई थी, यह नहीं कहा जा सकता है कि सूचना देने वाले दल के सदस्य आक्रामक थे - यह बचाव कि अभियुक्तगण ने स्वयं की प्रतिरक्षा में यह कृत्य किया है, मान्य नहीं है।

क्या अभियोजन, अभियुक्त को कारित प्रत्येक उपहति का स्पष्टीकरण देने के लिये आबद्ध है? अभिनिर्धारित, नहीं - यह अभिनिर्धारित करने से पूर्व कि अभियोजन साक्षियों के द्वारा अभियुक्त व्यक्ति के शरीर पर आई उपहतियों का स्पष्टीकरण नहीं देना

अभियोजन के मामले को प्रभावित कर सकता है, न्यायालय को दो परिस्थितियों की विद्यमानता से संतुष्ट होना चाहिए -

(i) कि अभियुक्त के शरीर पर आई उपहतियाँ गंभीर प्रकृति की थीं; और

(ii) कि इस प्रकार की उपहतियाँ प्रश्नगत घटना के घटित होने के समय ही कारित होनी चाहिए।

इस मामले में अभियुक्त व्यक्ति को आई उपहतियां सामान्य प्रकृति की थीं - चिकित्सक की राय थी कि अभियुक्त के शरीर पर पाई गई उपहतियां स्वयं द्वारा कारित भी हो सकती थीं - ऐसी उपहतियों के स्पष्टीकरण का अभाव अभियोजन के लिये घातक नहीं है। (तखाजी हीराजी विरूद्ध ठाकोर कुबेरसिंह चमनसिंह, (2001) 6 एससीसी 145, अवलंबित)

Dashrath @ Jolo v. State of Chhattisgarh

Order dated 23.01.2018 passed by the Supreme Court in Criminal Appeal No. 197 of 2018, reported in (2018) 4 SCC 428

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78. INDIAN PENAL CODE, 1860 – Sections 222 and 223

Applicability – Escape of an accused who is known to have tried to escape earlier as well – Absence of proper vigilance and care – Absence of "intention" as required for commission of offences punishable under Section 222 – It amounts to "negligence" which comes within the preview of Section 223 – Accused committed offence punishable under Section 223 and not under Section 222 of IPC.

भारतीय दण्ड संहिता, **1860 -** धाराएं **222** एवं **223**

प्रयोज्यता - ऐसे अभियुक्त का निकल भागना जिसका पूर्व में निकल भागने का प्रयास करना जानकारी में था - उचित निगरानी एवं देखभाल का अभाव - धारा 222 के अधीन दण्डनीय अपराध गठित करने के लिये आवश्यक ''आशय'' का अभाव - यह ऐसी ''असावधानी'' गठित करता है जो धारा 223 के परिक्षेत्र में आती है - अभियुक्त ने भारतीय दण्ड संहिता की धारा 223 के अधीन दण्डनीय अपराध कारित किया न कि धारा 222 के अधीन।

Sabulal Gond v. State of M.P.

Order dated 29.05.2017 passed by the High Court of Madhya Pradesh in Criminal Revision No. 151 of 2001 (Unreported)

Relevant extracts from the order:

The applicant was convicted for the offence under Section 222 of the IPC. An offence under Section 222 has following essential ingredients:

(i) That the accused was a public servant, at the time of the commission of offence;

(ii) That the accused was legally bound to apprehend (or to keep in confinement) any person;

(iii) That such person must have been committed to lawful custody or under sentence awarded by a Court of Justice;

(iv) That the accused omitted to apprehend such person or intentionally suffers such person to escape or intentionally aids such person in escaping to escape from such confinement:

(v) That the accused did so intentionally.

In accused statement under Section 313 of Cr.P.C. in question no.4, the applicant has admitted that Jamuna Prasad fled away after redeeming the handcuff from the hands during his duty. But in his accused statement, the applicant has never taken any defence with regard to failure on part of his duty.

It is important that before a man can be convicted under the section for having negligently allowed a prisoner to escape, it must be shown not only that he was guilty of negligence, but that the escape was at least the natural probable consequence of his negligence. It must be shown that the escape was directly due to the negligence. The negligence can be proved by conduct, absence of due care and caution expected from a public servant in discharge of his duties, is sufficient to prove negligence. An offence under Section 223 of IPC has three essential ingredients:-

(i) The offender must be a public Servant;

(ii) He must be legally bound to keep in confinement a person charged with or convicted of an offence or lawfully committed to custody;

(iii) He must negligently suffer such person to escape.

The arguments of the counsel for the applicant that learned Courts below on the basis of conjectures and surmises held the applicant guilty for escape of the co-accused Jamuna Prasad. As a statutory duty of the jail warden, the applicant was legally bound to keep the accused Jamuna Prasad in his custody in Victoria Hospital, which was violated negligently by the applicant.

In the present case, it is not proved that the applicant did so intentionally. Infact the applicant being a public servant was legally bound to keep the co-accused in confinement, who was serving sentence imposed by the Court, for the offence under Sections 302 and 294 of IPC. Negligence of applicant suffers such person to escape from confinement. In such case, the offence comes within the purview of Section 223 of the IPC, not for offence under Section 222 of IPC. The ingredients of Section 223 of the IPC, make it plain that an offence under section 223 is committed while acting or purporting to act in discharge of official duty negligently.

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79. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3

(i) Related witness – Credibility – Relationship with victim does not affect the credibility of a witness – Where prosecution is based on testimony of family members which is the only available evidence, non-examination of independent witnesses is not fatal to the prosecution – Also, a relation would not conceal actual culprit and make allegations against an innocent person.

(ii) Interested witness and related witness – Distinctions – Reiterted.

(ii) Child witness – Credibility – A 10 year old daughter of the deceased was the only eye witness – Her evidence found credible and also corroborated with medical evidence – Her school attendance register showing her presence in the school at the time of incident – Attendance register also showing presence of all the students for continuous period of seven months – Held, it is indicative of the fact that irrespective of their presence, attendance was marked for all the students – Evidence of child witness is reliable.

भारतीय दण्ड संहिता, 1860 - धारा 302

साक्ष्य अधिनियम, 1872 - धारा 3

(i) संबंधी साक्षी - विश्वसनीयता - पीड़ित का संबंधी होना किसी साक्षी की विश्वसनीयता को प्रभावित नहीं करता है - जहां अभियोजन का मामला परिवार के सदस्यों की परिसाक्ष्य, जो एकमात्र उपलब्ध साक्ष्य हो, पर आधारित हो, वहां स्वतंत्र साक्षियों का परीक्षण न कराया जाना अभियोजन के लिये घातक नहीं है - यह भी कि, संबंधी वास्तविक दोषी को छिपाकर किसी निर्दोष व्यक्ति के विरुद्ध आक्षेप नहीं लगाएगा।

(ii) हितबद्ध साक्षी और संबंधी साक्षी - भिन्नता - पुनरुद्धरित।

(iii) बाल साक्षी - विश्वसनीयता - मृतक की 10 वर्षीय बालिका घटना की एक मात्र प्रत्यक्षदर्शी साक्षी थी - उसकी साक्ष्य विश्वसनीय पाई गई एवं चिकित्सीय साक्ष्य से संपुष्ट थी - उसके विद्यालय की उपस्थिति पंजी में उसे घटना के समय विद्यालय में उपस्थित दर्शाया गया था - उपस्थिति पंजी समस्त विद्यार्थियों की उपस्थिति लगातार सात माह से दर्शा रही थी - अभिनिर्धारित, यह इस तथ्य का द्योतक है कि विद्यार्थियों की उपस्थिति को विचार में लिये बिना ही उनकी उपस्थिति चिन्हित की जा रही थी - बाल साक्षी की साक्ष्य विश्वसनीय है।

Ganapathi and anr. v. State of Tamil Nadu
Judgment dated 27.03.2018 passed by the Supreme Court in Criminal Appeal No. 1313 of 2008, reported in AIR 2018 SC 1635

Relevant extracts from the judgment:

In several cases, only the family members are present at the time of incident, then the case of the prosecution will be based only on their evidence. When their evidence is the only evidence available, Courts should be cautious and meticulously evaluate the evidence in the process of trial and we are not able to appreciate the contention on behalf of the accused that the non-examination of independent witnesses and conviction based on the evidence of family members is fatal to the case of the prosecution.

'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be 'interested' [See: ***State of Rajasthan v. Smt. Kalki and anr., AIR 1981 SC 1390***].

Merely because the eye-witnesses are family members their evidence cannot *per se* be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made [See :***Maranadu and anr. v. State by Inspector of Police, Tamil Nadu, AIR 2008 SC (Supp) 534***].

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The argument of the learned counsel for the accused that the Courts below erred in disbelieving the evidence of DW-1, cannot be accepted for the reason that it is manifest on record that all the students were marked as present in the attendance register (Ext. D1) of the school in which PW3 was studying, for a continuous period of seven months i.e. from June, 1999 to December, 1999 and there was not even a single absentee. Thus it is indicative of the fact that irrespective of the fact whether the students have attended the school or not, attendance was marked to all the students. In those circumstances, neither the evidence of DW1 nor Ext. D1 will come to the rescue of the accused and on this count, the evidence of PW3 cannot be disbelieved.

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***80. INDIAN PENAL CODE, 1860 – Sections 302 and 304**

Parameters that have to be considered while deciding the question as to whether a case falls under Section 302 or 304 IPC – Reiterated the parameters laid down by the Apex Court in *Dhirendra Kumar v. State of Uttarakhand, 2015 (3) SCALE 30,* as follows:

(a) The circumstances in which the incident took place;

(b) The nature of weapon used;

(c) Whether the weapon was carried or was taken from the spot;
(d) Whether the assault was aimed on vital part of body;
(e) The amount of the force used:
(f) Whether the deceased participated in the sudden fight;
(g) Whether there was any previous enmity;
(h) Whether there was any sudden provocation.
(i) Whether the attack was in the heat of passion; and
(j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

भारतीय दण्ड संहिता**, 1860 -** धाराएं **302** एवं **304**

क्या मामला भारतीय दण्ड संहिता की धारा 302 के अंतर्गत आता है या धारा 304 के अंतर्गत, इस प्रश्न के विनिश्चय हेतु विचारणीय मापदण्ड - शीर्षस्थ न्यायालय द्वारा धीरेन्द्र कुमार वि. उत्तराखंड राज्य, 2015 (3) स्केल 30 में प्रतिपादित निम्न लिखित मापदंडों की पुनरावृत्ति की गईः-

(क) वह परिस्थितियां जिनमें घटना घटित हुई;

(ख) उपयोग में लाये गये आयुध की प्रकृति;

(ग) क्या वह आयुध लाया गया था अथवा घटना स्थल से प्राप्त किया गया था;

(घ) क्या वह हमला शरीर के किसी महत्वपूर्ण भाग को लक्ष्य बनाकर किया गया था;

(ड.) बल प्रयोग की मात्रा;

(च) क्या मृतक ने अचानक हुए झगड़े में भाग लिया था;

(छ) क्या कोई पुरानी शत्रुता थी;

(ज) क्या कोई अचानक प्रकोपन था;

(झ) क्या वह हमला आवेश की तीव्रता में किया गया था; और

(ञ) क्या उपहत व्यक्ति ने कोई अनुचित लाभ उठाया या क्रूर या असाधारण रीति से व्यवहार किया था।

Lavghanbhai Devjibhai Vasava v. State of Gujarat
Order dated 10.01.2018 passed by the Supreme Court in Criminal Appeal No. 253 of 2018, reported in (2018) 4 SCC 329

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81. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part-II
EVIDENCE ACT, 1872 – Section 3
Murder or culpable homicide not amounting to murder – Intention versus knowledge – Even a single blow of wooden stick with such force on vital part of the body (head) resulting in fracture of the skull enabling brain matter to come out – Sufficient to impute knowledge, if not intention, that injuries caused by accused are sufficient in the normal course to cause death.

भारतीय दण्ड संहिता, **1860 -** धारा **302** एवं **304** भाग-**II**

साक्ष्य अधिनियम, **1872 -** धारा **3**

हत्या अथवा आपराधिक मानव वध जो हत्या नहीं है - आशय बनाम ज्ञान - शरीर के महत्वपूर्ण भाग (सिर) पर लाठी का इस तीव्रता का एक मात्र प्रहार जिससे कपाल में अस्थिभंग कारित हुआ और मस्तिष्क से द्रव्य बाहर आ गया था - इस बात का अनुमान लगाने के लिये पर्याप्त है कि यदि अभियुक्त का आशय नहीं था तो भी उसे ज्ञान था कि उसके द्वारा कारित चोट सामान्य अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त है।

State of Himachal Pradesh v. Hans Raj

Judgment dated 16.01.2018 passed by the Supreme Court in Criminal Appeal No. 104 of 2018, reported in AIR 2018 SC 1185

Relevant extracts from the judgment:

Motive apart, the three eye-witnesses have clearly testified the assault on the head of the deceased by the accused with a danda. PW-12, who carried out the post-mortem, corroborates the testimony of the eye-witnesses and further the said witness (Doctor) has specifically deposed that there was a fracture of the skull and he found brain matter oozing out from the wound.

The High Court took the view that the accused had carried a danda in one hand and a Drat (sharp instrument) in the other hand and the fact that he had used the danda and not the sharp weapon was ample testimony of the fact that he had no intention to commit the murder of the deceased.

We are unable to agree with the view taken by the High Court. Injuries on the skull with a danda resulting in a fracture with brain matter oozing out of the wound has been found by PW-12 in the course of the postmortem. This would show that the ingredients necessary to attract the offence under Section 302 IPC are present in the instant case. A person assaulting another with a wooden danda on the head with such force that the same has resulted in a fracture enabling brain matter to come out must be understood to have knowledge, if not the intention, that injuries caused by him are sufficient in the normal course to cause death. If that be so, we will have no occasion to agree with the view taken by the High Court that the offence committed is one under Section 304 Part-II IPC. We, therefore, interfere with the order of the High Court and restore the conviction and sentence recorded by the learned trial court.

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82. INDIAN PENAL CODE, 1860 – Sections 420 and 498-A
CRIMINAL PROCEDURE CODE, 1973 – Section 178

(i) Suppression of fact – Groom suffering from serious disease of liver cirrhosis – Marriage by concealing that fact – Disclosure could have every possibility of denial from marriage – *Prima facie* amounts to cheating.

(ii) Cruelty – Territorial jurisdiction – Compelling to leave matrimonial house and stay at paternal house in order to get dowry – Continuing cruelty under Section 498-A – Court at paternal house will also have jurisdiction.

भारतीय दण्ड संहिता**, 1860 -** धाराएं **420** एवं **498-**क

दण्ड प्रक्रिया संहिता**, 1973 -** धारा **178**

(i) तथ्य का छिपाव - वर लिवर सिरोसिस की गंभीर बीमारी से पीड़ित - उक्त तथ्य को छिपाकर विवाह - प्रकटीकरण से विवाह से इंकार करने की प्रबल संभावना हो सकती थी - प्रथम दृष्टया छल गठित करता है।

(ii) क्रूरता- प्रादेशिक क्षेत्राधिकार - दाम्पत्य निवास को छोड़ने हेतु विवश करना और दहेज की प्राप्ति हेतु पैतृक निवास पर रहने के लिये छोड़ना/दबाव बनाना - धारा 498-क के अंतर्गत निरन्तर क्रूरता - पैतृक निवास के न्यायालय को भी क्षेत्राधिकर होगा।

Kalpana Soni v. State of Madhya Pradesh

Judgment dated 02.05.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 7520 of 2012, reported in 2017 Law Suit (MP) 642.

Relevant extracts from the judgment:

It is clear that where even a person induces another to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

If the allegation of suppression of fact that the groom is suffering from a serious disease like liver cyrrohsis is concerned, then it is clear that had the applicants disclosed this fact to the complainant or her parents, then there was every possibility that they would not have agreed to marry the complainant with Sanjeev. Thus, the suppression of serious disease, with which the groom is suffering, and inducing the complainant or her parents to get the complainant married with Sanjeev *prima facie* amounts to cheat.

X X X

It is next contended by the counsel for the applicants that as no cause of action had arisen within the territorial jurisdiction of the Trial court at Dabra, therefore, the Trial of the applicants at Dabra is bad and is liable to be quashed.

In the FIR, it is specifically mentioned that the applicants were demanding money from the complainant to meet out the expenses of treatment of Sanjeev. In continuation of that harassment, it is alleged in the FIR that they compelled the complainant to take her husband to Dabra so that she can get him treated at Gwalior. It is also alleged that the applicant no.2 brought the complainant and her husband to Dabra.

The Supreme Court in the case of ***Sunita Kumari Kashyap v. State of Bihar, (2011) 11 SCC 301,*** reads as under:-

> "18. We have already adverted to the details made by the appellant in the complaint. In view of the specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, we hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment of ill-treatment meted out to the complainant, clause (c) of Section 178 is attracted. Further, from the allegations in the complaint, it appears to us that it is a continuing offence of ill-treatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted."

It is further clear that the complainant was forced to leave her matrimonial house and was forced to live in her parents house at Dabra. Compelling a married woman to leave her matrimonial house and to live along with her parents because of non-fulfillment of demand of any property or valuable security may also amount to cruelty as defined under Section 498-A of IPC.

The Co-ordinate Bench of this Court in the case of ***Bhag Singh and others v. Sunita and others, (1995) 4 Crimes (HC) 735,*** has held as under:-

> "10. I am of the view that the wife having been left at her parents' place by the accused persons either with the object to meet the demand of dowry or because of wife's failure to meet the said demand, in both the cases the act of the accused person comes within the mischief of cruelty and in both the situation harassment continues."

Once it is held that the harassment continues at the place of residence of her father where the complainant is residing at the time of filing of the complaint, I am firmly of the view that the offence is a continuing one and in view of Section 178 (c) of the Code of Criminal Procedure which *inter alia* provides that where an offence is a continuing one, and continues to be committed in more local

areas than one, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

I am fortified in my view by the judgment of Allahabad High Court in ***Vijai Ratan Sharma and others v. State of U.P. and another, 1988 Cri.L.J. 1581,*** wherein the learned judge has held as follows:-

> "Rather, this harassment seems to be continued one. It started when demand of dowry was made outside Ghaziabad and it has continued when she is not being called from Ghaziabad and she has been left there in order to get the dowry. So the offence continues to be committed or it may be possible to say that the offence was partly committed outside Ghaziabad when she was maltreated and it continues to be at Ghaziabad where she has been left and is not being called. So it seems that the Courts at Ghaziabad should have jurisdiction to try the offence of cruelty."

Thus, if the facts and circumstances of the case are considered in the light of the allegations made in the FIR, it is clear that one of the applicants not only came to Dabra in order to leave the complainant and her husband at Dabra but the complainant was forced to leave her matrimonial house and has been forced to live in her parents house, therefore, at this stage, it cannot be said that the Trial Court at Dabra has no territorial jurisdiction to try the offence.

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***83. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 68**

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007 – Rule 12

Age determination – Two different entries as to age of accused in two different schools – Earlier on the basis of declaration by parents while later on his own basis – No reasonable basis for change of date – First entry to hold the field and be relied upon.

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम**, 2000 -** धारा **68**

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम**, 2007 -** नियम **12**

आयु निर्धारण - दो भिन्न विद्यालयों में अभियुक्त की आयु के संबंध में दो भिन्न प्रविष्टियां - पूर्व परिजन द्वारा की गई घोषणा के आधार पर जबकि पश्चातवर्ती स्वयं के आधार पर - तिथि में परिवर्तन हेतु कोई युक्तियुक्त आधार नहीं - प्रथम प्रविष्टि कायम रहेगी एवं विश्वसनीय है।

Lok Nath Pandey v. State of Uttar Pradesh

Judgment dated 01.08.2017 passed by the Supreme Court in S.L.P. (Cri.) No. 1173 of 2015, reported in 2018 CriLJ 400

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***84. LAND ACQUISITION ACT, 1894 – Sections 18 and 23**

Land acquisition – Compensation, assessment of – Factors to be taken into account – Iterated – Acquired land situated in middle of railway track and national highway having capacity of higher potential – Adjacent land was sold at the rate of ` 4,919/- per cent – Other nearby land sold at the rate of ` 4,893/- per cent – Held, assessment of compensation at the rate of per cent together with 30% solatium and 12% additional amount was proper.

भूमि अर्जन अधिनियम**, 1894 -** धाराएं **18** एवं **23**

भूमि अर्जन - प्रतिकर का निर्धारण - विचार योग्य कारक - व्यक्त किये गये - अर्जित भूमि रेल्वे ट्रैक एवं राष्ट्रीय राजमार्ग के मध्य स्थित थी जिसमें मूल्यवृद्धि की क्षमता थी - इससे लगी हुई भूमि रूपये 4,919/- प्रतिशत - समीपवर्ती भूमि 4,893/- प्रतिशत के मूल्य पर विक्रय की गई थीं - अभिनिर्धारित, प्रतिशत की दर पर 30 प्रतिशत तोषण (मुआवजा) एवं 12 प्रतिशत अतिरिक्त राशि के साथ किया गया प्रतिकर निर्धारण उचित था।

Manimegalai v. Spl. Tahsildar (L.A. Officer) Adi Dravidar Welfare

Judgment dated 16.04.2018 passed by the Supreme Court in Civil Appeal No. 2294 of 2011, reported in AIR 2018 SC 2020

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85. MOTOR VEHICLES ACT, 1988 – Section 14

Validity of Driving Licence – It is deposed on the basis of dispatch register that the licence is valid for 5 years – Held that the testimony solely based on a register could not have been the basis of a finding that the licence was expired – It is also not a mere question of the dates mentioned in the licence but those dates should tally with mandate of Section 14 (2).

मोटर यान अधिनियम**, 1988 -** धारा **14**

चालन अनुज्ञप्ति की वैधता - जावक पंजी के आधार पर यह अभिसाक्ष्य दी गयी कि अनुज्ञप्ति पांच वर्षों के लिये वैध थी - अभिनिर्धारित किया गया कि मात्र पंजी पर आधारित अभिसाक्ष्य यह विनिश्चित करने का आधार नहीं हो सकती कि अनुज्ञप्ति की समय सीमा समाप्त हो चुकी थी - यह केवल अनुज्ञप्ति में वर्णित तिथियों का प्रश्न नहीं है वरन् यह तिथियां धारा 14 (2) के आदेश से मेल खानी चाहिए।

Compaq International v. Bajaj Allianz General Insurance Company Ltd.

Judgment dated 27.3.2018 by the Supreme Court in Civil Appeal No. 2538 of 2018, reported in 2018 ACJ 1259

Relevant extracts from the judgment:

The relevant provision is Section 14 (2)(b) in terms whereof the licence in question, whether originally issued or a renewal thereof had to be issued would

be effective for a period of 20 years or until the person obtaining such licence attains the age of 50 years, whichever is earlier. Since the date of birth of the driver, Nirmal Singh was recorded in the licence itself as 30.04.1961, he would have attained the age of 50 years on 30.04.2011. Thus, the licence issued was valid up to 29.04.2011. In terms of sub-clause (ii) of clause (b) of sub-section (2) of Section 14 of the said Act, once a person attains the age of 50 years, the licence is renewed for a period of five years from the date of such issue or renewal. The renewed licence issued to the petitioner is valid for a period of five years from 2011 to 2016 for the "LMV-NT-Car Only" category of vehicles. The reference to the same number and the original date of issue in the renewed license also leaves no manner of doubt that it is the renewal of the same licence. This licence was subsequently converted into a licence both for LMV and Transport vehicle, a copy of which licence was also produced. The validity of this licence is from 2016 to 2018, i.e., the next renewal and, once again, the date of issuance of original licence is 27.02.1998.

We find force in the contention of the learned counsel for the appellants from the aforesaid facts that the reliance on the testimony of RW-1 solely based on a register could not have been the basis of a finding that the expiry date of the licence was 26.02.2003. The Licencing Authority apparently did not itself have any copy of the licence. It is also not a mere question of the dates mentioned in the licence but those dates ought to have tallied with the mandate of subsection (2) of Section 14 of the said Act. The licence would not have been issued for 5 years when the driver, Nirmal Singh, was only about 37 years but would be issued for a period of 20 years or 50 years of age, whichever was earlier. Since the petitioner attained the age of 50 years on 30.04.2011, the licence mentioned the expiry date as 29.04.2011. Not only that, if there was any doubt on the driving licence, there would have been no occasion to renew it for a period of 5 years post 2011 and thereafter a second renewal for two years and that too by change of the category of vehicles including commercial vehicles.

We are, thus, of the view that the High Court clearly fell into an error in doubting that the licence was valid on the date of the accident and, thus, absolving the insurance company of its liability and directing the amount to be recovered from the appellants jointly and severally.

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86. MOTOR VEHICLES ACT, 1988 – Sections 147, 166 and 168

(i) Site plan/Spot map – Probative value – Spot map merely reflects the position of motorcycle after the accident and not at the time of accident – Spot where vehicle was found lying after accident cannot be basis to assume that the vehicle was driven on the wrong side of road.

(ii) Compensation – Insurer's liability to pay – Insurance company did not receive any payment towards premium nor issued any policy – Cover note issued by Development Officer of insurance

company while working with the company – Held, company is liable to pay compensation and entitled to recover from the owner.

(iii) Appreciation of evidence – Accident claim – Approach – Rules of pleading do not strictly apply – Evidence to be examined on the touchstone of preponderance of probability.

मोटरयान अधिनियम**, 1988 -** धाराएं **147, 166** एवं **168**

(i) नक्शा मौका/नजरी नक्शा - प्रामाणिक मूल्य - नक्शा मौका मात्र दुर्घटना के पश्चात की मोटर सायकिल की अवस्थिति को दर्शाता है न कि दुर्घटना के समय की - वह स्थान जहां दुर्घटना के बाद वाहन पड़ा हुआ मिला था यह मानने का आधार नहीं हो सकता है कि वाहन दुर्घटना के समय सड़क की गलत दिशा में चलाया जा रहा था।

(ii) प्रतिकर - बीमाकर्ता का भुगतान करने का दायित्व - बीमा कंपनी ने न तो कोई प्रीमियम प्राप्त किया था और न ही पाॅलिसी जारी की थी - कंपनी के विकास अधिकारी ने अपने नियोजन के दौरान कव्हर नोट जारी किया था - अभिनिर्धारित किया गया, कंपनी प्रतिकर अदा करने के दायित्वाधीन है और वाहन स्वामी से वसूल करने की अधिकारी है।

(iii) साक्ष्य का मूल्यांकन - दुर्घटना दावा - दृष्टिकोण - अभिवचनों के सिद्धांत दृढ़ता से लागू नहीं होते हैं - साक्ष्य का परीक्षण अधिसंभाव्यता की प्रबलता की कसौटी पर किया जाना चाहिये।

Mangla Ram v. Oriental Insurance Co. Ltd. and ors.

Judgment dated 06.04.2018 passed by the Supreme Court in Civil Appeal No. 2499 of 2018, reported in AIR 2018 SC 1900

Relevant extracts from the judgment:

The question is whether the Tribunal was justified in concluding that the appellant was also negligent and had contributed equally, which finding rests only on the site map (Exh. 2) indicating the spot where the motorcycle was lying after the accident? We find substance in the criticism of the appellant that the spot where the motor vehicle was found lying after the accident cannot be the basis to assume that it was driven in or around that spot at the relevant time. It can be safely inferred that after the accident of this nature in which the appellant suffered severe injuries necessitating amputation of his right leg above the knee level, the motorcycle would be pushed forward after the collision and being hit by a high speeding jeep. Neither the Tribunal nor the High Court has found that the spot noted in the site map, one foot wrong side on the middle of the road was the spot where the accident actually occurred. However, the finding is that as per the site map, the motorcycle was found lying at that spot. That cannot be the basis to assume that the appellant was driving the motorcycle on the wrong side of the road at the relevant time. Further, the respondents did not produce *any contra* evidence to indicate that the motorcycle was being driven on the wrong side of the road at the time when the offending vehicle dashed it. In this

view of the matter, the finding of the Tribunal that the appellant contributed to the occurrence of the accident by driving the motorcycle on the wrong side of the road, is manifestly wrong and cannot be sustained.

X X X

The Tribunal has absolved the insurance company on the finding that no premium was received by the insurance company nor any insurance policy was ever issued by the insurance company in relation to the offending vehicle. The respondents no.2 and 3 had relied on a Cover Note which according to respondent No.1 - Insurance Company was fraudulently obtained from the then Development Officer, who was later on sacked by respondent No.1 Insurance Company. The possibility of misuse of some cover notes lying with him could not be ruled out. The respondent Nos. 2 and 3 have relied on the decision of this Court in ***New India Assurance Co. Ltd. v. Rula and ors., AIR 2000 SC 1082.*** That decision will be of no avail to respondent Nos. 2 and 3. In that case, the Court found that the insurance policy was already issued after accepting the cheque; whereas in the present case, the respondent No.1 Insurance Company has been able to show that no payment was received by the company towards the insurance premium nor any insurance policy had been issued in respect of the offending vehicle (jeep). However, the claim of respondent Nos. 2 and 3 to the extent that they possessed a cover note issued by the then Development Officer of the Oriental Insurance Company (respondent No.1) will have to be accepted coupled with the fact that there is no positive evidence to indicate that the said Cover Note is *ante dated*. Pertinently, the Cover Note has been issued by the then Development Officer at a point of time when he was still working with respondent No.1 Insurance Company. It must follow that the then Development Officer was acting on behalf of the Insurance Company, even though *stricto sensu* the respondent No.1 Insurance Company may not be liable to pay any compensation as no insurance policy has been issued in respect of the offending vehicle, much less a valid insurance policy. But for the Cover Note issued by the Development Officer of respondent No.1 Insurance Company at a point of time when he was still working with respondent No.1, to do substantial justice, we may invoke the principle of "pay and recover", as has been enunciated by this Court in the case of ***National Insurance Co. Ltd. v. Swaran Singh and ors., AIR 2004 SC 1531***.

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87. MOTOR VEHICLES ACT, 1988 – Section 149

(i) Compensation – Insurer's liability to pay – Deceased loaded his agricultural produce on tractor and accompanied the same for unloading – Met with the accident while returning – Held, deceased was travelling along with his goods at the time of accident – Further held, insurance company is liable to pay compensation.

(ii) Doctrine of pay and recover – Principles reiterated.

मोटरयान अधिनियम, **1988 -** धारा **149**

(i) प्रतिकर - बीमाकर्ता का भुगतान करने का दायित्व - मृतक ने अपनी कृषि उपज को ट्रैक्टर में लादा और उसे उतारने के लिये ट्रैक्टर के साथ गया - वापस लौटते हुये दुर्घटना हुई - अभिनिर्धारित, मृतक दुर्घटना के समय अपने सामान के साथ यात्रा कर रहा था - आगे यह भी अभिनिर्धारित, बीमा कम्पनी प्रतिकर अदा करने के लिये दायित्वाधीन है।

(ii) भरो और वसूल करो का सिद्धांत - सिद्धांत पुनरुद्धरित किये गये।

Shivawwa v. Branch Manager, National India Insurance Co. Ltd.

Judgment dated 28.03.2018 passed by the Supreme Court in Civil Appeal No. 2247 of 2018, reported in AIR 2018 SC 1640

Relevant extracts from the judgment:

A perusal of the judgment of the Tribunal reveals that the Tribunal had analysed the evidence of PW-2 and PW-1 in its entirety and also took into account other evidence in the shape of charge-sheet filed by the Investigating Officer, in respect of Crime No.12/2001 registered in respect of the accident in question for accepting the factum that deceased had travelled in the tractor along with his goods to Holealur where he had gone to unload the foodgrains of Maize loaded on the tractor belonging to respondent No.2, which was driven by Mallikarjuna Beemappa Ganiger and while returning from Holealur, met with the accident.

The High Court based its conclusion that the insurer cannot be saddled with the liability to satisfy the award, on the finding that the deceased was not travelling along with his goods at the time of accident. No more and no less. However, as the said finding recorded by the High Court cannot be sustained, the finding of the Tribunal on the factum that the deceased had travelled along with his goods will have to be affirmed and restored. It would necessarily follow that the insurer was not absolved of its liability to pay the compensation amount awarded to the claimants.

X X X

Assuming for the sake of argument that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to recover the same from the owner of the vehicle owner (respondent No.2), in light of the exposition in the case of ***National Insurance Co. Ltd. v. Swarn Singh and ors., AIR 2004 SC 1531***.

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88. MOTOR VEHICLES ACT, 1988 – Section 149 (2)(a)

(i) Breach of insurance policy – On ground of invalid driving licence – Should be so fundamental as to have contributed to the causes of accident.

(ii) Pay and recover – Applicability – Owner/Driver producing two driving licences one after the other – Former found to be fake and latter already expired and not renewed within prescribed period – Held, this is fundamental breach and a fit case to apply the doctrine of pay and recover.

मोटरयान अधिनियम**, 1988 -** धारा **149 (2)(**क)

(i) बीमा पालिसी का उल्लंघन - अविधिमान्य चालन अनुज्ञप्ति के आधार पर - इतना सारभूत होना चाहिये कि उनका उल्लंघन दुर्घटना होने के कारणों में सम्मिलित हो।

(ii) भरो और वसूल करो - प्रयोज्यता - वाहन स्वामी/चालक ने एक के बाद एक दो चालन अनुज्ञप्ति प्रस्तुत कीं - पूर्ववर्ती अनुज्ञप्ति जाली होना पाई गई जबकि पश्चातवर्ती अनुज्ञप्ति की वैधता समाप्त हो चुकी थी एवं उसका विहित समयावधि में नवीनीकरण नहीं कराया गया था - अभिनिर्धारित, यह सारभूत उल्लंघन है एवं 'भुगतान करें और वसूल करें' के सिद्धांत के लागू होने का उपयुक्त मामला है।

Singh Ram v. Nirmala and others

Judgment dated 06.03.2018 passed by the Supreme Court in Civil Appeal No. 2103 of 2018, reported in AIR 2018 SC 1290 (Three Judge Bench)

Relevant extracts from the judgment:

In ***National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297,*** this Court held that the holder of a driving licence has a period of thirty days on its expiry, to renew it:

> "45. Thus, a person whose licence is ordinarily renewed in terms of the Motor Vehicles Act and the Rules framed thereunder, despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. Proviso appended to Section 14 in unequivocal terms states that the licence remains valid for a period of thirty days from the day of its expiry.
>
> 46. Section 15 of the Act does not empower the authorities to reject an application for renewal only on the ground that there is a break in validity or tenure of the driving licence has lapsed, as in the meantime the provisions for disqualification of the driver contained in Sections 19, 20, 21, 22, 23 and 24 will not be attracted, would indisputably confer a right upon the person to get his driving licence renewed. In that view of the matter, he cannot be said to be

delicenced and the same shall remain valid for a period of thirty days after its expiry ."

The following conclusion has been recorded in summation in the judgment:

"(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149 (2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case."

In the present case it is necessary to note, as observed by the Tribunal, that the owner did not depose in evidence and stayed away from the witness box. He produced a licence which was found to be fake. Another licence which he sought to produce had already expired before the accident and was not renewed within the prescribed period. It was renewed well after two years had expired. The appellant as owner had evidently failed to take reasonable care (proposition (vii) of ***Swaran Singh*** (supra), since he could not have been unmindful of facts which were within his knowledge.

In the circumstances, the direction by the Tribunal, confirmed by the High Court, to pay and recover cannot be faulted.

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89. MOTOR VEHICLES ACT, 1988 – Sections 149, 165, 166, 168 and 173

Liability of Insurance Company – Accident arising out of use of Motor vehicle – When appellant was tightening the screw of cutter attached with tractor, the driver all of a sudden, started the tractor and put the gear of tractor, as a result of which his right hand got amputated – Accident arose out of use of Motor vehicle (Tractor) – Insurance Company cannot avoid its liability on the ground that Tractor was insured and cutter was not insured.

मोटर यान अधिनियम, **1988 -** धाराएं **149, 165, 166, 168** एवं **173**

बीमा कम्पनी का दायित्व - मोटर यान के उपयोग से उत्पन्न दुर्घटना - जिस समय अपीलार्थी ट्रैक्टर से जुड़े हुए कटर का स्क्रू कस रहा था, चालक ने अचानक ट्रैक्टर चालू कर दिया एवं ट्रैक्टर को गेयर में डाल दिया जिसके परिणामस्वरूप उसका दांया हाथ कट गया - दुर्घटना मोटर यान (ट्रैक्टर) के उपयोग से हुई थी - बीमा कम्पनी इस आधार पर अपने दायित्वों से नहीं बच सकती कि ट्रैक्टर बीमाकृत था एवम् कटर बीमाकृत नहीं था।

Rajaram v. Pradeep Kumar

Judgment dated 07.03.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 1208 of 2005, reported in 2018 ACJ 1125

Relevant extracts from the judgment:

I have gone through the evidence adduced by appellant/claimant on the issue of injuries sustained by him. From the statement of appellant Rajaram, it appears that when he was tightening the screw of cutter attached with tractor, driver Dilip Sharma, all of a sudden, started tractor and put the gear of the tractor, as a result of which his right hand got amputated.

Learned Counsel for the Insurance Company submitted that since the offending tractor was insured and the cutter was being operated with the help of “motor of tractor”, which was not insured, therefore, the Insurance Company is not liable to pay compensation but Mr. Jaihind Babu Arya, the Assistant Administrative Officer of United Insurance Company Ltd., Branch Morena (NAW-1) had admitted in his cross-examination that if the tractor is driven by fitting of the cutter to it then it will be presumed that the tractor was in use.

In the case of ***United India Insurance Company Limited v. Sardari Lal and Others, 2006 ACJ 943,*** wherein the tractor used for propelling wheat thresher and labourer woman was collecting wheat grain under the thresher when the driver started the tractor, thresher came in motion and the woman got wrapped with the belt resulting in her death. Himachal Pradesh High Court held that accident arose out of use of tractor. It was also observed that the tractor is not being plied on the road does not necessarily mean that an accident had not occurred arising out of the use of motor vehicle.

In the case of ***Oriental Insurance Company Ltd. v. Savthanji Khodaji Thakor, I (2008) ACC 477,*** wherein the Insurance Company sought to avoid its liability on the ground that the tractor was insured but not thresher, a Division Bench of Gujarat High Court held that Insurance Company is liable for payment of compensation.

In the matter of ***United India Insurance Company Ltd. v. Rajendra and Others, 2011 ACJ 782,*** wherein the claimant was working on thresher and the thresher was being run with the aid of tractor for cutting Soyabean. This was being done

by the claimant when his right hand came in contact with the blade and his hand was cut in pieces. Madhya Pradesh High Court held that the accident occurred with the tractor/thresher. Hence, the Insurance Company is liable for payment of compensation.

Therefore, I do not find any good ground to differ with the view taken in these decisions because no decision taking any contrary view was relied on by learned Counsel for the Insurance Company except to contend that the Insurance Company is not liable.

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90. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168

(i) Compensation – Assessment of – Held, calculation of income based on average of income stated in past three years of income tax return – Proper.

(ii) Nature of injury in discharge certificate found to be interpolated – Medical Officer admitted in cross examination such interpolation and that disability was not permanent – Held, this is a case of temporary disability.

(iii) Compensation – Assesment of – Principles summed up.

मोटरयान अधिनियम**, 1988 -** धाराएं **166** एवं **168**

(i) प्रतिकर - निर्धारण - अभिनिर्धारित, विगत तीन वर्ष के आयकर विवरण में दर्शित आय के औसत के आधार पर निर्धारण - उचित।

(ii) दावाकर्ता के मुक्ति प्रमाण पत्र में चोट की प्रकृति में कांट-छांट की गई थी - चिकित्साधिकारी ने प्रतिपरीक्षण में स्वीकार किया कि उसके द्वारा प्रमाणपत्र में कांट-छांट की गई थी और चोट के कारण आई निर्योग्यता स्थायी नहीं थी - अभिनिर्धारित, यह अस्थायी निर्योग्यता का मामला है।

(iii) प्रतिकर - निर्धारण - सिद्धांत विवेचित।

ICICI Lombard General Insurance Co. Ltd. v. Ajay Kumar Mohanty

Judgment dated 06.03.2018 passed by the Supreme Court in Civil Appeal No. 7181 of 2015, reported in (2018) 3 SCC 686

Relevant exracts from the judgment:

In arriving at the quantification of compensation, we must be guided by the well-settled principle that compensation can be granted both on account of permanent disability as well as loss of future earnings, because one head relates to the impairment of the person's capacity and the other to the sphere of pain and suffering on account of loss of enjoyment of life by the person himself.

In ***Sri Laxman @ Laxman Mourya v Divisional Manager, Oriental Insurance Co. Ltd., (2011) 12 Scale 658,*** this Court held thus:

> "The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

In ***Govind Yadav v. New India Insurance Company Limited, (2011) 10 SCC 683,*** this Court after referring to the pronouncements in ***R.D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551, Nizam Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 SCC 1, Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422, Arvind Kumar Mishra v. New India Assurance Co. Ltd., (2010) 10 SCC 254 and Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343,*** held thus:

> "18. In our view, the principles laid down in ***Arvind Kumar Mishra v. New India Assurance Co. Ltd.*** and ***Raj Kumar v. Ajay Kumar*** (supra) must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident." (Id at page 693). These principles were reiterated in a judgment delivered by one of us (Justice Dipak Misra, as the learned Chief Justice then was) in ***Subulaxmi v MD Tamil Nadu State Transport Corporation, (2012) 10 SCC 177***.

In the present case, the evidence of PW2 Dr Umakanta Jena indicates that he had initially, before issuing the disability certificate, examined the shoulder joint, elbow joint and left femur as per the discharge certificate. The discharge certificate indicated that the injuries sustained were grievous in nature. The Doctor initially placed a tick mark over the word 'permanent'. However, subsequently he made an interpolation by cutting the word 'permanent' and "not likely to improve". The evidence of the Doctor is reproduced below, insofar as it is material:

> "(4) The disability is temporary but not permanent. The disability is likely to improve. The disability certificate is the original one. By mistake, I gave a tick mark on the word "permanent". Per day about one hundred disability certificates are issued. So, I committed this wrong. I have not mentioned which documents I verified prior to issuance of this disability certificate. There is nothing in the certificate to show that there

was nailing. Particularly in this case, the disability may improve. Any fracture of extremity will cause disability. I cannot give any authority to the opinion of my above sentence.

(5) It is not a fact that the percentage of disability has been made by me being gained over by the injured and that there was no disability. It is not a fact that being gained over by the injured I gave this disability certificate.

TO COURT:-

Q. No. 1:- Whether the certificate issued by you is creating confusion?

Ans: Yes.

Q. No. 2: Whether you will be paid T.A. and D.A. from State Exchequer for your mistake?

Ans: No, I should be paid.

Q. No. 3:- Whether my attendance in the court is a govt. duty or C.L.?

Ans: For my mistake I should take C.L.

Q. No. 4:- Can you explain why you interpolated the certificate which was signed by 4 doctors including CDMO, Bhadrak?

Ans: I cannot explain.

Q. No. 5:- Was not it desirable to obtain the consent of other three doctors before cutting and putting tick mark and making interpolation on an already prepared public document?

Ans: I should have obtained the consent and signature of all other signatories before interpolating the document."

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***91. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168**

Compensation, determination of – Multiplier – Appropriate multiplier in case of unmarried deceased – Multiplier should be applied according to the age of the deceased and not according to the age of the dependents i.e. parents (*Sarla Verma v. DTC, (2009) 6 SCC 121* and *National Insurance Co. Ltd. v. Pranay sethi, (2017) 13 Scale 12 : (2017) 16 SCC 680,* relied on)

मोटरयान अधिनियम, **1988 -** धाराएं **166** एवं **168**

क्षतिपूर्ति का निर्धारण - गुणक - अविवाहित मृतक के मामले में उचित गुणक - गुणक मृतक की उम्र के आधार पर लगाया जाना चाहिए न कि आश्रितों अर्थात माता पिता की उम्र के आधार पर। (सरला वर्मा विरूद्ध डीटीसी, (2009) 6 एससीसी 121 तथा नैशनल इंश्योरेंस कंपनी लिमिटेड विरूद्ध प्रणय सेठी, (2017) 13 स्केल 12: (2017) 16 एससीसी 680, अवलंबित)

Sube Singh and anr. v. Shyam Singh (dead) and ors.

Judgement dated 09.02.2018 passed by the Supreme Court of India in Civil Appeal No. 7176 of 2015, reported in (2018) 3 SCC 18

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92. MOTOR VEHICLES ACT, 1988 – Sections 168 and 173

(i) Whether the award of future prospects is permissible if deceased was self-employed or on a fixed salary or not engaged in a permanent job? Held, Yes – In this case the deceased was less than 40 years of age at the time of the accident and was self-employed – He shall be held entitled to 40% of his established income towards "future prospects. [Reiterated the law laid down by the Constitution Bench of the Apex Court in *National Insurance 2018 (2) MPLJ 344 (SC) Co. Ltd. v. Pranay Sethi, 2018 (2) MPLJ 344 (SC)*]

(ii) Whether principle of "pay and recover" is inapplicable as to liability of insurance company as it has been referred to the Larger Bench of the Apex Court? Held, No. (*Manager, National Insurance Co. Ltd. v. Saju P. Paul and another, (2013) 2 SCC 41* relied on and *Shankar Lal v. Sanjay Kumar and others, 2017 (2) MPLJ 65,* held *per incuriam*)

मोटर यान अधिनियम, 1988 - धाराएं 168 एवं 173

(i) क्या भविष्य की संभावनाओं का अधिनिर्णय अनुज्ञेय है यदि मृतक स्वनियोजन में था या निश्चित वेतन पर था या स्थायी नौकरी में नियोजित नहीं था? अभिनिर्धारित, हां - इस मामले में मृतक दुर्घटना के समय 40 वर्ष से न्यून आयु का था एवम् स्वनियोजन में था - उसे भविष्य की संभावनाओं हेतु उसकी स्थापित आय का 40 प्रतिशत प्राप्त करने का अधिकारी होना अभिनिर्धारित किया गया। (शीर्षस्थ न्यायालय की संविधान पीठ द्वारा नेशनल इंश्योरेंश कंपनी 2018 (2) एमपीएलजे लिमिटेड वि. प्रणय सेठी, 2018 (2) एमपीएलजे 344, (एससी) में प्रतिपादित विधि की पुनरावृत्ति की गई)

(ii) क्या ''भुगतान करें और वसूलें'' का सिद्धांत बीमा कम्पनी के उत्तरदायित्व के संबंध में अप्रयोज्य है क्योंकि इसे शीर्षस्थ न्यायालय की बड़ी पीठ को निर्दिष्ट किया गया है? अभिनिर्धारित, नहीं। (मैनेजर नेशनल इंश्योरेंश कंपनी लिमिटेड वि. साजू पी पाल एवम अन्य, (2013) 2 एससीसी 41 अवलंबित एवम् शंकर लाल वि. संजय कुमार एवम् अन्य, 2017 (2) एमपीएलजे 65 अनवधानता में पारित (पर इनक्यूरियम अभिनिर्धारित)

Branch Manager, Oriental Insurance Co. Ltd. v. Smt. Ranju Yadav

Order dated 09.11.2017 passed by the High Court of Madhya Pradesh in Misc. Appeal No. 77 of 2017, reported in 2018 (2) MPLJ 371 (DB)

Relavant extracts from the order:

1. At the time of the argument, it was informed that the issue regarding payment of "future prospects" in the case of the deceased who was self employed

or in a fixed salary and the issue of "pay and recover" have been referred to the Larger Bench. The case was heard and reserved. The first issue has been answered by the Constitution Bench in ***National Insurance Co. Ltd. v. Pranay Sethi and others, (2017) 16 SCC 680***. The first issue was referred by a two-Judge Bench of the Apex Court in the case of ***National Insurance Co. Ltd. v. Pushpa and others, (2015) 9 SCC 166,*** considering the cleavage of opinion in the cases of ***Reshma Kumari and others v. Madan Mohan and another, (2013) 9 SCC 65 and Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54,*** for an authoritative pronouncement in respect of award of "future prospects" in the case of a deceased having a permanent job or self-employed or working in a fixed salary. The Constitution Bench has decided the said issue and crystallized the same in para 61 as under:

> "61. (i) The two-Judge Bench in ***Santosh Devi v. National Insurance Co. Ltd., 2012 ACJ 1428 (SC),*** should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in ***Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC),*** a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As ***Rajesh*** (supra) has not taken note of the decision in ***Reshma Kumari*** (supra), which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of ***Sarla Verma*** (supra) which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in ***Sarla Verma*** (supra) read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

In the present case the age of the deceased has been found to be between 26 to 30 years in paras 12 and 19 of the award passed by the Tribunal. Thus, the deceased was less than 40 years at the time of the accident and, therefore, as per para 61(iv) of the judgment passed by the Apex Court in ***Pranay Sethi and others*** (supra), the deceased being a self-employed, shall be entitled to 40% of the established income instead of 50%, as awarded.

2. The next issue raised by the appellant that since the Tribunal has found breach of the insurance policy, as the offending vehicle was being driven in a rash and negligent manner in contravention of the terms and conditions of the insurance policy, and the driver was not having a valid driving licence for heavy vehicles, therefore, the insurance company could not have compelled to pay the compensation amount and to recover it from the owner of the vehicle. He relied on a judgment passed by this Court in the case of ***Shankar Lal v. Sanjay Kumar and others, 2017 (2) MPLJ 65***.

The issue regarding "pay and recover" is also referred to the Larger Bench. It is not in dispute that the issue is still pending adjudication. In the case of ***National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785,*** the following two questions were referred to the Larger Bench for consideration:

"7..... (I) If an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle?

(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142? Does Article 142 permit the Court to create a liability where there is none?"

In the case of ***Manager, National Insurance Co. Ltd. v. Saju P. Paul and another, (2013) 2 SCC 41,*** the Apex Court has clarified that during the pendency of consideration of the above questions by a Larger Bench, the course of "pay and recover" followed in ***National Insurance Co. Ltd. v. Baljit Kaur, (2004) 2 SCC 1,***

and National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517, will be continued to be followed. It is pertinent to reproduce para 26 of the judgment:

> "The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in ***Baljit Kaur*** (supra) and ***Challa Upendra Rao*** (supra) should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of ***Challa Upendra Rao*** (supra)."

So far as contention of the appellant is concerned, there is no dispute to the proposition of law that in the case of contravention and breach of the terms and conditions of the insurance policy, the insurance company cannot be held to be liable to pay compensation. In the present case also, the Tribunal has not held that the insurance company is liable to pay compensation, but has directed to pay compensation amount to the claimants and later to recover it from the owner of the vehicle in question under the principles of 'pay and recover'. In the case of ***Shankar Lal*** (supra) para 26 of the judgment passed by the Apex Court in the case of ***Saju P. Paul and another*** (supra) has not been considered, hence the said judgment is per incuriam on the issue of "pay and recover".

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***93. N.D.P.S. ACT, 1985 – Sections 20 and 29**
EVIDENCE ACT, 1872 – Section 3

(i) Appreciation of evidence – Seizure – Examination of independent witnesses is not an indispensable requirement and their non-examination is not necessarily fatal to the prosecution.

(ii) Contraband recovered from Manali-Kullu highway in extreme cold day of 27.01.2009 at 06:30 PM – Non-availability of independent witnesses to witness seizure – Probable and acceptable.

(iii) No animosity between police party and accused – Large quantity of contraband (18.85 Kg of cannabis) recovered – Defence that contraband was planted in his vehicle – Improbable.

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, **1985 -** धाराएं **20** एवं **29**

साक्ष्य अधिनियम, **1872 -** धारा **3**

(i) साक्ष्य का मूल्यांकन - जप्ती - स्वतंत्र साक्षियों की परीक्षा अनिवार्य आवश्यकता नहीं है एवं उनका परीक्षण न किया जाना प्रत्येक मामले में अभियोजन के लिये घातक नहीं है।

(ii) निषिद्ध पदार्थ मनाली-कुल्लू लोकमार्ग पर दिनांक 27/01/2009 की सायं लगभग 06:30 बजे अत्यधिक सर्द समय में जप्त किया गया था - जप्ती कार्यवाही के लिये स्वतंत्र साक्षियों की अनुपलब्धता - स्वाभाविक व ग्राह्य योग्य है।

(iii) पुलिस दल एवं अभियुक्त के मध्य कोई पूर्व वैमनस्यता नहीं - निषिद्ध पदार्थ बहुत अधिक मात्रा (18.85 किलो गांजा) में जप्त किया गया था - अभियुक्त का यह बचाव कि निषिद्ध पदार्थ उसके वाहन में रखकर उसे झूठा फंसाया गया है - असंभाव्य है।

State of Himachal Pradesh v. Pardeep Kumar

Judgment dated 16.02.2018 passed by the Supreme Court in Criminal Appeal No. 277 of 2018, reported in AIR 2018 SC 1345

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***94. N.D.P.S. ACT, 1985 – Section 50**

Search – Provision of Section 50 should be complied with in letter and spirit – Suspected person must be informed of his right under section 50 of being taken to be nearest Gazetted Officers or Magistrate for making search – Mere seeking an option or giving him an option that he can get himself searched either by Gazetted Officers or Magistrate or he can also give search to the searching Officer, is not proper compliance of Section 50 – Failure to inform the person concerned about the existence of his right, would cause prejudice to that person/accused.

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, **1985 -** धारा **50**

तलाशी - धारा 50 के उपबंधों का अनुपालन भाषा एवं भावना में किया जाना चाहिये - संदेही व्यक्ति को समीपस्थ राजपत्रित अधिकारी अथवा मजिस्ट्रेट के समक्ष तलाशी हेतु ले जाये जाने विषयक उसके अधिकार से अवगत् कराया जाना चाहिये - केवल राय मांगना अथवा उसे विकल्प देना कि वह अपनी तलाषी समीपस्थ राजपत्रित

अधिकारी या मजिस्ट्रेट के समक्ष करा सकता है अथवा तलाशी लेने वाले अधिकारी को तलाशी दे सकता है, धारा 50 के उपबंधों का समुचित पालन नहीं है - संबंधित व्यक्ति को उसके अधिकार की विद्यमानता के बारे में अवगत कराने में विफलता संबंधित व्यक्ति/अभियुक्त को प्रतिकूलतः प्रभावित करती है।

Badrilal v. State of M.P.

Order dated 07.07.2017 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 408 of 1998, reported in 2018 (1) ANJ 282

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95. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
ADVOCATES ACT, 1961 – Section 49
BAR COUNCIL OF INDIA RULES, 1975 – Rule 20
CONTRACT ACT, 1872 – Section 23

(i) Whether an advocate can determine fee with reference to percentage of decreetal amount ? Held, No – Claim of an advocate based on the subject matter is a professional misconduct.

(ii) Cheque issued to advocate for satisfaction of claim relating to percentage of subject matter – Complaint filed under Section 138 after dishonour of the cheque – Burden is on the advocate to prove the liability – Claim is against public policy and amounts to professional misconduct – Complaint dismissed.

(iii) Role of legal Professionals – Increase of commercialisation in the profession – Dialectory tactics resulting into obstruction in administration of justice – Actual duty is to provide access to justice and assistance in securing fundamental rights – Maintenance of irreducible minimum standards of profession is a must – Recommendations of 131st and 266th Report of the Law Commission endorsed.

परक्राम्य लिखत अधिनियम, **1881 -** धारा **138**

अधिवक्ता अधिनियम, **1961 -** धारा **49**

भारतीय अधिवक्ता परिषद नियम - नियम **20**

संविदा अधिनियम, **1872 -** धारा **23**

(i) क्या अधिवक्ता आज्ञप्त धनराशि के प्रतिशत के संदर्भ में शुल्क निर्धारित कर सकता है? अभिनिर्धारित, नहीं - अधिवक्ता का विषयवस्तु पर आधारित दावा वृत्तिक कदाचार है।

(ii) अधिवक्ता को विषय वस्तु के प्रतिशत के संबंध में दावे की तुष्टि हेतु चैक जारी किया गया - चैक अनादरण के पश्चात् धारा 138 के अंतर्गत परिवाद प्रस्तुत किया गया - दायित्व को साबित करने का भार अधिवक्ता पर है - दावा लोकनीति के विरूद्ध एवं वृत्तिक कदाचार गठित करता है - परिवाद खारिज।

(iii) विधिक पेशेवरों की भूमिका - पेशे में वाणिज्यिकीकरण की बढ़ोत्तरी - विलम्बित कार्यनीति के परिणामस्वरूप न्याय प्रशासन में व्यवधान - वास्तविक कर्तव्य न्याय तक पहुंच प्रदान करना एवं मूल अधिकारों की सुरक्षा में सहायता प्रदान करना है - पेशे के न्यूनतम मानकों को बनाये रखना आवश्यक है - विधि आयोग की 131वीं एवं 266वीं रिपोर्ट की सिफारशों का समर्थन किया गया।

B. Sunitha v. State of Telengana and anr.

Judgment dated 05.12.2017 passed by the Supreme Court in S.L.P. (Cri.) No. 10700 of 2015, reported in 2018 CriLJ 715

Relevant extracts from the judgment:

The Bombay High Court in ***Re: K L Gauba, 1954 AIR (Bom) 47***8 held that fees conditional on the success of a case and which gives the lawyer an interest in the subject matter tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics.

In the matter of ***Mr. G.: A Senior Advocate of the Supreme Court, (1955) 1 SCR 490,*** this Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct.

In ***V. C. Rangadurai v. D. Gopalan, (1979) 1 SCC 308,*** it was observed that relation between a lawyer and his client is highly fiduciary in nature. The advocate is in the position of trust.

Rule 20 of Part VI, Chapter II, Section II of the Standard of Professional Conduct and Etiquette reads as follows :

> "An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."

Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

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Undoubtedly, the legal profession is the major component of the justice delivery system and has a significant role to play in upholding the rule of law. Significance of the profession is on account of its role in providing access to justice and assisting the citizens in securing their fundamental and other rights. Can justice be secured with the legal professionals failing to uphold the professional ethics? This Court has even earlier expressed the concern on the

falling professional norms in the legal profession, ***R.K. Anand v. Delhi High Court, (2009) 8 SCC 106, para 333; Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, In Re., (1995) 3 SCC 619, para 20***.

In ***Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani, 1993 Supp. (3) SCC 256,*** this Court noted the trend of increasing element of commercialization and decreasing element of service.

In ***V C Rangadurai*** (supra), Paras 30 to 32, this Court observed that confidence of the public in the legal profession was integral to the confidence of the public in the legal system. Commercialization to the extent of exploiting the litigant and misbehaviour to the extent of browbeating the Court, breach of professional duties to the court and the litigant on the part of some members of the legal profession, affecting the right of the litigants to speedy and inexpensive justice, need to be checked. This has also been observed earlier in the decisions of this Court in ***O.P. Sharma v. State of Punjab, (2011) 6 SCC 86, paras 18 to 23; R.D. Saxena v. Balram Prasad Sharma, (2000) 7 SCC 264, paras 14, 28, 41, 42***.

In its 131st Report dated 31st August, 1988, the Law Commission of India, examined the role of the legal profession in strengthening the system of administration of justice. The issue considered included :

(i) the state of profession and its public image;
(ii) profession's attitude towards the policy of social change intended under the Constitution;
(iii) the functioning of the Bar Councils and the question of disciplinary jurisdiction;
(iv) the strike by lawyers, its implications and fall out;
(v) the question of hobnobing between the Bar and politicians, between the Bar and the Judiciary;
(vi) regulation and standardization of fees chargeable by the members of the profession in relation to the monopolistic character of the profession."

It was observed that recurring strikes by the bar had contributed to the piling up of arrears jeopardizing the consumers of justice and has thus led to weakening the system of administration of justice, Para 2.17. While considering the mounting cost of litigation, it was observed that fee charged by some senior advocates are astronomical in character. The corporate sector is willing to retain talent at a high cost. It develops into a culture and it permeates down below, Paras 2.22, 2.24. Role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article 39A to ensure equal opportunity for access to justice. The legal profession must make its services available to the needy by developing its public sector. It was observed that like public hospitals for medical services, the public sector should have a role in providing legal services for those who cannot afford fee, Para 3.30.

Maintenance of irreducible minimum standards of the profession is a must for ensuring accountability of the legal profession, Paras 3.4, 3.8, 3.25. The methodology was required to be devised as a part of social audit of the profession wherein consumers of justice were required to be given role, Para 3.31.

Referring to the lawyers' fee as barrier to access to justice, it was observed that it was the duty of the Parliament to prescribe fee for services rendered by members of the legal profession. First step should be taken to prescribe floor and ceiling in fees, Para 3.28.

With regard to the role of the legal profession for strengthening the administration of justice, it was observed that members of the legal profession could have a decisive say in law making being largest group in legislative bodies, Para 3.6. They could contribute to reduce the litigation instead of perpetuating disputes by counselling the parties and could contribute to reduce the delay in proceedings, Para 3.11, 3.13. Alternative modes of resolution of disputes should be explored and one such may be pre-trial conciliation proceedings, Para 3.21. Reducing the number of witnesses to be examined by deleting the irrelevant witnesses, reducing the length of cross-examination by avoiding unnecessary questions, Para 3.17 and avoiding adjournments could help the administration of justice.

Though the 131st Report was submitted in the year 1988, no effective law appears to have enacted to regularize the fee or for providing the public sector services to utmost needy litigants without any fee or at standardized fee. Mechanism to deal with violation of professional ethics also does not appear to have been strengthened. Success of administration of justice to a great extent depends on successful regulation of legal profession in the light of mandate under Article 39A for access to justice. Deficiency in the working of the present regulatory mechanism has been acknowledged by this Court in several decisions ***Mahipal Singh Rana Advocate v. State of Uttar Pradesh, (2016) 8 SCC 335, para 56.*** Mandate for the Bench and the bar is to provide speedy and inexpensive justice to the victim of justice and to protect their rights. The legal system must continue to serve the victims of injustice.

In view of this mandate, this Court requested the Law Commission to have a re-look at the regulatory mechanism and expressed the hope that the Government of India will consider the recommendation of the Law Commission. In its 260th Report dated 23rd March, 2017 submitted in the light of decision of this Court in ***Mahipal Singh Rana***, (supra) it was noted that conduct of members of the legal profession who do not follow ethics contributes to the pendency of cases. Element of public service has to remain predominant. The Commission noted that there was a huge loss of working days by call of unjustified strikes in jurisdiction of various High Courts resulting in denial of justice to the litigant in public, Para 6.3. Such dilatory tactics including seeking adjournments on unjustified grounds affect the speedy disposal of cases. The Commission also noted the instances of browbeating the courts for getting favourable orders obstructing administration of justice, Paras 8.7 to 8.12, 8.14 to 8.19. The Law

Commission also noted the contemptuous conduct of some members of the legal profession, Chapter IX.

The Law Commission thereafter considered the issue of review of regulatory framework of the legal profession. Referring to the developments in other countries it was observed that there was dire necessity of reviewing regulatory mechanism not only in the matter of discipline and misconduct but also in other areas. It was suggested that constitution of the Bar Council required a change for which an Amendment Bill was also recommended, Para 17.10.

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***96. PREVENTION OF MONEY LAUNDERING ACT, 2002 – Sections 3, 4 and 45**

CRIMINAL PROCEDURE CODE, 1973 – Section 439

(i) Bail – Considerations thereof – Huge amount of demonetized currency deposited in bank – Demand drafts of the said amount issued in favour of sham people – Source of money and reasons for payments to strangers not explained – *Prima facie* formidable case of serious offence of money laundering – Application rejected.

(ii) Offence of "Money Laundering" – Involvement in criminal activity – It includes criminal activity relating to scheduled offences.

धनशोधन निवारण अधिनियम**, 2002 -** धाराएं **3, 4** एवं **45**

दण्ड प्रक्रिया संहिता**, 1973 -** धारा **439**

(i) जमानत - विचारणीय बिन्दु - बड़ी मात्रा में विमुद्रीकृत रकम की मुद्रा बैंक में जमा की गई - उक्त रकम के डिमांड ड्राफ्ट बनावटी लोगों के पक्ष में जारी किये गये - धन के स्रोत एवं अपरिचित व्यक्तियों को भुगतान किये जाने के कारण स्पष्ट नहीं किये गये - प्रथम दृष्टया धनशोधन के गंभीर अपराध का सुदृढ़ मामला - आवेदन खारिज किया गया।

(ii) ''धनशोधन'' का अपराध - आपराधिक गतिविधि में संलिप्तता - अनुसूचित अपराध से संबंधित आपराधिक गतिविधि इसमें सम्मिलित है।

Rohit Tandon v. Enforcement Directorate

Judgment dated 10.11.2017 passed by the Supreme Court in S.L.P. (Cri.) No. 6896 of 2017, reported in 2018 CriLJ 416

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97. RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Section 24

(i) Lapse of acquisition proceedings – Non-payment of compensation – Deliberate inaction of the owners in collecting or receiving compensation – Held, Section 24 (2) of the Act of 2013 does not apply to such cases where owners deliberately do not claim the compensation for decades.

(ii) Delay and laches – Effect of – Once right has been lost due to delay or laches or otherwise – It cannot be revived under Section 24 of the Act of 2013.

भूमि अर्जन, पुनर्वास और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, **2013 -** धारा **24**

(i) अर्जन कार्यवाहियों का व्यपगत होना - प्रतिकर का असंदाय - भूमिस्वामियों द्वारा प्रतिकर की राशि प्राप्त करने अथवा एकत्रित करने में सुविचारित निष्क्रियता - अभिनिर्धारित, जहां भूमिस्वामी सुविचारित रूप से प्रतिकर की राशि का दावा दशकों तक नहीं करते हैं वहां 2013 के अधिनियम की धारा 24 (2) लागू नहीं होती है।

(ii) विलंब एवं अतिविलंब - प्रभाव - जहां कोई अधिकार विलंब या अतिविलंब से या अन्यथा समाप्त हो जाता है - वहां इसे 2013 के अधिनियम की धारा 24 के प्रभाव से पुनर्जीवित नहीं किया जा सकता है।

Mahavir v. Union of India

Judgment dated 08.09.2017 passed by the Supreme Court in SLP (Civil) No. 26281 of 2017, reported in (2018) 3 SCC 588

Relevant extracts from the judgment:

In our opinion, the cases in which there is deliberate action of the owners for not collecting the compensation and they do not want to receive it, Section 24 (2) of the 2013 Act does not come to their rescue as provisions are to help those persons who are deprived of compensation but not for those who deliberately had not received it and litigated for decades for quashing of proceedings avoiding to receive compensation by willful act. The failure to deposit in court under Section 31(1) in such cases would attract only interest as envisaged under Section 34 of the Act and the provisions of Section 24 cannot be so invoked in such cases.

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The protective umbrella of Section 24 is not available to barred claims. If such claims are entertained under Section 24, it would be very-very difficult to distinguish with the frivolous claim that may be made even after tampering the records etc. or due to non-availability of such record after so much lapse of time. Once right had been lost due to delay and laches or otherwise, it cannot be revived under provisions of Section 24 of the Act of 2013. The intendment of Act 2013 is not to revive stale and dead claims and in the concluded case when rights have been finally lost. If there is delay and laches or claim is otherwise barred, it is not revived under Section 24 (2) of the 2013 Act. The provision does not operate to revive legally barred claims.

It is not conceivable how the petitioners could file such a petition in a laconic manner relating to the prime locality at New Delhi that too for hundreds of acres with the delay of more than 100 years. The prayers that have been made in writ

petition are not only misconceived, there is an attempt to stop the ongoing construction activity. It has also been mentioned that Government offices etc. have come up and the Government has leased property to private parties also but still, the prayer has been made to stop the construction activity. It passes comprehension how such relief could ever be asked for. No authority had ever been approached by the petitioners or by their ancestors. As such the petition is aimed at the total misuse of the process of law. Even for a moment, such a petition could not have been received for consideration.

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

EVIDENCE ACT, 1872 – Section 68

Will, proof of – Suit for eviction on the basis of ownership – Plaintiff subsequently amended the plaint to claim ownership by way of will – Questioned will was proved to be drawn in own handwriting of executant who himself was an advocate – Handwriting of executant proved by his son-in-law who had correspondences with the executant – Will was deposited with finance company to secure loan for more than 25 years before amendment was sought – No suspicious circumstances surrounding genuineness of will – No evidence adduced to prove how the name of defendant over suit property in municipal records was added – Held, will was not afterthought and mutation of defendant is of no use.

उत्तराधिकार अधिनियम**, 1925 -** धारा **63**

साक्ष्य अधिनियम**, 1872 -** धारा **68**

वसीयत का प्रमाण - स्वत्व के आधार पर निष्कासन का वाद - पश्चातवर्ती प्रक्रम पर वादी ने वाद में संशोधन कर वसीयत के आधार पर स्वत्व का दावा किया - प्रश्नगत वसीयत निष्पादनकर्ता जो स्वयं अभिभाषक थे, की हस्तलिपि में तैयार किया जाना साबित किया गया - निष्पादनकर्ता की हस्तलिपि उनके दामाद ने प्रमाणित की जिन्होंने उनके साथ पत्राचार किया था - वसीयत संशोधन के 25 वर्ष पूर्व तक वित्तीय कंपनी में ऋण के सुरक्षार्थ जमा की गई थी - वसीयत की असलीयत को प्रभावित करने वाली कोई भी संदेहजनक परिस्थितियां नहीं पाई गईं - नगर निगम के अभिलेख में प्रतिवादी का नामांतरण कैसे हुआ, इसकी कोई साक्ष्य प्रस्तुत नहीं की गई - अभिनिर्धारित, कि वसीयत पश्चातवर्ती सोच का परिणाम नहीं थी और प्रतिवादी का नामांतरण किसी भी महत्व का नहीं है।

Mohan Lal v. Nand Lal

Judgment dated 21.03.2018 passed by the Supreme Court in Civil Appeal No. 5887 of 2009, reported in AIR 2018 SC 1889

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99. TRANSFER OF PROPERTY ACT, 1882 – Sections 54 and 58

Construction of a deed – Mortgage by conditional sale or sale with a condition of repurchase – Recitals in document, intention of the parties and attending circumstances are relevant factors – Document in question – Styled as a sale deed – No mention as to loan or debt or mortgage – Absence of any indication establishing debtor or creditor relationship – Mere option of repurchase in five years will not render it to be mortgage by conditional sale – Document held to be Sale with condition to repurchase.

संपत्ति अंतरण अधिनियम**, 1882 -** धाराएं **54** एवं **58**

विलेख का अर्थान्वयन - सशर्त विक्रय द्वारा बंधक या पुनः क्रय किये जाने की शर्त के साथ विक्रय - दस्तावेज में विवरण, पक्षकारों का आषय एवं विद्यमान परिस्थितियां सुसंगत कारक हैं - प्रश्नाधीन दस्तावेज - विक्रय विलेख के रूप में प्रारूपित - कर्ज या ऋण या बंधक का कोई उल्लेख नहीं - देनदार या लेनदार का संबंध स्थापित करने का कोई भी संकेत नहीं - मात्र पांच वर्षों में पुनः क्रय का विकल्प इसे सशर्त विक्रय द्वारा बंधक नहीं बना देगा - दस्तावेज का पुनः क्रय किए जाने की शर्त के साथ विक्रय होना अभिनिर्धारित किया गया।

Suraj Narain Kapoor and ors. v. Pradeep Kumar and ors.

Judgment dated 24.10.2017 passed by the Supreme Court in Civil Appeal No. 1300 of 2009, reported in AIR 2017 SC 5046

Relevant extracts from the judgment:

A bare reading of the original document reveals that it is styled as a sale deed. The vendor specifically recites that he had purchased the property for a sum of ` 1500/- by sale deed dated 22.6.1948, from its original owners. That he was the exclusive owner of the property, which was not encumbered in any manner and that he had absolute title and authority singularly, to deal with the same to the exclusion of his brothers, from whom he had separated long ago. He was selling the shop for a sum of ` 4000/- because he had purchased a motor vehicle, which he wanted to run on hire. On receipt of the consideration money he was voluntarily transferring all right, title and interest in the property to the vendee and his legal heirs for all times to come. If the property was found to be encumbered in any manner, the vendee could approach the court, for return of the sale amount, including against the immovable property of the vendor. If the amount was returned within a period of 5 years, either in installments or in lump-sum, the purchaser would execute the sale deed in his favour.

The recitals reveal no reference to any loan taken or mortgage created with regard to any immovable property as security for such loan, much less to discharge any debt. It does not evince the creation of a debtor and creditor relationship. On the contrary, the recitals are specific that the vendor was in need of money to run the vehicle purchased by him on hire, and was selling the

shop to raise money for the purpose. The suit for redemption was also filed beyond the period of 5 years. Significantly, the first appellate court observed that the recitals indicated that it was a sale deed, but concluded that it was a mortgage by conditional sale, only because the right to redemption was incorporated in the same document, which was but only one of the factors amongst others, to determine the true nature of the document.

In ***Tamboli Ramanlal Motilal (Dead) by L.R.s. v. Ghanchi Chimanlal Keshavlal (Dead) by L.R.s. and another, 1993 Supp. (1) SCC 295,*** the question was similar with regard to the nature of the document, in absence of any intention expressed with regard to creation of a debtor and creditor relationship. Holding that the document was not a mortgage by conditional sale but sale with an option to repurchase, it was held:-

> "17. What does the executant do under the document? He takes a sum of ` 5,000 in cash. The particulars are (a)` 2,499 i.e. ` 899 by mortgage of his house on January 27, 1944 and (b) ` 1,600 by a further mortgage on May 31, 1947 totaling to ` 2,499. Thereafter, an amount of ` 2,501 in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of ` 5,000 was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of ` 5,000 with the conditional sale is executed, we are unable to see how the relationship of debtor and creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction.
>
> 18. The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state 'Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right'."

In the facts and circumstances of the present case, and for reasons discussed, we find no reason to interfere with the order impugned holding that the document in question was a sale deed with an option to repurchase and not a mortgage by conditional sale.

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100. VISHESH NYAYALAYA ADHINIYAM, 2011 (M.P.) – Section 2 (e)
PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (1)(e)
INDIAN PENAL CODE, 1860 – Section 465

(i) Applicability of the Act – "Offence" – Interpretation of phrase "or any of the provisions of IPC" in Section 2 (e) – Allegations under Section 13 (1)(e) of the Prevention of Corruption Act is essential – Trial of offences relating to IPC simplicitor by Special Court – It will frustrate the object of expedite trial and special procedure – Special Court cannot try IPC offences, simplicitor.

(ii) Whether State Government can grant sanction for prosecution in relation to employees of Municipal Council? Held, Yes.

विशेष न्यायालय अधिनियम**, 2011 -** धारा **2 (**ङ)

भ्रष्टाचार निवारण अधिनियम**, 1988 -** धारा **13 (1)(**ङ)

भारतीय दण्ड संहिता**, 1860 -** धारा **465**

(i) अधिनियम की प्रयोज्यता - ''अपराध'' - धारा 2 (ङ) में पद ''या भारतीय दण्ड संहिता के अन्य कोई प्रावधान'' का निर्वचन - विशेष न्यायालय द्वारा भ्रष्टाचार निवारण अधिनियम की धारा 13 (1)(ङ) के अधीन आक्षेप आवश्यक है - विशेष न्यायालय द्वारा मात्र भारतीय दण्ड संहिता के अपराध का विचारण - यह शीघ्र विचारण के उद्देश्य एवं विशेष प्रक्रिया को विफल करेगा - विशेष न्यायालय मात्र भारतीय दण्ड संहिता के अपराध का विचारण नहीं कर सकता।

(ii) क्या राज्य सरकार नगर परिषद के कर्मचारी के संबंध में अभियोजन के लिये मंजूरी प्रदान कर सकती है? अभिनिर्धारित, हाँ।

Vinay Kumar Gupta v. State of Madhya Pradesh

Order dated 10.08.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 365 of 2012, reported in 2018 Cri.L.J. 1272

Relevant extracts from the order:

Section 2 (e) of the Adhiniyam 2011 clearly provides that the offences contemplated under the Adhiniyam are those which either independently attract Section.13 (1)(e) of the Prevention of Corruption Act (for short the P.C. Act) or in combination with any other provision of the P.C. Act or any of the provisions of the IPC.

A bare perusal of the above definition of "offence" makes it clear that the Adhiniyam, 2011 comes into operation only when the offence u/S.13 (1)(e) independently or in combination with other provision of the P.C. Act or any provision of the IPC is alleged in any case and not otherwise. In the instant case, Section.13 (1)(e) of the P.C. Act has not been alleged against the petitioners who in fact are charged with offences punishable u/s.120-B, 465 and 471 of IPC.

At this juncture, it is relevant to deal with the feeble attempt of the learned counsel for the prosecution-respondent to contend that the expression ".....or any other provision of IPC." found in the definition of offence Section 2 (e) of 2011 Adhiniyam should be read to include even those offences of criminal misconduct which attract the provision of IPC simplicitor. This argument holds no water as a close scrutiny of the definition of "offence" u/S. 2(e) makes it clear that presence of allegation under S.13(1)(e) is an essential ingredient to constitute offence defined in Section 2 (1)(e) and thereby attract Adhiniyam, 2011. The expression ".....or any of the provision of the IPC" found in Section.2 (e) is to be read in conjunction in the following manner :-

> ".....offence of criminal misconduct which attracts application of Section.13 (1)(e) of the Act either independently or in combination with..... any of the provisions of IPC."

If the contention of the learned counsel for the State is accepted then an incongruous situation would arise where offences of conspiracy and forgery punishable exclusively under the IPC would have to be tried by Special Courts constituted under 2011 Adhiniyam despite offence u/S. 13 (1)(e) of P.C. Act not being alleged.

More so, this course of action as suggested by the learned counsel for the State would render the very foundational object of 2011 Adhiniyam nugatory. The object of this Adhiniyam is to expedite the trials of offences related to disproportionate assets punishable u/S.13 (1)(e) of the P.C. Act, simplicitor or in combination with other offences under IPC by establishment of Special Courts and laying down procedure for confiscation of unaccounted property and money procured by means of offence defined u/S.2 (1)(e) of 2011 Adhiniyam.

Thus, the allegation if made merely in respect of offence in IPC (as is the case herein) without involvement of Section 13 (1)(e) would not attract the provisions of Act of 2011.

X X X

This issue of legality and validity and competence of an authority superior to the appointing or disciplinary authority for the purpose of grant of sanction for prosecution is no more *res integra* in view of the Apex Court decision in the case of ***State of T.N. v. T. Thulasingham, 1994 Supp. (2) SCC 405,*** in which the Apex Court in para 77 held thus :-

> "The last finding of the High Court in reversing the decision of the trial Court so far as it upheld the sanction for prosecution of the employees is again erroneous. The High Court was in error in its view that only the special officer appointed by the Corporation, when it was superseded, was competent to grant the sanction. It will be noticed that here the sanction had been given by the superior authority,

namely the Government itself which appointed the special officer, Once the sanction is granted by the superior authority it does not get invalidated. It could be invalid if the sanction had been granted by the authority subordinate to the authority who had to grant the sanction and in that case would have been subject to challenge. We thus find that the trial Court was right in holding that the sanction was validly granted by the competent authority."

The above said decision has been followed in the case of ***State of M.P. v. Pradeep Kumar Gupta, (2011) 6 SCC 389.*** The above said view of the Apex Court continues to hold the field till date.

Therefore, the State Govt. being an authority superior to that of Municipal Council and having supervisory powers over the same including power of validating an appointment made u/S. 94 of the M.P. Municipalities Act, assumes the colour and character of appointing authority. Once having satisfied the definition of the appointing authority in terms of the law laid down by the Apex Court, the State Govt. partakes as the authority competent to remove the petitioners from the respective posts thereby satisfying the requirement of Section.19 (1)(c) of the P.C. Act.

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Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centres of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and vesistance."

ROBERT. F. KENNEDY

(American Attorney General, Senator).

PART - II A

VIDEO CONFERENCING GUIDELINES ISSUED BY THE HIGH COURT OF MADHYA PRADESH

PREFATORY NOTE

Use of computers and communication technology is all pervasive now. Judicial proceedings should not be denied the advantages to be gained from the techniques and advances of science. Video conferencing by way of audio-video linkage is such advancement in technology which can ensure presence of a person at a remote location in Court without his physical presence. The use of this technology will advance speedy trial and curtail the requirement of adjournments on the basis of inability of a person to be physically present in Court.

These guidelines are intended to be supplemental to the Code of Civil Procedure, Code of Criminal Procedure, the Evidence Act and all Rules and guidelines issued in various judgments of the Supreme Court of India and High Court of Madhya Pradesh which are applicable to the proceedings of the civil and criminal courts and other enquiries.

These guidelines provide for the use of Video Conferencing in all matters including hearing on remands and bail applications, examination of witnesses, securing presence of accused, advancement of arguments at any stage and in all civil and criminal trials as well as departmental enquiries where a person required to be present or appear is located intrastate, interstate, or overseas.

1 General

1.1 In these guidelines, reference to the 'Court point' means the Courtroom or other place where the Court is sitting or the place where Commissioner appointed by the Court to record the evidence by video conference is sitting or the place where enquiring officer is sitting and the 'remote point' is the place where person required to be present or appear via video conference is located.

1.2 Person required to be present or appear includes a person whose deposition or statement is required to be recorded or in whose presence certain proceedings are to be recorded or an Advocate who intends to cross-examine a witness or any person who is required to make submissions before the Court or any other person who is permitted by the Court to appear through video conference.

1.3 Wherever possible, proceedings by way of video conference shall be conducted as judicial proceedings and the same courtesies and protocols will be observed. All relevant statutory provisions applicable to judicial proceedings including the provisions of the Information

Technology Act, 2000 and the Indian Evidence Act, 1872 shall apply to the recording of evidence by video conference.

1.4 Video conferencing facilities can be used in all matters including remands, bail applications and in civil and criminal trials where a person required to be present or appear is located intrastate, interstate, or overseas.

1.5 The guidelines applicable to a Court will mutatis mutandis apply to a Commissioner appointed by the Court to record the evidence and the enquiry officer conducting the enquiry. The reference to 'Court' directing Video Conferencing includes the Enquiry Officer conducting the enquiry, unless the context otherwise requires.

2. Appearance by video conference

A Court may either suo motu or on application of a party or a witness, direct by reasoned order that any person shall appear before it or be examined or give evidence or make a submission to the Court through video conference.

3. Preparatory arrangements for video conference

3.1 There shall be co-ordinators both at the court point as well as at the remote point.

3.2 In the High Court, person nominated by the High Court shall be the co-ordinator at the court point.

3.3 In the District Courts, a person nominated by the High Court or the District Judge, shall be the co-ordinator at the court point as well as the remote point.

3.4 The co-ordinator at the remote point may be any of the following:-

(i) Where the person required to be present or appear is overseas, the Court may specify the co-ordinator out of the following:-

(a) the official of Consulate/Embassy of India,

(b) duly certified Notary Public/Oath Commissioner,

(ii) Where the person required to be present or appear is in another State/U.T, any responsible official as may be nominated by the District Judge concerned.

(iii) Where the person required to be present or appear is in custody, the concerned Jail Superintendent or any other responsible official nominated by him.

(iv) Where the person required to be present or appear is in a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other

person, the Medical Superintendent or In-charge of the said hospital or any other responsible official nominated by him.

(v) Where the person required to be present or appear is a juvenile or a child who is an inmate of an Observation Home/Special Home/Children's Home/ Shelter Home, the Superintendent/Officer In-charge of that Home or any other responsible official nominated by him.

(vi) Where the person required to be present or appear, is in custody or care of any other government organisation or institution, the Superintendent/Officer In-Charge of such organisation or institution or any other responsible official nominated by him.

(vii) Where the person required to be present or appear is a government servant or working in any government organisation, the Head of the Office or any other responsible official nominated by him.

(viii) Wherever co-ordinator is to be appointed at the remote point under clause 3.4 sub-clause (iii), (iv), (v), (vi) and (vii) and video conferencing facilities are not available in that Office, organisation or institution, the Court concerned will make formal request to District Judge concerned in whose jurisdiction the remote point is located to appoint a Co-ordinator and to provide facility of Video conferencing from Court premises of such remote location.

(ix) In case of any other person, as may be ordered by the Court.

3.5 The co-ordinators at both the points shall ensure that the minimum requirements as mentioned in the Guideline No.4 are in position at Court point and remote point and shall conduct a test between both the points well in advance, to resolve any technical problem so that the proceedings are conducted without interruption.

3.6 It shall be ensured by the co-ordinator at the remote point that:-

(i) The person required to be present or appear is available and ready at the room earmarked for the video conference atleast 30 minutes before the scheduled time.

(ii) No other recording device is permitted except the one installed in the video conferencing room.

(iii) Entry into the video conference room is regulated.

(iv) The person to be examined is not helped, prompted or tutored by any other person and is not referring to any document, script or device without the permission of the Court during his examination.

3.7 (i) Where the witness is to be examined through video conferencing or it is otherwise expedient to do so, the Court shall send sufficiently in advance of the scheduled video conference, non-editable digital scanned copies of all or any part of the record of the proceeding by email through NIC or any other Indian service provider to the co-ordinator at remote point.

(ii) It shall be ensured by the co-ordinator at the court point that the co-ordinator at the remote point has certified copies or print out of non-editable scanned copies of all or any part of record of proceeding in a sealed cover or the soft copy thereof sent by the Court sufficiently in advance of the scheduled video conference. But, the same shall be permitted to be utilised by the person to be present or appear, under permission of the Court.

3.8 The Court shall order the co-ordinator at the remote point or at the court point wherever it is more convenient, to provide: -

(i) a translator in case the person to be examined is not conversant with Court language;

(ii) an expert in sign languages in case the person to be examined is speech and/or hearing impaired;

(iii) for reading of documents in case the person to be examined is visually challenged;

(iv) an interpreter or special educator, as the case may be, in case the person to be examined is temporarily or permanently mentally or physically disabled.

4. Minimum requisites for video conference

(i) A desktop or laptop
(ii) Device ensuring uninterrupted power supply
(iii) Device ensuring uninterrupted internet connectivity
(iv) Video Camera
(v) Microphones and speakers
(vi) Display unit
(vii) Printer
(viii) Scanner including mobile scanner
(ix) Comfortable sitting arrangements ensuring privacy
(x) Adequate lighting
(xi) Insulations as far as possible/proper acoustics

5. Cost of video conferencing

The court may make an order as to expenses, if any, in facilitating proceedings through video conferencing, as it considers appropriate taking into account rules/instructions regarding payment of expenses to complainant and witnesses as may be prevalent from time to time.

6. Procedures generally

6.1 The identity of the person required to be present or appear shall be confirmed by the court with the assistance of the co-ordinator at remote point at the time of proceedings through video conferencing and a note to such identification shall be recorded by the concerned Court.

6.2 In civil cases, party requesting for presence or appearance of any person through video conferencing shall confirm to the Court his location, his willingness to be present or appear by video conferencing, place and facility of such video conferencing and a note to such confirmation shall be recorded by the concerned Court.

6.3 In criminal cases, where the person to be examined is a prosecution witness or court witness or a person is to make submission for prosecution, the prosecution and where person to be examined is a defence witness or a person is to make submission for defence, the defence counsel or the accused will confirm to the Court his location, his willingness to be present or appear by video conferencing, place and facility of such video conferencing.

6.4 In case person to be examined or appear is an accused, prosecution/defence counsel will confirm his location at remote point.

6.5 Video conference shall ordinarily take place during the court hours. However, the Court may pass suitable directions with regard to timings of the video conferencing as the circumstances may dictate.

6.6 The record of proceedings including transcription of statement shall be prepared at the court point under supervision of the Court and accordingly authenticated as per existing rules of procedure.

6.7 If digital signatures are available at both points, the soft copy of transcript digitally signed by the presiding officer at the court point shall be sent by e-mail through NIC or any other Indian service provider to the remote point where printout of the same will be taken and signed by the deponent. Scanned copy of the statement digitally signed by co-ordinator at the remote point would be sent by e-mail to the court point. The hard copy would also be sent subsequently, preferably within three days by the co-ordinator at the remote point to the court point by recognised courier/post.

6.8 Where digital signatures are not available, the printout of the transcript shall be signed by the presiding officer and the representative of the parties, if any, at the Court point and shall be sent in non-editable scanned format by e-mail through NIC or any other Indian service provider to the remote point where printout of the same will be taken and signed by the deponent and counter signed by the co-ordinator at the remote point. Non-editable scanned format of the transcript so signed shall be sent by email to the Court point where printout of the same will be taken and shall be made part of the record. The hard copy would also be sent subsequently, preferably within three days by the co-ordinator at the remote point to the court point by recognised courier/post.

6.9 The audio-visual of the examination of witnesses through video conferencing shall be recorded at the court point. An encrypted master copy with hash value shall be retained in the court as a part of the record at a later stage as and when such facility is made available by the High Court.

6.10 The Court may, at the request of a person to be examined, or on its own motion, taking into account the best interests of the person to be examined, direct appropriate measures to protect his privacy keeping in mind his age, gender and physical condition.

6.11 Where a party or a lawyer requests that in the course of video-conferencing some privileged communication may have to take place, Court will pass appropriate directions in that regard.

6.12 Where a person required to be present or appear is not capable of visiting court point or remote point due to any sickness or other physical infirmity, or whose presence can not be secured without undue delay or expense, the court may authorise any of its subordinate staff as coordinator to facilitate video conferencing from place of his convenience. Such staff or coordinator can be provided with portable video conferencing system including Laptop to facilitate video conferencing from such place.

6.13 In case any party or his/her authorized person is desirous of being physically present at the remote point at the time of recording of the evidence, it shall be open for such party to make arrangements at party's own costs including for appearance/representation at the remote point subject to orders to the contrary by the Court.

7. Examination of Medical and other experts:

7.1 The examination of medical and other experts shall as far as practicable, be conducted through, video conferencing.

7.2 Whoever wishes to examine a medical or other expert in his favour shall disclose the current place of posting or practice of the concerned expert along with his email address and/or contact number.

7.3 The co-ordinator shall fix the time of the video conferencing in consultation with the Medical or other expert and the Court concerned.

7.4 The soft copies of the MLC reports, PM reports and FSL reports digitally signed shall be made available over the server of High Court of Madhya Pradesh or the State Government and such expert can refer those documents whenever required. (As directed in ***Amitabh Gupta vs. State of M.P. & Ors., W.P. No.19147/2013,*** Order dated 26.02.2018)

7.5 All documents which are not available over the server including query reports shall be made available to such experts well in advance by the Court through the co-ordinator at remote point.

7.6 If the documents to be proved by the Medical or other expert are in possession of a third person or party, a simultaneous direction would be issued by the Court requiring that person to make available the documents in the Court sufficiently before the time of recording of evidence of the medical or other expert through video conferencing;

7.7 In civil cases, the concerned Court will fix a date, before which the examination-in-chief will be furnished by the Medical Expert or other expert concerned, to the Court.

7.8 On the given time, the Court will organize two ways or three-ways video conferencing i.e. between Court, Medical Expert or other expert and the Central/District Jail, if the accused is in custody and not in Court to facilitate recording of the statement of the medical or other experts.

7.9 Until video conferencing facilities are established in Civil Hospitals, Private Hospitals, Medical Colleges, Forensic Science Laboratories and other related institutions, the medical or other experts may go to the District/Civil Court or any other Govt. organisation or undertaking where video conferencing facility is available. The District Judge or Head of the Organisation or undertaking, as the case may be, would facilitate recording of evidence of medical or other experts by permitting them access to the VC rooms.

8. Putting documents to a person at remote point

If in the course of examination of a person at remote point by video conference, it is necessary to put a document to him, the Court may permit the document to be put in the following manner:-

(a) if the document is at the court point, by transmitting a copy of it to the remote point electronically including through a document visualizer and the copy so transmitted being then put to the person,

(b) if the document is at the remote point, by putting it to the person and transmitting a copy of it to the court point electronically including through a document visualizer. The hard copy would also be sent subsequently to the court point by courier/mail.

9. Persons unconnected with the case

9.1 Third parties may be allowed to be present during video conferencing subject to orders to the contrary, if any, by the Court.

9.2 Where, for any reason, a person unconnected with the case is present at the remote point, then that person shall be identified by the co-ordinator at the remote point at the start of the proceedings and the purpose for his being present explained to the Court.

10. Conduct of proceedings

10.1 Establishment and disconnection of links between the court point and the remote point would be regulated by orders of the Court..

10.2 The Court shall satisfy itself that the person required to be present or appear at the remote point can be seen and heard clearly and similarly that the person to be examined at the remote point can clearly see and hear the Court.

11. Cameras

11.1 The Court shall, at all times have the ability to control the camera view at remote point so that there is an unobstructed view of all the persons present in the room.

11.2 The Court shall have a clear image of each deponent to the extent possible so that the demeanour of such person may be observed.

12. Residuary Clause

Such matters with respect to which no express provision has been made in these guidelines shall be decided by the Court consistent with furthering the interests of justice.

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It takes a person with a mission to succeed.

मध्यप्रदेश उच्च न्यायालय द्वारा जारी वीडियो कान्फ्रेंसिंग दिशानिर्देश (हिन्दी अनुवाद)

(नोटः यह हिन्दी अनुवाद पाठकों की सुविधा हेतु उपलब्ध है। अंग्रेजी एवं हिन्दी पाठ में भिन्नता होने पर अंग्रेजी पाठ मान्य होगा।)

प्रारंभिक टिप्पणी

कम्प्यूटर तथा संचार प्रौद्योगिकी का प्रयोग सर्वव्यापक है। न्यायिक कार्यवाहियों को भी विज्ञान की तकनीकियों और उन्नतियों के लाभ से वंचित नहीं किया जाना चाहिए। श्रव्य-दृश्य (Audio-Video) संपर्क माध्यम से वीडियो कान्फ्रेंसिंग, प्रौद्योगिकी में ऐसी प्रगति है जो किसी व्यक्ति की भौतिक उपस्थिति के बिना भी किसी सुदूर स्थान से न्यायालय में उसकी उपस्थिति को सुनिश्चित कर सकती है। इस प्रौद्योगिकी का प्रयोग त्वरित विचारण को बढ़ायेगा और न्यायालय में व्यक्ति की भौतिक उपस्थिति की अनुपलब्धता के आधार पर स्थगनों की अनिवार्यता को भी सीमित करेगा।

ये दिशा निर्देश व्यवहार प्रक्रिया संहिता, दण्ड प्रक्रिया संहिता, साक्ष्य अधिनियम और भारत के उच्चतम न्यायालय तथा मध्यप्रदेश उच्च न्यायालय द्वारा विभिन्न निर्णयों में जारी समस्त नियमों एवं दिशा निर्देशों के पूरक समझे जायेंगे जो सिविल तथा दाण्डिक न्यायालयों की कार्यवाहियों एवं अन्य जांचों को लागू होगें।

ये दिशा निर्देश प्रतिप्रेषण और जमानत के आवेदनों पर सुनवाई, साक्षियों की परीक्षा, अभियुक्त की उपस्थिति सुरक्षित रखने, किसी भी प्रक्रम पर बहस (तर्कों) को बढ़ावा देने एवं समस्त सिविल तथा दाण्डिक विचारणों के साथ - साथ समस्त विभागीय जांचों में जहां अंतर्राज्यिक, राज्य क्षेत्रातीत तथा विदेशी व्यक्ति से उपस्थिति की अपेक्षा की गई है, के समस्त मामलों में वीडियो कान्फ्रेंसिंग की उपयोगिता उपलब्ध कराते हैं।

1. सामान्यः

1.1 इन दिशा निर्देशों में कोर्ट प्वाइंट के निर्देश से तात्पर्य न्यायालय कक्ष या अन्य स्थान से है जहाँ न्यायालय बैठता है या ऐसे स्थान से है जहाँ न्यायालय द्वारा नियुक्त कमिश्नर वीडियो कान्फ्रेंसिंग के द्वारा साक्ष्य के अभिलेखन हेतु बैठता है, या ऐसे स्थान से है जहाँ जाँचकर्ता अधिकारी बैठता है और 'सुदूर स्थल (remote point) के निर्देश से तात्पर्य ऐसे स्थान से है जहाँ अवस्थित वीडियो कान्फ्रेंसिंग के माध्यम से व्यक्ति की उपस्थिति की अपेक्षा की गई है।

1.2 उपस्थिति हेतु अपेक्षित व्यक्ति से ऐसा व्यक्ति अभिप्रेत है जिसकी अभिसाक्ष्य या कथनों के अभिलेखन की अपेक्षा की गई है या जिसकी उपस्थिति में कुछ निश्चित कार्यवाहियाँ अभिलिखित की जानी हैं या कोई अधिवक्ता जो किसी साक्षी के प्रतिपरीक्षण का आशय रखता है या कोई अन्य व्यक्ति जिसकी न्यायालय के समक्ष प्रस्तुतिकरण बावत् अपेक्षा की गई है या अन्य कोई ऐसा व्यक्ति सम्मिलित है जिसे वीडियो कान्फ्रेंसिंग के माध्यम से न्यायालय के समक्ष उपस्थिति हेतु अनुज्ञात किया गया है।

1.3 जहां तक संभाव्य हो वीडियो कान्फ्रेंसिंग के माध्यम से कार्यवाहियाँ न्यायिक कार्यवाहियों के समान ही संचालित की जायेंगी और सभी न्यायाचारों एवं शिष्टाचारों (Courtesies and protocols) का पालन सुनिश्चित किया जायेगा। वीडियो कान्फ्रेंसिंग के माध्यम से साक्ष्य के अभिलेखन हेतु सूचना प्रौद्योगिकी अधिनियम, 2000 एवं भारतीय साक्ष्य अधिनियम, 1872 के प्रावधानों को सम्मिलित करते हुये सभी संबंधित सांविधिक प्रावधान इन न्यायिक कार्यवाहियों को लागू होंगे।

1.4 वीडियो कान्फ्रेंसिंग की सुविधा सभी मामलों में प्रयोग की जा सकती है जैसे रिमाण्ड, जमानत आवेदन एवं सभी सिविल तथा आपराधिक विचारण जहां अंतर्राज्यिक, राज्य - क्षेत्रातीत या विदेशी व्यक्ति की उपस्थिति की अपेक्षा की गई है।

1.5 किसी न्यायालय को लागू होने वाले ये दिशा निर्देश, साक्ष्य अभिलेखन हेतु न्यायालय द्वारा नियुक्त कमिश्नर तथा जांच के संचालन हेतु जांचकर्ता अधिकारी को यथा आवश्यक परिवर्तन सहित लागू होंगे। जब तक कि संदर्भ से अन्यथा अपेक्षित न हो, वीडियो कान्फ्रेंसिंग निर्देशित करने वाले न्यायालय में जांचकर्ता अधिकारी भी सम्मिलित हैं।

2. वीडियो कान्फ्रेंसिंग द्वारा उपसंजाति

कोई न्यायालय या तो स्वप्रेरणा से या किसी पक्षकार या साक्षी के आवेदन पर सकारण आदेश द्वारा निर्देशित कर सकता है कि वीडियो कान्फ्रेंसिंग के माध्यम से उसके समक्ष कोई व्यक्ति उपस्थित होगा या परीक्षित किया जायेगा या साक्ष्य प्रस्तुत करेगा या अपना पक्ष रखेगा।

3. वीडियो कान्फ्रेंसिंग के लिये प्रारंभिक व्यवस्था

3.1 कोर्ट प्वांइट (Court Point) के साथ-साथ सुदूर स्थान (Remote Point) पर एक -एक समन्वयक होगा।

3.2 उच्च न्यायालय में कोर्ट प्वाइंट पर समन्वयक, उच्च न्यायालय द्वारा नामांकित व्यक्ति होगा।

3.3 जिला न्यायालयों में कोर्ट प्वाइंट तथा रिमोट प्वाइंट पर समन्वयक उच्च न्यायालय या जिला न्यायाधीश द्वारा नामांकित व्यक्ति होगा।

3.4 रिमोट प्वाइंट (Remote Point) का समन्वयक निम्नलिखित में से कोई व्यक्ति हो सकता है -

(i) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है विदेशी व्यक्ति है, तो न्यायालय निम्नलिखित में से किसी को समन्वयक विनिर्दिष्ट कर सकता है -

(क) भारतीय दूतावास/उच्चायोग का कोई अधिकारी,

(ख) सम्यक रूप से प्रमाणित नोटरी पब्लिक/शपथ आयुक्त,

(ii) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, किसी अन्य राज्य या केन्द्र शासित प्रदेश में है तब संबंधित जिला न्यायाधीश द्वारा नामांकित उत्तरदायी अधिकारी।

(iii) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, अभिरक्षा में है तब संबंधित जेल अधीक्षक या उसके द्वारा नामांकित कोई अन्य उत्तरदायी अधिकारी।

(iv) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, किसी लोक या प्राइवेट अस्पताल में है, चाहे वह केन्द्र सरकार, राज्य सरकार या किसी स्थानीय निकाय या किसी अन्य व्यक्ति द्वारा संचालित हो, तब कथित अस्पताल का चिकित्सा अधीक्षक या उसका भारसाधक या उसके द्वारा नामांकित कोई अन्य उत्तरदायी अधिकारी,

(v) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, किषोर या बालक है, जो किसी संप्रेक्षण गृह/विशेष गृह/बाल गृह/आश्रय गृह का निवासी है, तब ऐसे संगठन या संस्था का अधीक्षक/भारसाधक अधिकारी या उसके द्वारा नामांकित कोई अन्य उत्तरदायी अधिकारी,

(vi) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, किसी संगठन या संस्था की अभिरक्षा या देखरेख में है, तब उस संगठन या संस्था का अधीक्षक/भारसाधक अधिकारी या उसके द्वारा नामांकित कोई अन्य उत्तरदायी अधिकारी,

(vii) जहां कोई व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, कोई शासकीय सेवक है या शासकीय संगठन में कार्यरत है, तब उस कार्यालय का प्रधान या उसके द्वारा नामांकित अन्य कोई उत्तरदायी अधिकारी,

(viii) जहां रिमोट प्वाइंट (सुदूर स्थान) पर किसी समन्वयक की नियुक्ति खण्ड 3.4 के उपखण्डों (iii), (iv), (v), (vi) एवं (vii) के अंर्तगत की जानी है परन्तु उस कार्यालय, संस्था या संगठन में वीडियो कान्फ्रेंसिंग की सुविधा उपलब्ध नहीं है, तो न्यायालय उस संबंधित स्थान के जिला न्यायाधीश से, जिनकी क्षेत्राधिकारिता में रिमोट प्वाइंट (सुदूर स्थान) आता है, से किसी समन्वयक की नियुक्ति किये जाने और उस रिमोट लोकेशन (सुदूर स्थान) के न्यायालय परिसर से वीडियो कान्फ्रेंसिंग की सुविधा उपलब्ध कराने के लिये लिखित निवेदन कर सकेगा।

(ix) किसी अन्य व्यक्ति की दशा में, जैसा न्यायालय द्वारा आदेशित किया जाये।

3.5 दोनों बिन्दुओं (कोर्ट प्वाइंट एवं रिमोट प्वाइंट) के समन्वयक यह सुनिश्चित करेंगे कि कोर्ट प्वांइट तथा रिमोट प्वाइंट के लिए दिशा निर्देश क्रमांक 4 में यथा विहित अपेक्षाएं अच्छी अवस्था में हैं और वह दोनों स्थानों के मध्य किसी तकनीकी समस्या को हल करने के लिए एक परीक्षण करेगा ताकि कार्यवाहियां बिना किसी बाधा के संचालित की जा सकें।

3.6 रिमोट प्वाइंट का समन्वयक यह सुनिश्चित करेगा कि -

(i) व्यक्ति जिसकी उपस्थिति की अपेक्षा की गई है, वह वीडियो कान्फ्रेंसिंग के लिये निर्धारित कक्ष में निर्धारित समय से 30 मिनिट पूर्व उपलब्ध एवं तैयार है,

(ii) वीडियो कान्फ्रेंसिंग कक्ष में स्थापित युक्ति के अतिरिक्त अन्य कोई रिकार्डिंग युक्ति उपलब्ध नहीं है,

(iii) वीडियो कान्फ्रेंसिंग कक्ष में प्रवेश विनियमित है,

(iv) व्यक्ति जिसे परीक्षित किया जाना है, किसी अन्य व्यक्ति द्वारा सहायता प्राप्त, उत्प्रेरित या सिखाया नहीं गया है और अपने परीक्षण के दौरान न्यायालय की अनुमति के बिना कोई अन्य दस्तावेज, आलेख या युक्ति का उपयोग नहीं कर रहा है।

3.7 (i) जहां किसी साक्षी का वीडियो कान्फ्रेंसिंग के माध्यम से परीक्षण किया जाना है या ऐसा किया जाना अन्यथा उपयुक्त है, न्यायालय एन.आई.सी. (NIC) या अन्य किसी भारतीय सेवा प्रदाता के माध्यम से ई-मेल के द्वारा निर्धारित वीडियो कान्फ्रेंसिंग के पर्याप्त समय पूर्व सबंधित अभिलेख की सभी या कोई असंपादनीय डिजिटल स्कैन्ड प्रतिलिपियों को पर्याप्त रूप से पूर्व में ही रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक को भेजेगा।

(ii) कोर्ट प्वाइंट के समन्वयक् द्वारा यह सुनिश्चित किया जायेगा कि रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक के पास न्यायालय द्वारा पर्याप्त समय पूर्व से प्रेषित की गई कार्यवाही के अभिलेख की समस्त या कोई प्रमाणित प्रति या असंपादनीय स्कैन की हुई प्रतियों के प्रिंट आउट सीलबद्ध लिफाफे के साथ हैं या उनकी साफ्ट कापी है परंतु उपस्थित होने वाले व्यक्तियों को उक्त प्रतिलिपियों के प्रयोग की अनुमति न्यायालय के आदेश के अधीन रहते हुए दी जायेगी।

3.8 न्यायालय, जहां कहीं यह अधिक सुविधाजनक हो, कोर्ट प्वाइंट तथा रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक् को निम्नलिखित की सुविधा प्रदान किये जाने हेतु आदेशित करेगा-

(i) जहां कि परीक्षित किये जाने वाला व्यक्ति न्यायालय की भाषा से अपरिचित है, एक अनुवादक,

(ii) जहां कि परीक्षित किया जाने वाला व्यक्ति सुनने या बोलने में सक्षम न हो, सांकेतिक भाषा विशेषज्ञ,

(iii) जहां कि परीक्षित किया जाने वाला व्यक्ति दृष्टिहीन है, दस्तावेजों को पढ़ने की युक्ति अथवा विशेषज्ञ,

(iv) जहां कि परीक्षित किया जाने वाला व्यक्ति अस्थाई या स्थाई रूप से शारीरिक या मानसिक रूप से निर्योग्य है, एक दुभाषिया या विशेषज्ञ, जैसी भी स्थिति हो।

4. वीडियो कान्फ्रेंसिंग हेतु न्यूनतम आवश्यकताएँ -

(i) एक डेस्कटाप अथवा लेपटाप

(ii) अबाधित विद्युत प्रवाह को सुनिश्चित करने वाला यंत्र

(iii) अबाधित इंटरनेट कनेक्टिविटी को सुनिश्चित करने वाला यंत्र

(iv) वीडियो कैमरा

(v) माइक्रोफोन तथा स्पीकर

(vi) डिस्प्ले यूनिट

(vii) प्रिन्टर

(viii) स्कैनर जिसमें मोबाइल स्कैनर सम्मिलित है,

(ix) निजता (प्राइवेसी) को सुनिश्चित करने वाली आरामदायक बैठक व्यवस्था,

(x) पर्याप्त प्रकाश व्यवस्था

(xi) जहां तक संभव/उचित हो ध्वनि अवरोधक की व्यवस्था।

5. वीडियो कान्फ्रेंसिंग का व्यय

न्यायालय वीडियो कान्फ्रेंसिंग के माध्यम से कार्यवाहियों को सुविधाजनक बनाने में हुए व्ययों, यदि कोई हो, के संबंध में आदेश कर सकती है, जो उसे समय-समय पर खर्चों के संदायों हेतु बनाये गये नियमों/निर्देशों को दृष्टिगत रखते हुए परिवादी और साक्षियों को दिलाया जाना उचित प्रतीत होता है।

6. सामान्य प्रक्रिया

6.1 वीडियो कान्फ्रेंसिंग के माध्यम से कार्यवाही के समय उपस्थिति हेतु अपेक्षित व्यक्ति की पहचान रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक की सहायता से न्यायालय द्वारा पुष्ट की जायेगी और उस न्यायालय द्वारा ऐसी पहचान अभिलिखित की जायेगी।

6.2 सिविल मामलों में जो पक्षकार वीडियो कान्फ्रेंसिंग के माध्यम से किसी व्यक्ति की उपस्थिति का निवेदन कर रहा है वह उस व्यक्ति के स्थान, वीडियो कान्फ्रेंसिंग के माध्यम से उपस्थिति हेतु उसकी इच्छा, उक्त वीडियो कान्फ्रेंसिंग के स्थान तथा उसकी सुविधाओं की न्यायालय में पुष्टि करेगा और इस पुष्टिकरण का नोट संबंधित न्यायालय द्वारा अभिलिखित किया जायेगा।

6.3 आपराधिक मामलों में, यदि परीक्षित किया जाने वाला व्यक्ति अभियोजन साक्षी या न्यायालय साक्षी है या अभियोजन की ओर से प्रस्तुत होने वाला व्यक्ति है, तो अभियोजन अथवा जहां कि परीक्षित किया जाने वाला व्यक्ति बचाव साक्षी है या बचाव की ओर से प्रस्तुत होने वाला व्यक्ति है, तो बचाव पक्ष के अधिवक्ता या अभियुक्त न्यायालय को उस व्यक्ति के स्थान, वीडियो कान्फ्रेंसिंग के द्वारा उस व्यक्ति की उपस्थिति की इच्छा तथा उस वीडियो कान्फ्रेंसिंग के स्थान तथा उसकी सुविधाओं की पुष्टि करेंगे।

6.4 यदि परीक्षित किया जाने वाला या उपस्थित होने वाला व्यक्ति अभियुक्त है, तो अभियोजन/बचाव पक्ष के अधिवक्ता रिमोट प्वाइंट (सुदूर स्थान) पर उसकी उपस्थिति की पुष्टि करेंगे।

6.5 वीडियो कान्फ्रेंसिंग सामान्यतया न्यायालयीन समय के दौरान ही की जायेगी। फिर भी, परिस्थितियों से प्रतीत होने वाले कारणों से न्यायालय वीडियो कान्फ्रेंसिंग के समय के संबंध में उपयुक्त दिशा निर्देश पारित कर सकेगा।

6.6 कार्यवाहियों का अभिलेख जिसमें अभिकथनों की अनुलिपि भी शामिल है, न्यायालय के पर्यवेक्षण के अधीन कोर्ट प्वाइंट पर तैयार किया जायेगा और प्रक्रिया के विद्यमान नियमानुसार प्रमाणित किया जायेगा।

6.7 यदि दोनों स्थानों पर डिजिटल हस्ताक्षर विद्यमान हैं, तो कोर्ट प्वाइंट के पीठासीन अधिकारी द्वारा डिजिटल हस्ताक्षरित अनुलिपि की साफ्ट कापी एन.आई.सी. (NIC) अथवा अन्य किसी भारतीय सेवा प्रदाता के माध्यम से ई-मेल के द्वारा रिमोट प्वाइंट (सुदूर स्थान) पर भेजी जायेगी जहां उसका प्रिंट आउट प्राप्त कर अभिसाक्षी से हस्ताक्षरित कराया जायेगा। उक्त हस्ताक्षरित अनुलिपि रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक द्वारा डिजिटल हस्ताक्षरित कर ई-मेल से कोर्ट प्वाइंट को प्रेषित की जायेगी। तत्पश्चात् रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक द्वारा कोर्ट प्वाइंट को, सामान्यतया 3 दिन के भीतर मान्यता प्राप्त कोरियर/पोस्ट द्वारा साक्षी के हस्ताक्षर की मूल प्रति (Hard Copy) भी भेजी जायेगी।

6.8 जहां डिजिटल हस्ताक्षर उपलब्ध न हों, तो अनुलिपि को कोर्ट प्वाइंट के पीठासीन अधिकारी और पक्षकारों के प्रतिनिधियों, यदि कोई हों, द्वारा हस्ताक्षरित किया जायेगा जो एन.आई.सी. (NIC) या अन्य किसी भारतीय सेवा प्रदाता के माध्यम से ई-मेल के द्वारा रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक को असंपादनीय स्कैन्ड प्रारूप में भेजा जायेगा जहां इसका प्रिंट आउट प्राप्त कर अभिसाक्षी से हस्ताक्षरित कराया जायेगा और कोर्ट प्वाइंट के समन्वयक् द्वारा भी प्रति-हस्ताक्षरित किया जायेगा। उक्त हस्ताक्षरित अनुलिपि को पुनः असंपादनीय स्कैन्ड प्रारूप में ई-मेल के द्वारा कोर्ट प्वाइंट को भेजा जायेगा जहां उसका प्रिंट आउट प्राप्त कर उसे अभिलेख का भाग बनाया जायेगा। तत्पश्चात् रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक द्वारा कोर्ट प्वाइंट को सामान्यतया 3 दिन के भीतर मान्यता प्राप्त कोरियर/पोस्ट द्वारा साक्षी के हस्ताक्षर की मूल प्रति (Hard Copy) भी भेजी जायेगी।

6.9 वीडियो कान्फ्रेंसिंग के माध्यम से की गई साक्षियों की परीक्षा का श्रव्य-दृश्य रूप कोर्ट प्वाइंट पर रिकार्ॅड किया जायेगा। इसकी इनक्रिप्टेड मास्टर कार्ॅपी (encrypted master Copy) हैश वैल्यू के साथ न्यायालय में अभिलेख के भाग के रूप में पश्चात्वर्ती प्रक्रम पर भी तब सुरक्षित रखी जायेगी जब ऐसी सुविधा उच्च न्यायालय द्वारा उपलब्ध कराई जायेगी।

6.10 न्यायालय या तो स्वप्रेरणा से या परीक्षित होने वाले व्यक्ति के निवेदन पर परीक्षित होने वाले व्यक्ति के सर्वोत्तम हित में उसकी उम्र, लिंग और शारीरिक स्थिति को ध्यान में रखते हुए उसकी निजता की सुरक्षा हेतु उचित निर्देश जारी कर सकेगा।

6.11 जहां कोई पक्षकार या अधिवक्ता यह निवेदन करता है कि वीडियो कान्फ्रेंसिंग के दौरान कुछ विशेषाधिकृत संसूचनाओं का ध्यान रखा जावे तो न्यायालय इस संबंध में युक्तियुक्त निर्देश जारी करेगा।

6.12 जहां उपस्थित होने जाने वाला व्यक्ति किसी बीमारी या अन्य शारीरिक दुर्बलता के कारण कोर्ट प्वाइंट या रिमोट प्वाइंट पर उपस्थित होने में अक्षम है या जिसकी उपस्थिति अनावश्यक विलंब या व्यय के बिना सुरक्षित नहीं की जा सकती तो न्यायालय अपने किसी अधीनस्थ कर्मचारी को उसकी सुविधा के स्थान में वीडियो कान्फ्रेंसिंग में सहायता पहुंचाने के लिए समन्वयक के रूप में प्राधिकृत कर सकेगा। ऐसे कर्मचारी या समन्वयक को ऐसे स्थान से वीडियो कान्फ्रेंसिंग की सुविधा के लिए पोर्टेबल वीडियो कान्फ्रेंसिंग सिस्टम जिसमें लैपटाप भी सम्मिलित है, प्रदान किया जा सकता है।

6.13 यदि कोई पक्षकार या उसके द्वारा प्राधिकृत व्यक्ति साक्ष्य अभिलेखन के समय रिमोट प्वाइंट पर भौतिक रूप से उपस्थित होने की वांछा करता है, तो न्यायालय के आदेश के अधीन रहते हुए पक्षकार के लिए, रिमोट प्वाइंट पर उपस्थिति हेतु स्वयं के व्यय पर यह सुविधा उपलब्ध रहेगी ।

7. चिकित्सीय या अन्य विशेषज्ञों की परीक्षा

7.1 चिकित्सीय या अन्य विशेषज्ञों की परीक्षा, जहां तक व्यवहारिक हो, वीडियो कान्फ्रेंसिंग के माध्यम से कराई जायेगी।

7.2 जो कोई चिकित्सीय या अन्य विशेषज्ञ को अपने पक्ष में परीक्षित किये जाने की इच्छा व्यक्त करता है तो वह उसके ई-मेल एड्रेस और/या कान्टेक्ट नम्बर (Contact Number) के साथ उसकी पदस्थापना या कार्य स्थल का वर्तमान पता भी उल्लेखित करेगा।

7.3 समन्वयक, चिकित्सक या अन्य विशेषज्ञ और संबंधित न्यायालय के परामर्श से वीडियो कान्फ्रेंसिंग का समय निर्धारित करेगा।

7.4 डिजिटल हस्ताक्षरित एम.एल.सी. (M.L.C.) रिपोर्ट, पी.एम. (PM) रिपोर्ट तथा एफ.एस.एल. (FSL) रिपोर्ट की साफ्ट प्रतियाँ मध्यप्रदेश उच्च न्यायालय या राज्य सरकार के सर्वर पर उपलब्ध कराई जायेंगी और जब कभी अपेक्षित हो तो विशेषज्ञ उन दस्तावेजों को संदर्भित कर सकेंगे।

(जैसा कि अमिताभ गुप्ता विरूद्ध मध्यप्रदेश राज्य और अन्य, याचिका क्र. 19147/2013, आदेश दिनांक 26.02.2018 में निर्देशित किया गया है।)

7.5 क्वेरी रिपोर्ट को सम्मिलित करते हुए वे सभी दस्तावेज जो सर्वर पर उपलब्ध नहीं हैं, को न्यायालय द्वारा रिमोट प्वाइंट के समन्वयक के माध्यम से उस विषेषज्ञ को पर्याप्त समय पूर्व उपलब्ध कराया जायेगा।

7.6 यदि चिकित्सीय या अन्य विशेषज्ञ द्वारा प्रमाणित किये जाने वाली दस्तावेज किसी अन्य व्यक्ति या पक्षकार की अभिरक्षा में हैं तो न्यायालय वीडियो कान्फ्रेंसिंग के माध्यम से चिकित्सक या अन्य साक्षी की साक्ष्य अभिलिखित किये जाने के पूर्व आधिपत्य रखने वाले व्यक्ति से उक्त दस्तावेज उपलब्ध कराने हेतु निर्देशित करेगा।

7.7 सिविल मामलों में न्यायालय वह तिथि निर्धारित करेगा जिसके पूर्व चिकित्सक या अन्य संबंधित विशेषज्ञ की मुख्य परीक्षा न्यायालय में प्रस्तुत की जायेगी।

7.8 नियत तिथि पर न्यायालय चिकित्सीय या अन्य विशेषज्ञ की साक्ष्य अभिलिखित करने हेतु द्विस्तरीय या त्रिस्तरीय वीडियो कान्फ्रेंसिंग का आयोजन करेगा अर्थात न्यायालय, चिकित्सीय विषेषज्ञ या अन्य विशेषज्ञ के मध्य और केन्द्रीय/जिला कारागार के मध्य, यदि अभियुक्त अभिरक्षा में है और न्यायालय में उपस्थित नहीं है।

7.9 जब तक सिविल अस्पतालों, निजी अस्पतालों, मेडिकल कॉलेजों, विधिविज्ञान प्रयोगशालाओं और अन्य संबंधित संस्थाओं में वीडियो कान्फ्रेंसिंग की सुविधा उपलब्ध नहीं होती तब तक चिकित्सीय विशेषज्ञ या अन्य विशेषज्ञ अपने स्थान के जिला/सिविल न्यायालय या अन्य किसी शासकीय संगठन या उपक्रम, जहां वीडियो कान्फ्रेंसिंग की सुविधा उपलब्ध है, की सहायता ले सकेगा। जिला न्यायालय या संबंधित संगठन या उपक्रम का कार्यालय प्रमुख, जैसी भी स्थिति हो, चिकित्सीय या अन्य विशेषज्ञ को वीडियो कान्फ्रेंसिंग कक्ष का उपयोग करते हुए उनके साक्ष्य अभिलेखन में सहायता प्रदान करेगा।

8. रिमोट प्वाइंट (सुदूर स्थान) पर स्थित व्यक्ति से दस्तावेज प्रमाणित कराना

यदि वीडियो कान्फ्रेंसिंग के द्वारा रिमोट प्वाइंट (सुदूर स्थान) पर व्यक्ति की परीक्षा के दौरान उससे दस्तावेज प्रमाणित कराया जाना आवश्यक हो, तो न्यायालय निम्नलिखित रीतियों से दस्तावेज प्रमाणित कराया जाना अनुज्ञात कर सकेगा -

(i) यदि दस्तावेज कोर्ट प्वाइंट पर है, तो इसकी एक प्रतिलिपि इलेक्ट्रानिक रूप से जिसमें दस्तावेजी दृश्य (Document visualizer) भी सम्मिलित है, रिमोट प्वाइंट (सुदूर स्थान) पर प्रेषित की जायेगी और इस प्रकार प्रेषित प्रतिलिपि उस व्यक्ति को दिखाई जायेगी।

(ii) यदि दस्तावेज रिमोट प्वाइंट (सुदूर स्थान) पर है, तो इसे उस परीक्षित होने वाले व्यक्ति को दिखाकर इसकी एक प्रतिलिपि इलेक्ट्रानिक रूप से जिसमें दस्तावेजी दृश्य (Document visualizer) भी सम्मिलित है, कोर्ट प्वाइंट पर प्रेषित की जायेगी। ऐसे दस्तावेज की मूल प्रति (Hard Copy) भी बाद में डाक/कोरियर से कोर्ट प्वाइंट को प्रेषित की जायेगी।

9. मामले से असंबद्ध व्यक्ति

9.1 विपरीत आदेशों, यदि कोई हो, के अधीन रहते हुए न्यायालय मामले से असंबद्ध किसी व्यक्ति को वीडियो कान्फ्रेंसिंग के दौरान उपस्थिति हेतु अनुमत कर सकती है।

9.2 जहां किसी कारण से मामले से असम्बद्ध व्यक्ति रिमोट प्वाइंट (सुदूर स्थान) पर उपस्थित हो तो कार्यवाहियों के प्रारंभ के पूर्व रिमोट प्वाइंट (सुदूर स्थान) के समन्वयक् द्वारा उसकी पहचान की जायेगी और उसके उपस्थित होने का उद्देश्य न्यायालय को स्पष्ट किया जायेगा।

10. कार्यवाहियों का संचालन

10.1 कोर्ट प्वाइंट तथा रिमोट प्वाइंट पर लिंक का संयोजन तथा असंयोजन न्यायालय के आदेशों से द्वारा विनियमित होगा।

10.2 न्यायालय स्वतः इस बात से संतुष्ट होगा कि रिमोट प्वाइंट (सुदूर स्थान) पर उपस्थिति हेतु अपेक्षित व्यक्ति को स्पष्टतः देखा और सुना जा सकता है और इसी प्रकार उक्त व्यक्ति भी न्यायालय को स्पष्टतः देख और सुन सकता है।

11. कैमरा

11.1 न्यायालय को हर समय रिमोट प्वाइंट (सुदूर स्थान) पर के कैमरा दृश्य को नियंत्रित करने की सुविधा होगी ताकि कक्ष में उपस्थित समस्त व्यक्तियों का अबाधित दृश्य प्राप्त हो सके।

11.2 न्यायालय को प्रत्येक अभिसाक्षी का एक स्पष्ट दृश्य (Image) होना चाहिये ताकि ऐसे अभिसाक्षी की भाव भंगिमा की निगरानी की जा सके।

12. अवशिष्ट खण्ड

जिन मामलों के संबंध में कोई अभिव्यक्त उपबंध इन दिशानिर्देशों में नहीं किये गये हैं, उनका विनिश्चय न्याय के हितों के अग्रसरण के लिये न्यायालय द्वारा किया जा सकेगा।

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The courts should not be places where resolution of dispute begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.

PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MADHYA PRADESH HIGHER JUDICIAL SERVICE (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 2017

In exercise of the powers conferred by Article 233 read with the proviso to Article 309 of the Constitution of India and in supersession of the Rules on the subject in force, the Governor of Madhya Pradesh, in consultation with the High Court, hereby, makes the following rules, in respect of Madhya Pradesh Higher Judicial Service, namely:-

1. Short title, Extent and Commencement:-

(1) These Rules may be called the **Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2017**.

(2) They shall apply to all the members of the Madhya Pradesh Higher Judicial Service.

(3) These Rules shall come into force on the date of their publication in the Official Gazette.

2. Definitions:-

In these Rules, unless the context otherwise requires —

(a) **"Advocate"** means an advocate as defined in the Advocate Act 1961;

(b) **"Cadre"** means the posts as defined in rule 4 and specified in Schedule-I as may be altered and modified from time to time by the State Government in consultation with the High Court;

(c) **"Chief Justice"** includes the Acting Chief Justice of the High Court of Madhya Pradesh;

(d) **"Direct Recruitment"** means direct recruitment to the post made under clause (a) of sub-rule (1) of Rule 3 in the manner prescribed under clause (c) of sub-rule (1) of Rule 5;

(e) **"District Judge"** includes Principal District Judge, Additional District Judge, Sessions Judge and Additional Sessions Judge;

(f) **"Foreign Service"** means the service as defined in sub-rule (7) of Rule 9 of the Madhya Pradesh Fundamental Rules;

(g) **"Service"** means the Madhya Pradesh Higher Judicial Service;

(h) **"Recruitment Year"** means year commencing from 1st Day of January of the year in which the recruitment process is initiated;

(i) **"Other Backward Classes"** means Other Backward Classes as declared by the State Government from time to time by Notification;

(j) **"Scheduled Caste"** means the Scheduled Caste as notified in relation to the State of Madhya Pradesh under Article 341 of the Constitution of India;

(k) **"Scheduled Tribe"** means the Scheduled Tribe as notified in relation to the State of Madhya Pradesh under Article 342 of the Constitution of India.

3. Constitution of Service:-

(1) The Service shall consist of the following categories, namely:

(a) District Judge (Entry Level) (in pay scale Rs. 51550-1230-58930-1380-63070);

(b) District Judge (Selection Grade) (in pay scale Rs. 57700-1230- 58930-1380- 67210-1540-70290);

(c) Principal District Judge (Super Time Scale) (in pay scale Rs.70290-1540- 76450);

The pay scales provided in clause (a), (b) and (c) shall be revisable from time to time.

(2) The Service shall consist of following persons:-

(a) Persons who, at the time of commencement of these Rules, are holding substantive post of District Judge;

(b) Persons recruited directly or promoted to the service in accordance with the provisions of these Rules;

(c) Persons officiating and/or promoted against the post of District Judge.

4. Strength of Cadre:-

The strength of Cadre shall be as determined by the Governor from time to time in consultation with the High Court:

Provided that the number of posts in categories (a), (b) and (c) of sub-rule (1) of Rule 3 shall be 65%, 25% and 10% respectively of the total number of cadre posts:

Provided further that for the purpose of determining aforesaid percentage, the number of posts mentioned in column No. (4) of Schedule-I shall stand excluded.

5. Method of Recruitment and Appointment:-

(1) Recruitment and appointment to the posts in category (a) of sub-rule (1) of Rule 3 shall be made in every recruitment year as under:-

(a) 65% (sixty five percent) by promotion from amongst Civil Judges (Senior Division) on the basis of merit-cum-seniority and passing suitability test to be conducted by the High Court;

The number of vacancies and the officers to be brought under the zone of consideration for promotion shall be in the ratio 1:3 and the suitability of the officers shall be tested with reference to norms prescribed by the High Court;

The qualifying of the suitability test by a candidate shall be valid for a maximum period of 2 (two) recruitment years.

(b) 10% (ten percent) by promotion from amongst Civil Judges (Senior Division) having completed minimum 5 (five) years of service, strictly on the basis of merit, through limited competitive examination to be held by the High Court as per norms prescribed by the High Court:

Provided that in the event of non-availability of candidates under clause (b), the vacancy shall be deemed as a vacancy under clause (a) and the same shall be filled in accordance with clause (a).

(c) 25% (twenty five percent) by direct recruitment from amongst the eligible Advocates on the basis of written examination and ***viva-voce*** test to be conducted by the High Court as per norms prescribed by the High Court, which shall include prescribing cut-off marks for the written examination and/or ***viva-voce***:

Provided that if for any reason, the posts meant for direct recruitment remain vacant even after two consecutive recruitment years, the same shall be filled up by promotion from amongst the Civil Judges (Senior Division), in accordance with clause (a).

(2) The procedure of selection for promotion to categories under clause (a) and (b) and for direct recruitment under clause (c) of sub-rule (1) shall be such as may be prescribed by the High Court from time to time before the start of the selection process.

(3) The Selection Grade and Super time Scale in terms of clause (b) and (c) of sub-rule (1) of Rule 3 shall be granted on the basis of merit-cum seniority in accordance with norms prescribed by the High Court.

6. Reservation of posts for Scheduled Castes, Scheduled Tribes and Other Backward Classes:-

(1) 15%, 18% and 14% of Posts for direct recruitment under clause (c) of sub-rule (1) of rule 5 shall be reserved for the candidates of Scheduled Castes, Scheduled Tribes and Other Backward Classes respectively:

Provided that if such reserved posts or any of them are not filled in a given recruitment year due to non-availability of suitable candidates, they shall be re-advertised for respective categories once more. If any such posts remain vacant due to the same reason, they shall be treated as un-reserved posts.

(2) 2% (two percent) posts shall be horizontally reserved, only at the time of initial recruitment under clause (c) of sub-rule (1) of Rule 5, for persons suffering from locomotor disabilities excluding those suffering from cerebral palsy, under clause (c) of sub-section (1) of Section 34 of The Rights of Persons with Disabilities Act, 2016.

(3) Any Candidate, who is not a bonafide resident (domicile) of the State of Madhya Pradesh, shall be treated as Unreserved Category (UR) in all respects.

7. Qualification for direct recruitment under clause (c) of sub-rule (1) of Rule 5 :-

(1) No person shall be eligible for appointment by direct recruitment unless, he or she

(a) is a citizen of India;

(b) has attained the age of 35 (thirty five) years and has not attained the age of 45 (forty five) years on the first day of January in the year in which applications for recruitment are invited;

(c) has for at least 7 (seven) years been an advocate on the first day of January of the recruitment year in which applications for recruitment are invited;

(d) has good character and is of sound mind and body and free from any physical and mental disability which renders him unfit for such appointment;

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

(a) has more than one spouse living;

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

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

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

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

(f) has more than two living children one of whom is born on or after 26-01-2001 in terms of sub-rule (6) of Rule 6 of The Madhya Pradesh Civil Services (General Conditions of Services) Rules, 1961;

Explanation:- For the purpose of this Sub Rule, child born within 280 days from the date of 26/01/2001 shall not constitute disqualification;

(g) if he has accepted or accepts dowry at the time of his marriage;

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

8. Appointing Authority:-

(1) All appointments to category under clause (a) of sub-rule (1) of Rule 3 shall be made by the Governor in accordance with the recommendations of the High Court.

(2) The Selection Grade and Super Time Grade to the officers falling in categories under clause (b) and (c) of sub-rule (1) of Rule 3 shall be granted by the High Court.

9. Probation:-

(1) A person appointed to a post in category (a) of sub-rule (1) of Rule 3 shall be on probation for a period of 2 (two) years from the date on which he/she joins duty.

(2) The High Court may, at any time, extend the period of probation but the total period of probation, shall not exceed 4 (four) years.

(3) The High Court may at any time during or at the end of the period of probation revert a promotee member of the Service to his/her substantive post from which he/she was promoted and in case of a direct recruit recommend termination of his/her service.

(4) On the successful completion of probation, the probationer shall, if there is a permanent post available, be confirmed in the service or post to which he has been appointed, or a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that as soon as a permanent post becomes available he shall be confirmed.

(5) A probationer shall continue as such until confirmed or reverted or terminated, as the case may be.

10. Postings and Transfers:-

All postings and transfers of members of the service shall be made by the High Court except the postings in the Office of the High Court which shall be made by the Chief Justice.

11. Seniority:-

(1) The relative seniority of the members of service holding substantive post within their respective quota at the time of commencement of these rules shall be as it exists before the commencement of these rules.

(2) After the commencement of these rules, the cadre posts in category (a) of sub-rule (1) of Rule 3 shall be filled up by rotation based on the quota fixed in clauses (a), (b) and (c) of sub-rule (1) of Rule 5 in every recruitment year.

(3) For the purpose of proper maintenance and determination of seniority of persons appointed through the aforesaid sources, a roster for filling of vacancies based on quota of vacancies reserved here-in-above, as given in Schedule-II shall be maintained for each recruitment year. This roster would operate on yearly basis in which applications for appointment were invited in the recruitment year.

(4) Seniority of persons appointed under clause (a), (b) and (c) of sub-rule (1) of Rule 5 to the Service in category (a) of rule (1) of Rule 3 shall be determined in following manner:-

(a) The Seniority. ***inter se***, of persons appointed by promotion under clause (a) of sub-rule (1) of Rule 5 shall be determined by their ***inter se*** seniority in the lower cadre;

(b) The Seniority, of person promoted through limited competitive examination of Civil Judges (Senior Division) under clause (b) of sub-rule (1) of Rule 5 shall be determined in accordance with the ***inter se*** Seniority in the lower cadre;

(c) The ***inter se*** seniority of Persons appointed to the Service by direct recruitment under clause (c) of sub-rule (1) of Rule 5 shall be fixed in the order of merit they are placed in the selection list, those recruited earlier shall rank senior to those recruited later;

(5) The seniority of the members of the service promoted under clause (a) of sub-rule (1) of Rule 5 and under proviso to clause (c) of sub-rule (1) of Rule 5 of the HJS Rules, 1994, (amended vide L.D. No.F:17(E)40/88/21-8 (one) dated 13-08-2015) shall be as per the seniority in the lower cadre.

12. Pay, Allowances, Facilities and other Conditions of Service:-

(1) The members of the Service shall be entitled to such pay, allowances and facilities as recommended by the National Judicial Pay Commissions from time to time;

(2) In addition to and apart from the above, the payment of dearness allowance to the members of the Higher Judicial Service shall also be

governed by the Madhya Pradesh Judicial Service Revision of Pay Rules, 2003 and the Madhya Pradesh Judicial Services (Revision of Pay, Pension and other Retirement Benefits) Rules, 2010 and as applicable to Class-I employees of the Central Government.

(3) In addition to the benefits which are granted under sub-rule (1) and (2), the Members of Higher Judicial Service shall also be entitled to other benefits that are given by the State to its Class-I Officers; and under any other rule, regulation, notifications, instructions that are issued by the State Government from time to time as applicable to its Class-I employees and any other benefit adopted by the High Court.

13. Applicability of other Rules/Circulars etc. :- Except as otherwise provided in these Rules, the members of the Service shall be regulated by the following Rules, as amended from time to time, namely:-

(1) The Madhya Pradesh Civil Services (General Conditions of Services) Rules, 1961.

(2) The Madhya Pradesh Civil Services (Conduct) Rules, 1965;

(3) The Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966;

(4) The Madhya Pradesh Civil Services (Pension) Rules, 1976;

(5) The Madhya Pradesh Civil Services (Commutation of Pension) Rules, 1996;

(6) The Madhya Pradesh Civil Services (Extraordinary Pension) Rules, 1963.

(7) The Madhya Pradesh Civil Services (Joining Time) Rules, 1982.

(8) The Madhya Pradesh Civil Services (Leave) Rules, 1977.

(9) The Madhya Pradesh Civil Services (Medical Attendance) Rules, 1958.

(10) The Madhya Pradesh Civil Services (Medical Examination) Rules, 1972.

(11) The District and Sessions Judge (Death-cum-Retirement Benefits) Rules, 1964.

(12) The Madhya Pradesh Civil Services (Travelling Allowances) Rules.

(13) The Madhya Pradesh Government Servants (Temporary and Quasi Permanent Service) Rules, 1960.

(14) The Madhya Pradesh Judicial Service Revision of Pay Rules 2003.

(15) The Madhya Pradesh Judicial Services (Revision of Pay, Pension and other Retirement Benefits) Rules, 2010.

(16) Madhya Pradesh Fundamental Rules.

(17) Madhya Pradesh Treasury Rules.

(18) The Madhya Pradesh General Provident Fund Rules.

(19) Central Civil Services (Leave, Travel and Concession) Rules, 1988.

(20) The Rules and instructions issued by the Central Government relating to Leave Travel Concession; Home Travel Concession and Dearness Allowance as applicable to its Class-I employees.

(21) Any other Rule/ Regulation/ Notifications /Instructions as issued by the State Government as may adopted by the High Court.

14. Superannuation Age:-

(1) Subject to the provisions of sub-rule (2) and (3), every member of the service shall retire from the service on the afternoon of the last day of the month in which he attains the age of 60 (sixty) years provided he is found fit and suitable to continue after 58 (fifty eight) years in service by the High Court :

Provided that a member of service whose date of birth is the first day of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 60 (sixty) years:

Provided further that an officer of the service, who has retired on superannuation at the age of 60 (sixty) years, may be re-employed on the recommendation of the High Court up to the age of 62 (sixty two) years to act as Presiding Officers of the Family Court,

(2) Notwithstanding anything to the contrary contained in these Rules or any other Rules for the time being in force, a member of the Service may, in public interest, be retired at any time after he has completed 10 (ten) years of service, or on attaining the age of 50 (fifty) years, whichever is earlier.

(3) For the purpose of the sub-rule (1) and (2), the Chief Justice may constitute a Screening Committee for the scrutiny and assessment of such member of the service, based on his past record of service, character rolls, quality of judgments/ orders and other relevant matters like his integrity, reputation and utility to the Service etc.

15. Oath:- Every person, appointed to the Service by direct recruitment, shall, before he joins, make and subscribe before such person as may be specified by the Chief Justice, an oath or affirmation in the following form:-

"I..... having been appointed as a member of the Madhya Pradesh Higher Judicial Service, do swear in the name of God/solemnly affirm, that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment, perform the duties of my office without fear or favour, affection or ill will, and that I will uphold the Constitution and the laws".

16. Deputation:-

A member of the Service may be sent on deputation to perform the duties of any post under the Central Government or the State Government or to serve in an organization, which is wholly or partly owned or controlled by such Government or in Foreign Service.

17. Interpretation:-

If any question arises as to the interpretation of these rules, the decision of the Chief Justice shall be final.

18. Power to Relax:-

Where the High Court is satisfied that the operation of any of these rules causes undue hardship to any particular class or categories of class of members of service, it may for reasons to be recorded in writing dispense with or relax the particular Rule to such extent and subject to such exceptions and conditions as may be deemed necessary:

Provided that as and when any such relaxation is granted by the High Court, the same shall be intimated to the Governor.

19. Repeal and Saving:-

Madhya Pradesh Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, 1994 and Orders, resolutions, if any, in force immediately before the commencement of these rules, are hereby repealed or rescinded as the case may be in respect of matters covered by these rules;

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

SCHEDULE-1
[See Rule 4]
STRENGTH OF CADRE

Sr No.	Designation of Post	Sanctioned Strength in the Cadre	Additional Posts Sanctioned in the Cadre
(1)	(2)	(3)	(4)
1	Principal District Judge (Super Time Scale)	62	-
2	Principal Judge/Additional Principal Judge Family Court [Sanctioned in District Judge (Super Time Scale)]	-	58*

3	District Judge (Selection Grade Scale)	154	-
4	Posts specially sanctioned in District Judge (Selection Grade Scale) for CBI / MPSIDC	-	12**
5	Special Judges SC/ST (P.A.) Act. 1989 [Sanctioned in District Judge (Selection Grade Scale)]	-	43***
6	District Judge Entry Level	401	-
7	Special Judge under Electricity Act. Other Posts	-	10****
8	High Court Registry Including officers of Registry, DJ (Inspection) 03 posts and MPSJA 02 posts.	-	20
9	Legal Remembrancer / Principal Secretary and Additional Legal Remembrancer / Additional Secretary, Law Department	-	7
10	State Legal Service Authority (SALSA)	-	2
11	Chairman MP State Transport Tribunal	-	1
	Total	617*****	153
	GRAND TOTAL STRENGTH OF CADRE	**770**	

* 58 Posts in Family Court specially sanctioned in District Judge (Super time Scale), vide last LD o. No. I-1/2002/21-B (one)/2012 Dt. 30/31.07.2013.....

** 12 Post specially sanctioned in District Judge (Selection Grade Scale).

[03 posts for Special Courts under Corruption Act, vide LD O. No. 82-5-A/21-B (one)/2012 Dt. 06.03.2012]

*** 43 Posts specially sanctioned in District Judge (Selection Grade Scale) under SC/ST (P.A.) Act, vide last LD O. No. F-23-48/2002/4/25 Dt. 24.04.2007.....---------

**** 10 Posts specially sanctioned in District Judge (Entry Level) under Electricity Act, 2003, vide LD O. No. F 2-3/2007/13 Dt. 05.07.2008

***** 235 new posts sanctioned in District Judge (Entry Level) vide LD O. No. 3 (A) 3-2016/21-B (one)/2588 Dt. 25.07 / 08.08.2016, are included in the Cadre Strength.

SCHEDULE-1
[See Rule 11 (3)]

Roster for filling up vacancies in the District Judge cadre by direct recruitment and by promotion.

Sl. No. of vacancy	Category for which the vacancy should be earmarked
(1)	(2)
1.	By promotion-merit-cum-seniority
2.	By promotion-merit-cum-seniority
3.	By promotion-merit-cum-seniority
4	By Direct recruitment
5	By promotion-merit-cum-seniority
6	By promotion-merit-cum-seniority
7	By promotion-merit-cum-seniority
8	By Direct recruitment
9	By promotion-Limited Competitive Examination
10	By promotion-merit-cum-seniority
11	By promotion-merit-cum-seniority
12	By Direct recruitment
13	By promotion-merit-cum-seniority
14	By promotion-merit-cum-seniority
15	By promotion-merit-cum-seniority
16	By Direct recruitment
17	By promotion-merit-cum-seniority
18	By promotion-merit-cum-seniority
19	By promotion-Limited Competitive Examination
20	By Direct recruitment
21	By promotion-merit-cum-seniority
22	By promotion-merit-cum-seniority
23	By promotion-merit-cum-seniority

SI. No. of vacancy	Category for which the vacancy should be earmarked
(1)	(2)
24	By Direct recruitment
25	By promotion-merit-cum-seniority
26	By promotion-merit-cum-seniority
27	By promotion-merit-cum-seniority
28	By Direct recruitment
29	By promotion-Limited Competitive Examination
30	By promotion-merit-cum-seniority
31	By promotion-merit-cum-seniority
32	By Direct recruitment
33	By promotion-merit-cum-seniority
34	By promotion-merit-cum-seniority
35	By promotion-merit-cum-seniority
36	By Direct recruitment
37	By promotion-merit-cum-seniority
38	By promotion-merit-cum-seniority
39	By promotion-Limited Competitive Examination
40	By Direct recruitment
41	By promotion-merit-cum-seniority
42	By promotion-merit-cum-seniority
43	By promotion-merit-cum-seniority
44	By Direct recruitment
45	By promotion-merit-cum-seniority
46	By promotion-merit-cum-seniority
47	By promotion-merit-cum-seniority
48	By Direct recruitment
49	By promotion-Limited Competitive Examination
50	By promotion-merit-cum-seniority

SI. No. of vacancy	Category for which the vacancy should be earmarked
(1)	(2)
51	By promotion-merit-cum-seniority
52	By Direct recruitment
53	By promotion-merit-cum-seniority
54	By promotion-merit-cum-seniority
55	By promotion-merit-cum-seniority
56	By Direct recruitment
57	By promotion-merit-cum-seniority
58	By promotion-merit-cum-seniority
59	By promotion-Limited Competitive Examination
60	By Direct recruitment
61	By promotion-merit-cum-seniority
62	By promotion-merit-cum-seniority
63	By promotion-merit-cum-seniority
64	By Direct recruitment
65	By promotion-merit-cum-seniority
66	By promotion-merit-cum-seniority
67	By promotion-merit-cum-seniority
68	By Direct recruitment
69	By promotion-Limited Competitive Examination
70	By promotion-merit-cum-seniority
71	By promotion-merit-cum-seniority
72	By Direct recruitment
73	By promotion-merit-cum-seniority
74	By promotion-merit-cum-seniority
75	By promotion-merit-cum-seniority
76	By Direct recruitment
77	By promotion-merit-cum-seniority

SI. No. of vacancy	Category for which the vacancy should be earmarked
(1)	(2)
78	By promotion-merit-cum-seniority
79	By promotion-Limited Competitive Examination
80	By Direct recruitment
81	By promotion-merit-cum-seniority
82	By promotion-merit-cum-seniority
83	By promotion-merit-cum-seniority
84	By Direct recruitment
85	By promotion-merit-cum-seniority
86	By promotion-merit-cum-seniority
87	By promotion-merit-cum-seniority
88	By Direct recruitment
89	By promotion-Limited Competitive Examination
90	By promotion-merit-cum-seniority
91	By promotion-merit-cum-seniority
92	By Direct recruitment
93	By promotion-merit-cum-seniority
94	By promotion-merit-cum-seniority
95	By promotion-merit-cum-seniority
96	By Direct recruitment
97	By promotion-merit-cum-seniority
98	By promotion-merit-cum-seniority
99	By promotion-Limited Competitive Examination
100	By Direct recruitment

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

R. K. VANI, Secy.

THE INDIAN STAMP (MADHYA PRADESH AMENDMENT) ACT, 2016
(NO. 30 OF 2017)

[Received the assent or the President on the 21st September, 2017; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 23rd October, 2017].

An Act further to amend the Indian Stamp Act, 1899 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the sixty-seventh year of the Republic of India as follows :-

1. Short title and commencement – (1) This Act may be called the Indian Stamp (Madhya Pradesh Amendment) Act, 2016.

(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Amendment of Central Act No.II of 1899 in its application to the State of Madhya Pradesh – The Indian Stamp Act, 1899 (No. II of 1899) (hereinafter referred to as the principal Act) shall in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Section 2 – In Section 2 of the principal Act,-

(i) for clause (11), the following clause shall be substituted, namely: –

(11) **"Duly Stamped"** as applied to an instrument means that the instrument bears a stamp of not less than the proper amount chargeable as per the Schedule I and Schedule I-A to this Act and that such stamp has been affixed or used in accordance with the law for the time being in force in India;";

(ii) after clause (11), the following clause shall be inserted, namely:-

"(I I-A) **"e-stamp or electronic stamp"** means an electronic record or its impression on paper. created to denote the payment of stamp duty;";

(iii) after clause (12), the following clause shall be inserted, namely:-

"(I2-A)**"Impound"** means to take an instrument into custody of the Public Officer with an endorsement made thereon in this regard;";

(iv) after clause (16-A), the following clauses shall be inserted, namely:-

"(16-B)**"Market value"** in relation to any property which is the subject matter of an instrument, means the price which such property would fetch or would have fetched if sold in the open market on the date of execution of such instrument determined by the Authority empowered to do so in the manner laid down under this Act or rules made thereunder, or the consideration stated in the instrument, whichever applicable;

(l6-C) "Market value Guidelines" means the set of market values of immovable property in different villages, planning areas. Municipalities, corporations and other areas in the State notified by the designated Authority under rules made under this Act for the purpose of determining chargeability of an instrument related to the property. with stamp duty;";

(v) for clause (24), the following clause shall be substituted, namely:-

"(24-) Settlement means any non-testamentary disposition, in writing, of movable or immovable property made-

(a) in consideration of marriage.

(b) for the purpose of distributing property of the settler amongst his family, or

(c) for any religious or charitable purpose, and includes an agreement in writing to make such a disposition and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition; ":

(vi) for clause (26), the following clause shall be substituted,namely:-

"(26) "Stamp" means any mark, seal or endorsement by any agency or person duly authorized by the State Government, and includes an adhesive or impressed stamp, or e-stamp, for the purpose of duty chargeable under this Act.".

4. Amendment of Section 35 – In Section 35 of the principal Act, in the proviso,–

(i) for clause (a), the following clause shall be substituted, namely:-

"(a) any such instrument shall be admitted in evidence, registered or authenticated on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with a penalty of two percent of the deficient portion of stamp duty for every month or part thereof, from the date of execution of the instrument, but in no case the amount of penalty so calculated shall exceed the principal amount of deficit stamp duty to be recovered;";

(ii) for clause (d), the following clause shall be substituted, namely:-

"(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter IX or part D of chapter X of the Code of Criminal Procedure. 1973 (No.2 of 1974);";

(iii) clause (I) shall be deleted.

5. Substitution of Section 40. For Section 40 of the principal Act, the following Section shall be substituted, namely:-

"40. **Collector's power to stamp instruments impounded –** (1) When the Collector impounds any instrument under section 33, or receives any instrument sent to him under sub-section (2) of Section 38, not being a receipt or a bill of exchange or promissory note, he shall adopt the following procedure –

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if, after holding an enquiry, he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of two percent of the deficient portion of stamp duty for every month or part thereof from the date of execution of the instrument and shall certify by endorsement thereon that it is duly stamped. The amount shall be payable by the person liable to pay the duty:

Provided that in no case the amount of penalty so calculated shall exceed the principal amount of deficit stamp duty to be recovered:

Provided further that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this Section;

(c) for the purpose of enquiry under this chapter, the Collector shall have the power to summon and enforce the attendance of witnesses, including the parties to the instrument or any of them and to compel the production of documents by the same means and so far as may be in the same manner as is provided in the case of Civil Court under the Code of Civil Procedure, 1908 (5 of 1908);

(d) any person aggrieved by an order of the Collector under sub-section (1) may, in the prescribed manner, appeal against such order to the officer notified by the State Government in this regard:

Provided that no appeal shall be admitted unless such person has deposited at least 25 percent of the amount of deficit stamp duty as ordered by the Collector. Such amount shall be adjustable against the amount payable as per final order of the appellate authority, or refundable together with an interest of one percent for every month or part thereof from the date of deposit;

(e) any person aggrieved by an order passed in appeal under clause (d) may appeal against such order to the Chief Controlling Revenue Authority in the prescribed manner;

(f) every first and second appeal shall be filed within thirty days from the date of communication of the order against which the appeal is filed, along with a certified copy of the order to which the objection is made and shall be presented and verified in such manner as may be prescribed:

Provided that in computing the period aforesaid, the time requisite for obtaining a copy of the order appealed against shall be excluded;

(g) the appellate authority, in deciding the appeal, shall follow such procedure as maybe prescribed:

Provided that no order shall be passed without affording opportunity of being heard to the appellant.

(h) subject to orders passed in first or second appeal, as the case may be, the order passed by the Collector under sub-section (I) shall be final and shall not be called into question in any Civil Court or before any other authority whatsoever.

(2) Every certificate under clause (a) and (b) of sub-section (I) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under sub-section (2) of Section 38, the Collector shall, when he has dealt with it as provided by this Section, return it to the impounding officer."

6. Substitution of Section 41 – For Section 41 of the Principal Act.the following Section shall be substituted, namely:

"41. **Instruments unduly stamped by accident –** If any instrument chargeable with duty and not duly stamped, not being a receipt or a bill of exchange or promissory note, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution and such person brings to the notice of the Collector the fact that such instrument is not duly stamped and offers to pay to the Collector the amount of the proper duty, or the amount required to make up the same, together with an interest of two percent of the deficient portion of stamp duty for every month or part thereof, from the date of execution of the instrument, and the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, he may, receive such amount and proceed as next hereinafter prescribed:

Provided that in no case the amount of interest so calculated shall exceed the principal amount of deficit stamp duty to be recovered.".

7. Amendment of Section 45 – In Section 45 of the principal Act,-

(i) sub- section (1), shall be deleted;

(ii) for sub-section (2), the following sub-section shall be substituted, namely;-

"(2) Where, in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid, such Authority may, upon application in writing made within six months of the payment, refund the excess, following procedure as prescribed.".

8. Deletion of Section 47-A – Section 47-A of the principal Act shall be deleted.

9. Substitution of Section 48-B – For Section 48-B of the principal Act, the following Section shall be substituted, namely:-

"48-B– **Where the deficiency of stamp duty is noticed from a copy of any Instrument.** Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order, require the production of the original instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order it shall be presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in Section 40 for the recovery of deficit stamp duty and penalty:

Provided that the certificate of the Collector that the document is duly stamped, shall be endorsed on the original document:

Provided further that no action under this Section shall be taken after a period of five years from the date of execution of such instrument.".

10. Amendment of Section 53 – In Section 53 of the principal Act, for clause (c), the following clause shall be substituted, narnely:-

"(c) at his discretion, the Same value in money, deducting two naye paise for each rupee or fraction of a rupee.".

11. Substitution or Section 73 – For Section 73 of the principal Act, the following Section shall be substituted, namely:-

"73. Books etc., to be "open to inspection– Every Public Officer or any authority or body incorporated by or under any law for the time being in force having in his custody any registers, books, records, papers, documents,

proceedings or electronic records, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud of omission in relation to any duty, shall, at all reasonable times, permit any officer, not below the rank of sub-registrar as defined in the Registration Act, 1908 (No: 16 of 1908), authorised in writing by the Collector, to inspect for such purpose the registers, books, records, papers, documents, proceedings and electronic records and to take such copies, notes and extracts as he may deem necessary, without fee or charge. If necessary, such authorised officer shall direct the public officer or the person to impound the document under Section 33 failing which he shall proceed himself to impound the same.

Explanation – For the purpose of this Section Collector means the Collector of the district."

12. Substitution or Section 76-A – For Section 76-A of the principal Act, the following Section shall be substituted, namely;-

"76–A Delegation of certain powers. The State Government may, by Notification in the official Gazette delegate –

(a) all or any of the powers conferred on it to the Chief Controlling Revenue Authority, and

(b) all or any of the powers conferred on the Chief Controlling Revenue Authority underthe Act to such subordinate officers of the State Government as may be specified in the notification.".

13. Amendment of Schedule1-A – In Schedule I-A to the principal Act, in Explanation to article 36 (Gift), Explanation-I to article 48 (partition), Explanation-I to article 50 (Power of Attorney), Explanation to article 54 (Release) and Explanation-II to article 57 (Settlement), for the word "sister", the words "sister, daughter-in-law" shall be substituted.

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Justice is conscience, not a personal conscience but the conscience of the whole humanity. Those who clearly recognize the voice of their own conscience usually also recognize the voice of justice.

मध्यप्रदेश उच्च न्यायालय, जबलपुर

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