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(BI-MONTHLY)

AUGUST 2018

MADHYA PRADESH STATE JUDICIAL ACADEMY

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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MADHYA PRADESH STATE JUDICIAL ACADEMY

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Former Chief Justice,
High Court of M.P., Jabalpur

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FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director

Respected Judges

Needless to say, justice to the victim or survivor of sexual violence should be provided at the earliest without undue delay but sometimes, pressure created by media and society may lead to undue haste and in turn miscarriage of justice.

Section 309 of Cr.P.C. mandates that the proceeding in a trial shall be continued from day to day until all the **witnesses in attendance** have been examined but it would be an extreme proposition that all the prosecution witnesses are to be called and examined in a single day or a couple of days. In a trial involving grave penalties, the trial Courts are expected to be vigilant against defence tactics of portraying the trial and using interregnum to win over the witnesses but it would be an overreaction on the part of Court to have the entire prosecution evidence in the shortest span of time.

In cases where the accused is facing charges that are punishable with death sentence and particularly, where they are represented by legal aid counsel, the trial Court must exercise some caution as well as patience to ensure that the legal aid counsel has sufficient time to prepare for the cross-examination after discussion with the accused. The trial Court cannot be oblivious of ground realities. The counsel may have to consult the accused for preparation of defence and putting specific questions to the witnesses, that may require some time and privacy which is not expected in the charged atmosphere of courtroom in the presence of the witness or the Judge.

A balance need to be struck between timely justice and fair justice, for "the justice should not only be done but also seems to be done."

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 ***Mohan Lal v. State of Punjab,*** the Apex Court reiterated that fair investigation necessarily postulates that the informant and the investigator must not be the same person.

Dealing with inalienable right of bail under section 437 (6) of Cr.P.C., the High Court of Madhya Pradesh in the case of ***Pramod Kumar Vishwakarma*** laid down that grant of bail on expiry of sixty days from the first date fixed for taking evidence is a norm. Application for such bail can be dismissed only on existence of compelling reasons. The High Court laid down persuasive guidelines for the Magistrates to take into consideration while deciding application u/s 437 (6) of Cr.P.C.

In case of ***Shyam Narayan Prasad***, the Apex Court held that property acquired by partition of ancestral property retains the character of ancestral property as regards coparceners of the person acquiring share on partition.

In case of ***Rishabh Saxena***, the High Court of Madhya Pradesh, distinguishing the rape with consensual sex, held that mere failure to keep promise of marriage cannot be inferred as false promise to marry.

In case of ***Amrit Paul Singh***, the Supreme Court held that absence of valid permit to use vehicle is a fundamental breach absolving insurance company from liability. It was also held that absence of permit cannot be equated with absence of licence or fake licence or violation as to number of passengers.

Explaining the meaning of the phrase "arising out of the use of motor vehicle", the Supreme Court in the case of ***Kalim Khan*** laid down the principle that casual relationship should exist between violation and the accident caused. Appreciation of causal relation is a question of fact to be decided on the basis of material brought on record.

In case of ***Suresh Kumar Kohli***, the Apex Court discussed the incidents of joint tenancy and tenancy in common. It was held that upon death of original tenant, the legal heirs inherit the tenancy as joint tenants. The landlord may implead either of the joint tenants and all joint tenants are bound by the order of the Court.

The Academy in the past two months has conducted First Phase Induction Course for the Second Batch of newly appointed Civil Judges Class II of 2018 Batch, Foundation/Orientation Course for the District Judges Entry Level directly appointed from Bar as well as promoted in the year 2018, Regional Workshops on Negotiable Instruments Act for Judicial Magistrates at Dewas, Motor Accident Claim Cases for the Judges of HJS at Satna and on Family Laws for Principal & Additional Principal Judges of Family Courts as well as Judges dealing with matrimonial cases at Ratlam.

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

Apart that, the Academy also conducted Educational Programme for Advocates at Gwalior.

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

Workshop on - Training of Trainers
(22.05.2018 to 26.05.2018)

Regional Conference on – Motor Accident Claim Cases
(28th & 29th July, 2018 at Satna)

APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Sanjay Dwivedi, Hon'ble Shri Justice Akhil Kumar Shrivastava, Hon'ble Shri Justice Brij Kishore Shrivastava, Hon'ble Shri Justice Rajendra Kumar Shrivastava and Hon'ble Shri Justice Mohammad Fahim Anwar have been administered oath of office by Hon'ble Shri Justice Hemant Gupta, Chief Justice, High Court of Madhya Pradesh on 19th June, 2018 as Judges of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall of South Block of High Court of M.P. at Jabalpur.

Hon'ble Shri Justice Sanjay Dwivedi was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 1st July, 1963 at Bilaspur (Chhattisgarh). Father Shri B.M. Dwivedi is a practicing lawyer in the High Court. After obtaining degrees of B.Com. and LL.B., enrolled as an Advocate on 10.07.1989 and joined the chamber of Shri Deepak Verma, who later on was appointed as Hon'ble Judge of High Court and then as Hon'ble Judge of Supreme Court. Also worked with a renowned Senior Advocate Shri N.S. Kale. Completed 27 years of active practice in the High Court of Madhya Pradesh in civil, criminal, constitutional etc. matters. Was appointed as Deputy Advocate General in the year 2009 and continued on the same post till elevation.

Hon'ble Shri Justice Akhil Kumar Shrivastava was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 5th August, 1959 in Bansgaon District Gorakhpur (U.P.). After obtaining degrees of B.A. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II in the year 1985. Promoted to Higher Judicial Services as Additional District & Sessions Judge on 31.05.2017.

Worked in different capacities at various places like Panna, Bhopal, Chhatarpur, Laundi, Satni, Jabalpur, Narsinghpur, Sihora, Khandwa, Rewa, Katni and Sagar. Also held the posts of Deputy Secretary, Additional Legal Remembrancer & Additional Secretary and Secretary, Law and Legislative Affairs Department, Bhopal and Law Officer, State Economic Offences Investigation Bureau. Worked as District & Sessions Judge at Narsinghpur. Was Principal Registrar (ILR and Examination) at Principal Seat, Jabalpur from 04.04.2013 till elevation.

Hon'ble Shri Justice Brij Kishore Shrivastava, was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 1st July, 1959. After obtaining degrees of B.Sc. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II on 07.11.1985. Promoted to Higher Judicial Services as Additional District & Sessions Judge on 16.05.1997.

Worked in different capacities at various places like Gwalior, Vidisha, Bhind, Gohad, Susner, Jora, Ashoknagar, Seoni, Jabalpur, Datia and Lakhnadaon. Also, held the posts of OSD and Registrar (Judicial) in the High Court from 2006 to 2010. Held the post of President, District Consumer Forum, Chhatarpur from 2010 to 2012. Also worked as District & Sessions Judge, Damoh and Shivpuri. Was District & Sessions Judge, Ujjain from 25.10.2016 till elevation.

Hon'ble Shri Justice Rajendra Kumar Shrivastava, was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 1st January, 1960. After obtaining degrees of B.A. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II on 30.01.1986. Promoted to Higher Judicial Services as Additional District & Sessions Judge on 26.05.1997.

Worked in different capacities at various places like Narsinghpur, Seoni, Burhar, Bhikangaon, Chhindwara, Maihar, Sagar, Raipur, Manawar, Seoni, Chhatarpur. Also held The post of Additional Principal Judge, Family Court, Gwalior. Was District & Sessions Judge, Raisen and Rewa. Was District & Sessions Judge, Chhatarpur from 25.03.2017 till elevation.

Hon'ble Shri Justice Mohammad Fahim Anwar, was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 5th April, 1959 in Sehore. After obtaining degrees of M.Sc. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II on 06.11.1985. Promoted to Higher Judicial Services as Additional District & Sessions Judge on 05.11.1997.

Held various posts in different capacities in the State of Madhya Pradesh at Sehore, Betul, Bhainsdehi, Khachraud, Bhopal, Jora, Gadarwara, Narsinghpur, Mandsaur, Khurai and Gwalior. Also held the post of President, District Consumer Forum, Rewa, Deputy Commissioner, Additional Commissioner and Registrar, Bhopal Gas (Victims), Bhopal, for adjudicating the compensation claim cases etc. Also worked as District & Sessions Judge, Hoshangabad. Was Registrar General, High Court of Madhya Pradesh from 01.04.2017 till elevation.

We on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.

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Learning is the beginning of wealth. Learning is the beginning of health. Learning is the beginning of spirituality. Searching and learning is where the miracle process all begins.

JIM ROHN

HON'BLE SHRI JUSTICE S. K. GANGELE AND
HON'BLE SHRI JUSTICE HOUSLA PRASAD SINGH DEMIT OFFICE

Hon'ble Shri Justice S.K. Gangele demitted office on His Lordship's attaining superannuation.

Hon'ble Shri Justice S.K. Gangele was born on July 26, 1956. Obtained degrees of B.Sc. from Maharaja College, Chhatarpur and LL.B. from Motilal Nehru Law College, Chhatarpur. Was enrolled as an Advocate on 31st October, 1980 and started practice in the District Court, Chhatarpur. Later on, in the year 1986 joined the office of senior Advocate Late Shri Y.S. Dharmadhikari and started practice in High Court at Jabalpur. Was Additional Standing Counsel for Union of India and Standing Counsel for Insurance Companies and other organizations. Practised mainly on Civil and Constitutional sides in the Principal Seat of High Court of Madhya Pradesh at Jabalpur.

Took oath as Permanent Judge, High Court of Madhya Pradesh on 11.10.2004.

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Hon'ble Shri Justice Housla Prasad Singh demitted office on His Lordship's attaining superannuation.

Hon'ble Shri Justice Housla Prasad Singh was born on July 1, 1956 at village Aschaura, District Ballia, Uttar Pradesh. After obtaining degrees of B.Sc. from DBS College, Kanpur and LL.B. from Rani Durgavati Vishwavidhyalaya, Jabalpur in the year 1979, enrolled as an Advocate in the State Bar Council of M.P. in the year 1979 and joined the Chamber of Senior Civil Advocate Late Shri N.K. Patel. Practised mainly in civil and criminal streams. Joined M.P. State Judicial Services as Civil Judge Class II on 7th March, 1983 and promoted to Higher Judicial Services in June, 1996. Granted Selection Grade Scale on 01.01.2003 and Super Time Scale on 15.03.2012.

Worked in different capacities at Seoni, Sagar, Banda, Niwas, Sihora, Jabalpur, Damoh, Raipur (now Chhattisgarh), Satna, Umariya and Gwalior. Held, the post of Chairman, District Consumer Redressal Forum, Jabalpur. Was posted as first District & Sessions Judge of the newly constituted District Court at Umariya in the year, 2009 and thereafter, at Sagar in the year 2013. Held different posts in Madhya Pradesh Judges' Association and played active role for the welfare of Judicial Officers.

Attended many Conferences, Workshops, Seminars and training programmes. Is a good speaker and has delivered lectures on varied subjects. Was Chairman, State Transport Appellate Tribunal, M.P., Gwalior prior to elevation.

Took oath as Additional Judge, High Court of Madhya Pradesh on 07.04.2016 and as Permanent Judge on 17.03.2017.

We on behalf of JOTI Journal, wish Their Lordships a healthy, happy and prosperous life.

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"The crown and glory of life is character. It is the noblest possession of a man, constituting a rank in itself, and an estate in the general good-will; dignifying every station, and exalting every position in society. It exercises a greater power than wealth, and secures all the honor without the jealousies of fame. It carries with it an influence which always tell; for it is the result of proved honor, rectitude, and consistency-qualities which, perhaps more than any other, command the general confidence and respect of mankind."

SAMUEL SMILES

PART–I

मोटर यान अधिनियम, 1988 की संशोधित द्वितीय अनुसूची अनुसार संरचना सूत्र के आधार पर प्रतिकर के संदाय हेतु विशेष उपबंध

सुदीप कुमार श्रीवास्तव,

अतिरिक्त संचालक,

म.प्र. राज्य न्यायिक अकादमी

दिनांक **14.11.1994** से प्रभावी मोटर यान (संशोधन) अधिनियम, **1994 (**सन् **1994** के अधिनियम क्रमांक **54)** द्वारा मोटर दुर्घटनाओं में मृत अथवा स्थायी रूप से निःशक्त होने वाले व्यक्ति के यथास्थिति विधिक वारिसों या आहत् को दावा की लंबी कार्यवाही से बचाने एवं दावा के शीघ्र निराकरण के प्रयोजन से मोटर यान अधिनियम, **1988** में धारा **163**ए एवं द्वितीय अनुसूची समाविष्ट कर "संरचना सूत्र के आधार पर प्रतिकर के संदाय बावत् विशेष उपबंध" किये गये थे। इसी उद्देश्य की पूर्ति हेतु वाहन स्वामी की उपेक्षा साबित करने तथा विभिन्न शीर्षों में अलग-अलग क्षति साबित करने के भार से दावेदार को मुक्ति प्रदान कर द्वितीय अनुसूची में वर्णित संरचना सूत्र द्वारा प्रतिकर निर्धारण की प्रक्रिया सरल बनाई गई।

सरला वर्मा विरुद्ध देल्ही ट्रांन्सपोर्ट कारर्पोरेशन, एआईआर **2009** एससी **3104,** अरुण कुमार अग्रवाल विरुद्ध नेशनल इश्योरेंन्स् कारर्पोरेशन लि., एआईआर **2010** एससी **3426** व अन्य न्याय दृष्टांतों में माननीय सर्वोच्च न्यायालय ने द्वितीय अनुसूची की कई विसंगतियों और कमियों की ओर ध्यान आकर्षित कराने के साथ-साथ ही जीवन निर्वाह लागत को ध्यान में रखते हुये द्वितीय अनुसूची में संशोधन किये जाने के सुझाव दिये थे। अधिनियम की धारा **163**ए की उपधारा **3** में वर्णित शक्तियों का प्रयोग करते हुये भारत के राजपत्र दिनांक **22** मई **2018** में प्रकाशित केन्द्रीय सरकार के सड़क परिवहन और राजमार्ग मंत्रालय द्वारा अधिसूचना क्रमांक - का आ. **2022(**अ), द्वारा मोटर यान अधिनियम, **1988** की दूसरी अनुसूची के स्थान पर निम्नलिखित अनुसूची प्रतिस्थापित की गई है, जो इस प्रकार है:-

दूसरी अनुसूची

(धारा **163**-क देखिये)

तीसरा पक्षकार घातक दुर्घटना/क्षति के मामलों में दावों हेतु प्रतिकर की अनुसूची

1. (क) घातक दुर्घटनाएँ:

मृत्यु के मामले में देय प्रतिकर पाँच लाख रूपये होंगे।

(ख) दुर्घटना के परिणामस्वरूप स्थायी निःशक्तता:

देय प्रतिकर = (रूपये **5,00,000** ग कर्मचारी प्रतिकर अधिनियम, **1923 (1923** का **8)** की अनुसूची **1** के अनुसार प्रतिशत निःशक्तता)

परंतु किसी भी प्रकार की स्थायी निःशक्तता के मामले में न्यूनतम प्रतिकर पचास हजार रूपये से कम नहीं होगा।

(ग) दुर्घटना के परिणामस्वरूप सूक्ष्म क्षति:

पच्चीस हजार रूपये का एक निश्चित प्रतिकर देय होगा।

2. जनवरी, **2019** की पहली तारीख से पैरा **1** के खण्ड (क) से (ग) में निर्दिष्ट प्रतिकर की रकम में वार्षिक **5** प्रतिशत की वृद्धि होगी।

3. यह अधिसूचना राजपत्र में प्रकाशन की तारीख को प्रवृत्त होगी।

पूर्ववर्ती अनुसूची और वर्तमान अनुसूची को तुलनात्मक रुप से देखने से निम्नलिखित स्थिति प्रकट होती है-

प्रथम - मृत्यु की दशा में:-

पुरानी अनुसूची की कण्डिका क्रमांक **1** में दी गई सारणी में घटना के समय मृतक की आयु और आय महत्वपूर्ण कारक थे। वर्तमान अनुसूची में इन कारकों को पूरी तरह से हटा दिया गया है। पूर्व सारणी के अनुसार जैसा दीपाल गिरीश भाई सोनी (ए.आई.आर **2004** एस.सी. **2107)** के न्याय दृष्टांत में प्रतिपादित किया गया है, केवल **40,000/-** (चालीस हजार रूपये) वार्षिक आय वर्ग के व्यक्ति ही धारा **163**ए की परिधि में आते थे किन्तु नई अनुसूची में आय वर्ग हटाये जाने का तात्पर्य है कि सभी आय वर्ग के व्यक्ति इस उपबंध की परिधि में आयेंगे। इसी तरह पुरानी अनुसूची की कण्डिका क्रमांक **3** में "सामान्य नुकसानी शीर्ष" में अंतिम संस्कार व्यय, सहचर्य की हानि, सम्पदा की हानि एवं चिकित्सा व्यय की राशियां दिलाये जाने के प्रावधान थे, जो कि नई अनुसूची में नहीं हैं। अतः घटना के समय मृतक की आयु, आय के कारकों एवं अन्य शीर्षों को हटाये जाने का प्रभाव यह है कि मोटर दुर्घटना में मृत्यु की दशा में मृतक चाहे किसी भी आयु या आय वर्ग का रहा हो, धारा **163**ए के अधीन प्रतिकर की राशि **5,00,000/-** रूपये (पाँच लाख रुपये) नियत कर दी गई है। इस राशि में कुछ भी जोड़ा या घटाया जाना नहीं है। समय के साथ केवल इतना परिवर्तन होगा कि **01** जनवरी **2019** को इस **5,00,000/-** रूपये (पाँच लाख रुपये) की राशि में **5** प्रतिशत की वृद्धि हो जायेगी और इसी राशि पर प्रतिवर्ष **5** प्रतिशत की वृद्धि आगे भी होती रहेगी।

द्वितीय - स्थायी निःशक्तता की दशा में -

इसी तरह स्थायी निःशक्तता की दशा में भी आहत् की आयु और आय के कारक हटा दिये गये हैं और प्रतिकर की गणना हेतु बताये गये सूत्र के अनुसार **5,00,000/-** रूपये (पाँच लाख रुपये) की राशि में कर्मचारी प्रतिकर अधिनियम की अनुसूची **1** में वर्णित "प्रतिशत निःशक्तता" का गुणा करना है।

महत्वपूर्ण यह है कि कर्मचारी प्रतिकर अधिनियम, **1923 (**पूर्व नाम कर्मकार प्रतिकर अधिनियम, **1923)** की प्रथम अनुसूची तीन कालॅम में है। इसके कालॅम क्रमांक **2** में उपहति का वर्णन है और कालॅम क्रमांक **3** में "अर्जन क्षमता में आई कमी के प्रतिशत" का वर्णन है। ध्यान देना होगा कि "निःशक्तता के प्रतिशत" और "अर्जन क्षमता में आई कमी के प्रतिशत" में संकल्पनात्मक अंतर है। दुर्घटना में आई उपहति के फलस्वरूप शारीरिक अक्षमता चिकित्सकीय साक्ष्य द्वारा देखी जा सकती है किन्तु चिकित्सकीय साक्ष्य शारीरिक अक्षमता तक ही सीमित होगी और चिकित्सक साक्ष्य, अर्जन क्षमता में आई कमी के बारे में साक्ष्य नहीं होगी। पूर्व में न्यायाधिकरण को देखना होता था कि क्या आहत् को जो उपहति कारित हुई है वह स्थायी, पूर्ण अथवा आंशिक निःशक्तता है और उस निःशक्तता के आधार पर आहत् के व्यवसाय, कार्य की प्रकृति एवं अन्य सुसंगत परिस्थितियों (यथा, क्या आहत् पूर्व की भांति, पूर्व में किये जाने वाले कार्य नहीं कर सकता है; यदि हाँ तो वह अन्य कौन सा कार्य कर सकता है), को देखना होता था। उसी आधार पर अर्जन क्षमता में आई कमी के प्रतिशत को तय किया जाता था।

[***देखें B. Kothandapani v. Tamil Nadu State Transport Corporation Limited, (2011) 6 SCC 420; Raj Kumar v. Ajay Kumar & anr., (2011) 1 SCC 343; Calcutta Licensed Measurers Bengal Chamber of Commerce v. Md. Hossain, AIR 1969 Cal. 378; Messrs. Calcutta Electric Supply Corporation Ltd. v. Kabul Chandra Das, AIR 1968 Cal. 278***]

वर्तमान में संशोधित द्वितीय अनुसूची में दिये गये सूत्र में प्रयुक्त शब्दों को देखें तो इसका आशय यह है कि कर्मचारी प्रतिकर अधिनियम, **1923** की प्रथम अनुसूची के कालॅम क्रमांक **3** में अर्जन क्षमता में आई कमी का जो प्रतिशत बताया गया है उसमें **100** का भाग देकर प्रतिशत निःशक्तता निकालेंगे और उसका गुणा रूपये **5,00,000/-** से करेंगे। इस तरह प्रतिकर की राशि प्राप्त हो जायेगी अर्थात् प्रतिकर की राशि का सूत्र होगा -

प्रतिकर की राशि = रूपये **5,00,000/- x** कर्मचारी प्रतिकर अधिनियम की अनुसूची एक के कालॅम क्रमांक **3** में वर्णित प्रतिशत **/ 100**

कर्मचारी प्रतिकर अधिनियम की अनुसूची एक में वर्णित न होने वाली उपहति/ निःशक्तता की दशा में अर्जन की हानि के प्रतिशत के संबंध में कोई उपधारण नहीं होगी और मेसर्स् कलकत्ता इलेक्ट्रिक सप्लाई कारर्पोरेशन लि. विरुद्ध काबुल चन्द्र दास, एआईआर **1968** कल. **278** में

बताये गये सिद्धांत के अनुसार मोटर दुर्घटना के परिणाम स्वरुप उत्पन्न निःशक्तता से अर्जन क्षमता में आई कमी के प्रतिशत को तथ्य की भाँति साबित करना होगा। इसके बाद उपरोक्त सूत्र का प्रयोग करना होगा।

यह भी ध्यान देना होगा कि पूर्ववर्ती द्वितीय अनुसूची की कण्डिका क्रमांक **4** में बताये गये दर्द और पीड़ा तथा चिकित्सकीय व्यय के शीर्ष को नई अनुसूची में शामिल नहीं किया गया है। पुरानी अनुसूची के क्रमांक **5** के स्थान पर ऊपर वर्णित अनुसार नया सूत्र प्रतिपादित किया गया है। इस सूत्र से प्राप्त राशि में कुछ भी जोड़ना या घटाना नहीं है। सीमा सिर्फ यह है कि किसी भी प्रकार की स्थायी निःशक्तता के मामले में न्यूनतम प्रतिकर पचास हजार रूपये से कम और अधिकतम प्रतिकर पाँच लाख रुपए से अधिक नहीं होगा और समय परिवर्तन पर इस सूत्र से परि-गणित राशि पर पाँच प्रतिशत वार्षिक की वृद्धि होगी।

तृतीय - सूक्ष्म क्षति की दशा में -

धारा **163**ए के मूल प्रावधान में केवल दो दशाओं **(1)** मृत्यु और **(2)** स्थायी निःशक्तता का वर्णन है। नवीन द्वितीय अनुसूची में कंडिका क्रमांक **1(**ग) में दुर्घटना के परिणाम स्वरूप सूक्ष्म क्षति की दशा में रूपये **25,000/-** का निश्चित प्रतिकर देय होना प्रावधानित किया गया है जो कि पुरानी अनुसूची में नहीं था। "सूक्ष्म क्षति" को मोटरयान अधिनियम, **1988** अथवा कर्मचारी प्रतिकर अधिनियम, **1923** में कहीं परिभाषित नहीं किया गया है। इस "सूक्ष्म क्षति" शब्द पर विचार करें तो इसका आशय ऐसी उपहतियों से प्रतीत होता है जिनके फलस्वरूप स्थायी निःशक्तता उत्पन्न नहीं हुई है क्योंकि किसी भी प्रकार की स्थायी निःशक्तता की दशा में न्यूनतम प्रतिकर पचास हजार रूपये से कम नहीं होगा। इस तरह "सूक्ष्म क्षति" के मामलों में रूपये **25,000/-** का निश्चित प्रतिकर दिया जाना मूल धारा से आगे जाकर किया गया प्रावधान है और यह उस दशा में लागू होगा जब मोटर दुर्घटना से हुई क्षति के परिणामस्वरूप स्थायी निःशक्तता उत्पन्न न हुई हो। इस पच्चीस हजार रुपये की राशि पर भी
01.01.2019 से पाँच प्रतिशत वार्षिक की वृद्धि होगी।

इस तरह नवीन अनुसूची दो के संशोधित उपबंधों को ध्यान में रखते हुए अधिनियम की धारा **163**ए के प्रावधानों का प्रयोग करना होगा।

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People accept the decision of a Judge not because his decision is always correct but because it is rendered by a person known for his wisdom, integrity, character and impartiality. It is only on account of these qualities of a Judge, people have faith in the judiciary.

– E.S. Venkataramiah, J.
in S.P. Gupta v. Union of India, (1981) Supp SCC 87, para 1137

भारतीय स्टाम्प (म.प्र. संशोधन) अधिनियम, 2016: **संक्षिप्त अवलोकन**

अवधेश कुमार गुप्ता,
संकाय सदस्य (वरिष्ठ)
म.प्र. राज्य न्यायिक अकादमी

भारतीय स्टाम्प (म.प्र. संशोधन) अधिनियम, **2016** द्वारा म.प्र. में प्रवृत्त भारतीय स्टाम्प अधिनियम, **1899** के कतिपय प्रावधानों को संशोधित, अंतःस्थापित, प्रतिस्थापित एवं विलोपित किया गया है। यह संशोधन अधिनियम दिनांक **23** अक्टूबर **2017** से प्रवृत्त हुआ है। इस संशोधन अधिनियम द्वारा प्रस्तावित प्रमुख नवीन प्रावधानों का संक्षिप्त विवरण, प्रभाव एवं प्रयोज्यता इस प्रकार है -

1. **निर्वचन खंड (धारा-**2)

अधिनियम की धारा - **2(11), 2(24)** तथा **2(26)** के अधीन क्रमशः "सम्यक् रूप से स्टाम्पित", "व्यवस्थापन" और "स्टाम्प" पद की विद्यमान परिभाषाओं को नवीन परिभाषाओं द्वारा प्रतिस्थापित किया गया है तथा धारा - **2(11-**क), **2(12-**क), **2(16-**ख) एवं **2(16-**ग) के रूप में क्रमशः "ई-स्टाम्प अथवा "इलेक्ट्रॉनिक स्टाम्प", "परिबद्ध", "बाजार मूल्य" एवं "बाजार मूल्य मार्गदर्शक सिद्धांतों" की नवीन परिभाषाएं अंतःस्थापित की गई हैं।

धारा - **2(26)** के अधीन स्टाम्प की परिभाषा में "ई-स्टाम्प" को भी सम्मिलित कर लिया गया है। धारा - **2 (11)** के अधीन "सम्यक रूप से स्टाम्पित" पद की परिभाषा में "आसंजक या छापित स्टाम्प" पद को विलोपित कर दिया गया है। इस प्रकार "ई-स्टाम्प अथवा इलेक्ट्रानिक स्टाम्प" को भी स्टाम्प के रूप में मान्यता प्राप्त हो गई है।

धारा - **2(12-**क) के अधीन "परिबद्ध" पद को परिभाषित कर दिया गया है। यह परिभाषा परिबद्ध किए जाने की प्रक्रिया को स्पष्ट करती है। इस परिभाषा के अनुसार किसी लिखत को परिबद्ध किए जाने के लिए उस पर इस आषय का पृष्ठांकन किया जाएगा एवं ऐसे पृष्ठांकन के साथ लोक अधिकारी (यथा न्यायाधीश) उस लिखत को अपनी अभिरक्षा में ले लेगा।

किसी सम्पत्ति से संबंधित लिखत पर प्रभार्य स्टाम्प शुल्क के निर्धारण के प्रयोजन से "बाजार मूल्य" को धारा **2(16-**ख) के अधीन परिभाषित किया गया है। स्थावर सम्पत्ति के विक्रय के करार, विक्रय प्रमाण पत्र, हस्तांतरण पत्र आदि लिखतों पर प्रभार्य स्टाम्प शुल्क के निर्धारण का एक आधार लिखत निष्पादन की तिथि पर उसका बाजार मूल्य भी होता है। इस परिभाषा में नियमों द्वारा विहित रीति से लिखत के निष्पादन की तिथि पर सम्पत्ति का अवधारित मूल्य अथवा लिखत में अभिव्यक्त प्रतिफल को बाजार मूल्य के अधीन सम्मिलित किया गया है।

2. सम्यक् रूप से स्टाम्पित न की गई लिखतें (धारा-**35)**

संशोधन के पूर्व एवं पश्चात् धारा-**35** के प्रावधान निम्नानुसार हैं -

धारा-35 (**संशोधन के पूर्व)**	**धारा-**35 (**संशोधन के पश्चात)**
35. सम्यक् रूप से स्टांपित न की गई लिखतें साक्ष्य, आदि में अग्राह्य हैं - शुल्क से प्रभार्य कोई भी लिखत जब तक कि ऐसी लिखत सम्यक् रूप से स्टांपित नहीं है, किसी व्यक्ति द्वारा	**35.** सम्यक् रूप से स्टांपित न की गई लिखतें साक्ष्य, आदि में अग्राह्य हैं - शुल्क से प्रभार्य कोई भी लिखत जब तक कि ऐसी लिखत सम्यक् रूप से स्टांपित नहीं है, किसी व्यक्ति द्वारा

धारा-35 (**संशोधन के पूर्व)**	**धारा-**35 (**संशोधन के पश्चात)**
जो विधि द्वारा या पक्षकारों की सम्मति से साक्ष्य लेने के लिये प्राधिकार रखता है, किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्म नहीं होगी अथवा ऐसे किसी व्यक्ति द्वारा या किसी लोक अधिकारी द्वारा उस पर कार्यवाही नहीं की जाएगी या वह रजिस्ट्रीकृत या अधिप्रमाणित नहीं की जाएगीः	जो विधि द्वारा या पक्षकारों की सम्मति से साक्ष्य लेने के लिये प्राधिकार रखता है, किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्य नहीं होगी अथवा ऐसे किसी व्यक्ति द्वारा या किसी लोक अधिकारी द्वारा उस पर कार्यवाही नहीं की जाएगी या वह रजिस्ट्रीकृत या अधिप्रमाणित नहीं की जाएगीः
परन्तु -	परन्तु -
(क) कोई ऐसी लिखत, जो शुल्क जिससे वह प्रभार्य है अथवा उस लिखत की दशा में, जो अपर्याप्त रूप से स्टाम्पित है, ऐसे शुल्क को पूरा करने के लिये अपेक्षित रकम और साथ-साथ पाँच रूपये की शास्ति अथवा जब उसके उचित शुल्क या कमी वाले भाग के दस गुनी रकम, पांच रूपये से अधिक हो, तब ऐसे शुल्क या भाग के दस गुने के बराबर राशि दे दिये जाने पर साक्ष्य में ग्राह्म होगी।	(क) कोई ऐसी लिखत, उस शुल्क के जिससे वह प्रभार्य है, भुगतान कर दिये जाने पर अथवा उस लिखत की दशा में, जो अपर्याप्त रूप से स्टाम्पित है, ऐसे शुल्क को पूरा करने के लिये अपेक्षित रकम, स्टाम्प शुल्क की कमी वाले भाग के लिए प्रति माह अथवा उसके भाग के लिये लिखत के निष्पादन की तारीख से दो प्रतिशत के बराबर शास्ति का भुगतान कर दिये जाने पर साक्ष्य में ग्राह्य, रजिस्ट्रीकृत अथवा अधिप्रमाणित होगी, परंतु किसी भी मामले में इस प्रकार संगणित की गई शास्ति की राशि वसूल किए जाने वाले कम स्टाम्प शुल्क की मूल राशि से अधिक नहीं होगी।
(ख) जहां कि किसी व्यक्ति ने, जिससे स्टाम्पित रसीद मांगी जा सकती थी, अस्टाम्पित रसीद दी है और यदि ऐसी रसीद स्टाम्पित होती तो उसके विरूद्ध साक्ष्य में ग्राह्म होती, वहां ऐसी रसीद उसे निविदत्त करने वाले व्यक्ति द्वारा एक रूपये की शास्ति दे दिए जाने पर उसके विरूद्ध साक्ष्य में ग्राह्म होगी।	(ख) जहां कि किसी व्यक्ति ने, जिससे स्टाम्पित रसीद मांगी जा सकती थी, अस्टाम्पित रसीद दी है और यदि ऐसी रसीद स्टाम्पित होती तो उसके विरूद्ध साक्ष्य में ग्राह्य होती, वहां ऐसी रसीद उसे निविदत्त करने वाले व्यक्ति द्वारा एक रूपये की शास्ति दे दिए जाने पर उसके विरूद्ध साक्ष्य में ग्राह्य होगी।
(ग) जहां कि किसी प्रकार कोई संविदा या करार दो या अधिक पत्रों से मिलकर बने पत्र व्यवहार द्वारा प्रभावी होता है और पत्रों में से किसी एक पर उचित स्टाम्प लगा है,	(ग) जहां कि किसी प्रकार कोई संविदा या करार दो या अधिक पत्रों से मिलकर बने पत्र व्यवहार द्वारा प्रभावी होता है और पत्रों में से किसी एक पर उचित स्टाम्प लगा है,

धारा-35 (**संशोधन के पूर्व)**	**धारा-**35 (**संशोधन के पश्चात)**
वहां उस संविदा या करार की बाबत् यह समझा जाएगा कि वह सम्यक् रूप से स्टाम्पित है। **(**घ) इसमें अन्तर्विष्ट कोई भी बात दण्ड प्रक्रिया संहिता, **1898 (1898** का **5)** के अध्याय **12** या अध्याय **36** के अधीन की कार्यवाही से भिन्न दाण्डिक न्यायालय की किसी कार्यवाही में किसी लिखत को साक्ष्य में ग्रहण किए जाने से निवारित नहीं करेगी। **(**ड.) इसमें अन्तर्विष्ट कोई भी बात किसी न्यायालय में किसी लिखत को ग्रहण किए जाने से तब निवारित नहीं करेगी, जब कि ऐसी लिखत सरकार द्वारा या उसकी ओर से निष्पादित की गई है या उस पर इस अधिनियम की धारा **32** या इसके किसी अन्य उपबन्ध द्वारा यथा उपबंधित कलेक्टर का प्रमाण पत्र लगा हुआ है। **(**च) कोई ऐसी लिखत, जो विनिमय-पत्र या वचन-पत्र नहीं है, सभी न्याय संगत अपवादों के अधीन रहते हुए उस शुल्क के, जिससे वह प्रभार्य है अथवा उस लिखत की दशा में, जो अपर्याप्त रूप से स्टाम्पित है, ऐसे शुल्क को पूरा करने के लिए अपेक्षित रकम के दे दिये जाने पर रजिस्ट्रकृत या अधिप्रमाणित की जाएगी।	वहां उस संविदा या करार की बावत् यह समझा जाएगा कि वह सम्यक् रूप से स्टाम्पित है। **(**घ) इसमें अन्तर्विष्ट कोई भी बात दण्ड प्रक्रिया संहिता, **1973 (1974** का **2)** के अध्याय **9** या अध्याय **10** के भाग घ के अधीन की कार्यवाही से भिन्न दाण्डिक न्यायालय की किसी कार्यवाही में किसी लिखत को साक्ष्य में ग्रहण किए जाने से निवारित नहीं करेगी। **(**ड.) इसमें अन्तर्विष्ट कोई भी बात किसी न्यायालय में किसी लिखत को ग्रहण किए जाने से तब निवारित नहीं करेगी, जबकि ऐसी लिखत सरकार द्वारा या उसकी ओर से निष्पादित की गई है या उस पर इस अधिनियम की धारा **32** या इसके किसी अन्य उपबन्ध द्वारा यथा उपबंधित कलेक्टर का प्रमाण पत्र लगा हुआ है। **(**च) विलोपित।

इस तालिका से निम्नलिखित तथ्य प्रकट हैं -

1. धारा-**35** का मूल प्रावधान इस संशोधन अधिनियम से अप्रभावित है अर्थात् ऐसी लिखतें जो अधिनियम की अनुसूची **1** एवं अनुसूची **1** क के अनुसार प्रभार्य समुचित रकम से अन्यून स्टाम्प से स्टाम्पित नहीं है (सम्यक् रूप से स्टाम्पित नहीं है) साक्ष्य में किसी भी प्रयोजन से ग्राह्य नहीं हैं।

2. परंतुक के पूर्व खंड (क) के स्थान पर नवीन खण्ड (क) के प्रतिस्थापन का प्रभाव यह है कि ऐसी लिखतें साक्ष्य में तब ग्रहण की जा सकती हैं यदि उस पर अवशेष स्टाम्प शुल्क तथा लिखत के निष्पादन की तिथि से इस अवशेष स्टाम्प शुल्क पर दो प्रतिशत प्रतिमाह (या माह के भाग

के लिये) के बराबर शास्ति का भुगतान कर दिया जाता है। यह शास्ति किसी भी दशा में अवशेष स्टाम्प शुल्क से अधिक नहीं होगी।

उदाहरणः दिनांक **01.01.2018** को 'अ' ने 'ब' के **3** वर्षीय पुत्र को दत्तक लिया। इस संव्यवहार के संबंध में एक विलेख एक सौ रूपये के स्टाम्प पर लेख किया गया। विलेख पर 'अ' 'ब' तथा साक्षियों ने हस्ताक्षर किए। दिनांक **15.07.2018** की तिथि पर इस लिखत के संबंध में निर्धारण निम्नानुसार होगा -

(i) लिखत का वर्णन - दत्तक विलेख

(ii) निष्पादन तिथि - **1** जनवरी **2018**

(iii) प्रभार्य स्टाम्प शुल्क के संबंध में प्रावधान - अनुसूची-**1**क अनुच्छेद-**4**

(iv) प्रभार्य स्टाम्प शुल्क (निष्पादन की तिथि पर) - दो हजार रूपये

(v) विलेख पर संदत्त शुल्क - एक सौ रूपये

(vi) अवशेष शुल्क - **2000-100 = 1900/-** रूपये

(vii) निष्पादन की तिथि से निर्धारण की तिथि तक अवधि - **6)** माह

(viii) प्रभार्य शास्ति - **1900** का **2% x 6 1/2) = 247/-** रूपये; **(**यह राशि अवशेष शुल्क **1900/-** रूपये से न्यून है)

(ix) अवशेष शुल्क एवं शास्ति **- 1900+247 = 2147/-**रूपये

यदि उक्त दत्तक विलेख के संबंध में **2147/-** रूपये का शुल्क एवं शास्ति संदत्त कर दी जाती है तो उसे साक्ष्य में ग्रहण किया जा सकेगा।

3. उक्त प्रावधान के प्रयोज्य होने की तिथि से संबंध में प्रश्न उत्पन्न हो सकता है । इस संबंध में उल्लेखनीय है कि जिस तिथि पर प्रश्नगत लिखत को साक्ष्य में ग्रहण किए जाने/न किये जाने के प्रश्न पर विचार किया जा रहा हो उसी तिथि पर विद्यमान विधि के अनुसार ही इस प्रश्न का निराकरण किया जाएगा अर्थात **23** अक्टूबर **2017** एवं उसके पश्चात् लिखतों की ग्राह्यता संशोधित धारा-**35** के अधीन होगी।

नवीन प्रतिस्थापित खण्ड (घ) इस प्रकार है **-**

"इसमें अन्तर्विष्ट कोई भी बात दण्ड प्रक्रिया संहिता**, 1973** के अध्याय **9** या अध्याय **10** के भाग घ के अधीन की कार्यवाही से भिन्न दाण्डिक न्यायालय की किसी कार्यवाही में किसी लिखत को साक्ष्य में ग्रहण किए जाने से निवारित नहीं करेगी।**"**

स्पष्ट है कि आपराधिक न्यायालय के समक्ष लंबित किसी कार्यवाही में साक्ष्य के रूप में प्रस्तुत लिखत अपर्याप्त रूप से स्टाम्पित होने के आधार पर अग्राह्य नहीं की जाएगी सिवाय दण्ड प्रक्रिया संहिता**, 1973** के अध्याय **9** के अधीन पत्नी**,** संतान और माता-पिता के भरण पोषण एवं अध्याय **10** के अधीन स्थावर सम्पत्ति संबंधित विवाद से संबंधित मामलों की कार्यवाहियों में। इन दोनों कार्यवाहियों में प्रस्तुत लिखतें यदि अपर्याप्त रूप से स्टाम्पित हैं तो वह इस तथ्य के होते हुए भी कि उन्हें आपराधिक न्यायालय की कार्यवाही में प्रस्तुत किया गया है**,** साक्ष्य में किसी भी प्रयोजन से अग्राह्य हैं।

5. वर्ष **2006** के केन्द्रीय संशोधन द्वारा खण्ड (क) से पद "केवल दस पैसे से अनधिक शुल्क से प्रभार्य होने वाली लिखत नहीं है या जो विनिमय पत्र या वचनपत्र नहीं है, ऐसे सभी न्यायसंगत अपवादों के अधीन रहते हुए" विलोपित कर दिया गया था। इस कारण खण्ड (च) अप्रासंगिक हो गया था। इस संषोधन अधिनियम द्वारा खण्ड (च) को विलोपित कर दिया गया है।

3. **परिबद्ध लिखतों को स्टाम्पित करने की कलेक्टर की शक्ति (धारा-**40)

संशोधन के पूर्व एवं पश्चात् धारा **40** के प्रावधान निम्नानुसार हैं-

धारा-40 (**संशोधन के पूर्व)**	**धारा-**40 (**संशोधन के पश्चात्)**
40 (1) जबकि कलेक्टर किसी लिखत को, जो रसीद या विनिमय-पत्र या वचन-पत्र नहीं है, धारा **33** के अधीन परिबद्ध करता है, या धारा **38** की उपधारा **(2)** के अधीन उसे भेजी गई किसी लिखत को प्राप्त करता है, तब वह निम्नलिखित प्रक्रिया अपनाएगा - **(**क) यदि उसकी यह राय है कि ऐसी लिखत सम्यक् रूप से स्टाम्पित है या शुल्क से प्रभार्य नहीं है तो वह उस पर पृष्ठांकन द्वारा यह प्रमाणित करेगा कि वह यथास्थिति, सम्यक् रूप से स्टाम्पित है या वह इस प्रकार से प्रभार्य नहीं है; **(**ख) यदि उसकी यह राय है कि ऐसी लिखत शुल्क से प्रभार्य है और वह सम्यक् रूप से स्टाम्पित नहीं है, तो वह यह अपेक्षा करेगा कि उचित शुल्क या उसे पूरा करने के लिये अपेक्षित रकम और साथ-साथ पांच रूपये की शास्ति अथवा यदि वह ठीक समझता है तो उचित शुल्क या उसकी कमी वाले भाग की रकम के दस गुने से अनधिक रकम, चाहे ऐसी रकम पांच रूपये से अधिक हो या कम हो, दी जाएः	**40 (1)** जबकि कलेक्टर किसी लिखत को, जो रसीद या विनिमय-पत्र या वचन-पत्र नहीं है, धारा **33** के अधीन परिबद्ध करता है, या धारा **38** की उपधारा **(2)** के अधीन उसे भेजी गई किसी लिखत को प्राप्त करता है, तब वह निम्नलिखित प्रक्रिया अपनाएगा - **(**क) यदि उसकी यह राय है कि ऐसी लिखत सम्यक् रूप से स्टाम्पित है या शुल्क से प्रभार्य नहीं है, तो वह उस पर पृष्ठांकन द्वारा यह प्रमाणित करेगा कि वह यथास्थिति, सम्यक् रूप से स्टाम्पित है या वह इस प्रकार से प्रभार्य नहीं है; **(**ख) यदि, जांच करने के पश्चात्, उसकी यह राय है कि ऐसी लिखत शुल्क से प्रभार्य है और वह सम्यक् रूप से स्टाम्पित नहीं है, तो वह यह अपेक्षा करेगा कि उचित शुल्क या उसे पूरा करने के लिये अपेक्षित रकम, स्टाम्प शुल्क की कमी वाले भाग के लिये प्रति माह अथवा उसके भाग के लिए लिखत के निष्पादन की तारीख से दो प्रतिशत के बराबर शास्ति का भुगतान किया जाए तथा उस पर पृष्ठांकन द्वारा यह प्रमाणित करेगा कि वह सम्यक् रूप से स्टाम्पित है। यह रकम उस व्यक्ति द्वारा देय होगी, जो कि शुल्क का भुगतान करने के लिये दायी होः परंतु किसी भी मामले में इस प्रकार संगणित की गई शास्ति की राशि वसूल किए जाने वाले कम स्टाम्प शुल्क की मूल राशि से अधिक नहीं होगीः

धारा-40 (**संशोधन के पूर्व**)	**धारा-**40 (**संशोधन के पश्चात्**)
परंतु जब कि ऐसी लिखत केवल इस कारण से परिबद्ध की गई है कि वह धारा **13** या धारा **14** के उल्लंघन में लिखी गई है, तब यदि कलेक्टर ठीक समझता है तो वह इस धारा द्वारा विहित की गई पूरी शास्ति की माफी दे सकेगा।	परन्तु यह और कि जब ऐसी लिखत केवल इस कारण से परिबद्ध की गई है कि वह धारा **13** या धारा **14** के उल्लंघन में लिखी गई है, तब यदि कलेक्टर, यह ठीक समझे तो, इस धारा द्वारा विहित की गई पूरी शास्ति की माफी दे सकेगा; **(**ग) इस अध्याय के अधीन जांच के प्रयोजन के लिए, कलेक्टर को साक्षियों को जिनमें लिखत के पक्षकार अथवा उनमें से कोई सम्मिलित है, समन करने तथा हाजिर कराने की तथा उसी माध्यम से और जहां तक हो सके, उसी रीति में दस्वातेजों को प्रस्तुत करने के लिए विवश करने की शक्ति होगी जैसा कि सिविल प्रक्रिया संहिता, **1908 (1908** का संख्यांक **15)** के अधीन किसी सिविल न्यायालय के मामले में उपबंधित है; **(**घ) कलेक्टर द्वारा उपधारा **(1)** के अधीन पारित आदेश से व्यथित कोई भी व्यक्ति ऐसे आदेश के विरूद्ध, विहित रीति में, सरकार द्वारा इस संबंध में अधिसूचित अधिकारी को अपील कर सकेगाः परन्तु कोई अपील ग्राह्य नहीं की जाएगी, जब तक कि ऐसा व्यक्ति कलेक्टर द्वारा आदेशित कम स्टाम्प शुल्क की राशि का कम से कम **35** प्रतिशत जमा नहीं कर देता। ऐसी राशि अपीलीय अधिकारी के अंतिम आदेश के अनुसार

धारा-40 (संशोधन के पूर्व)	धारा-40 (संशोधन के पश्चात्)
	देय राशि के विरूद्ध समायोज्य अथवा जमा किए जाने की तारीख से प्रति माह या उसके भाग के लिए एक प्रतिशत ब्याज के साथ वापसी योग्य होगी; (ड.) खण्ड (घ) के अधीन अपील में पारित आदेश से व्यथित कोई भी व्यक्ति ऐसे आदेश के विरूद्ध, विहित रीति में, मुख्य नियंत्रक, राजस्व प्राधिकारी को अपील कर सकेगा; (च) प्रत्येक प्रथम तथा द्वितीय अपील उस आदेश की, जिसके कि विरूद्ध अपील फाइल की गई हो, संसूचना की तारीख से तीस दिन के भीतर उस आदेश की, जिसके संबंध में आपत्ति की गई हो, एक प्रमाणित प्रतिलिपि के साथ फाईल की जाएगी तथा ऐसी रीति में, उपस्थापित एवं सत्यापित की जाएगी, जो कि विहित की जाए; परंतु पूर्वोक्त की कालावधि की संगणना करने में वह समय अपवर्जित कर दिया जाएगा, जो कि उस आदेश की, जिसके कि विरूद्ध अपील की गई हो, प्रतिलिपि अभिप्राप्त करने के लिये अपेक्षित हो; (छ) अपीलीय प्राधिकारी, अपील का विनिश्चय करने में ऐसी प्रक्रिया का अनुसरण करेगा, जैसी कि विहित की जाए; परंतु कोई भी आदेश अपीलार्थी को सुनवाई का अवसर दिए बिना पारित नहीं किया जाएगा। (ज) यथास्थिति प्रथम अथवा द्वितीय अपील में पारित आदेशों के अध्यधीन रहते हुए, कलेक्टर द्वारा उपधारा (1) के अधीन पारित किया गया आदेश अंतिम

(2) इस अधिनियम के प्रयोजनों के लिये उपधारा **(1)** के खण्ड (क) के अधीन हर एक प्रमाण पत्र उसमें वर्णित विषयों का निष्चायक साक्ष्य होगा। **(3)** जहां कि कोई लिखत धारा **38** की उपधारा **(2)** के अधीन कलेक्टर को भेजी गई है, वहां कलेक्टर इस धारा द्वारा यथा उपबंधित कार्रवाई कर लेने के पश्चात् उसे परिबंधन अधिकारी को लौटा देगा।	होगा और किसी भी सिविल न्यायालय में या किसी भी अन्य प्राधिकारी के समक्ष चाहे वह कोई भी हो, प्रश्नगत नहीं किया जाएगा । **(2)** इस अधिनियम के प्रयोजनों के लिए उपधारा **(1)** के खण्ड (क) तथा (ख) के अधीन प्रत्येक प्रमाण-पत्र, उसमें वर्णित विषयों का निश्चायक साक्ष्य होगा। **(3)** जहां कि कोई लिखत धारा **38** की उपधारा **(2)** के अधीन कलेक्टर को भेजी गई है, वहां कलेक्टर इस धारा द्वारा यथा उपबंधित कार्यवाही कर लेने के पश्चात् उसे परिबद्ध करने वाले अधिकारी को लौटा देगा।

इस तालिका से निम्नलिखित तथ्य प्रकट होते हैं-

1. प्रतिस्थापित नवीन धारा-**40** के अधीन उपधारा-**40(1)** के खण्ड (ख) में कतिपय संशोधन तथा नवीन खण्ड (ग), **(**घ), **(**ड.), **(**च), **(**छ) तथा (ज) जोड़े गए हैं।
2. यह धारा परिबद्ध लिखतों को स्टाम्पित करने के लिये कलेक्टर को सशक्त करती है। यह धारा कलेक्टर द्वारा परिबद्ध लिखतों अथवा किसी न्यायाधीश सहित अन्य लोक प्राधिकारी द्वारा परिबद्ध लिखतों जिन्हें धारा **38(2)** के अधीन कलेक्टर को प्रेषित किया जाता है, के संबंध में कलेक्टर द्वारा अनुसरित की जाने वाली प्रक्रिया विहित करती है।
3. उपधारा-**40(1)** के खण्ड (ख) में ''जांच के पश्चात्'' पद योजित किया गया है अर्थात किसी लिखत के सम्यक् रूप से स्टाम्पित नहीं होने के संबंध में कलेक्टर राय जांच के उपरांत ही बना सकता है। खण्ड (ग) में जांच की प्रक्रिया विहित की गई है। खण्ड (घ), **(**ड.) व (च) में ऐसी जांच में कलेक्टर द्वारा पारित आदेश की अपील की प्रक्रिया विहित है। पुनः इस खंड (ख) में स्टाम्प शुल्क एवं शास्ति के संबंध में धारा-**35** के परंतुक(क) के समान प्रावधान किया गया है। संशोधन द्वारा कलेक्टर द्वारा उचित शुल्क अवधारित कर उसकी दस गुना रकम लेकर लिखत अधिप्रमाणित करने के विवेकाधिकार को समाप्त कर दिया गया है। इसका अर्थ यह है कि धारा-**35** के परंतुक (क) के अधीन सम्यक् रूप से स्टाम्पित न की गई लिखत को साक्ष्य में ग्रहण किए जाने हेतु देय स्टाम्प शुल्क एवं शास्ति तथा धारा **40(1) (**ख) के अधीन लिखत के सम्यक् रूप से स्टाम्पित होने के अधिप्रमाणन हेतु देय स्टाम्प शुल्क एवं शास्ति में कोई भी अंतर नहीं

रहा है। अतएव धारा-**38(2)** के अधीन लिखत की मूल कलेक्टर के पास उसी दशा में भेजी जानी चाहिए जबकि पक्षकार अपेक्षित स्टाम्प शुल्क एवं शास्ति का भुगतान न्यायालय के आदेशानुसार नहीं करता है अथवा जब पक्षकार लिखत के स्वरूप या वर्णन (Description of instrument) के संबंध में धारा **33(2)** के अधीन जांच के पश्चात् न्यायालय के निष्कर्ष से सहमत नहीं है। यहां यह ध्यातव्य है कि लिखत के स्वरूप या वर्णन (Description) एवं उसके सम्यक् रूप से स्टाम्पित होने या नहीं होने के संबंध में कलेक्टर का अवधारण अंतिम है। धारा-**40(2)** के अधीन तत्संबंध में कलेक्टर का प्रमाणपत्र निश्चयात्मक साक्ष्य की श्रेणी में रखा गया है।

4. **धारा-** 41

घटनावश असम्यक् रूप से स्टाम्पित लिखतों के संबंध में कलेक्टर द्वारा अपेक्षित स्टाम्प शुल्क एवं शास्ति के संबंध में धारा-**35** के परंतुक (क) तथा धारा **40 (1)**(ख) के समान प्रावधान किया गया है।

5. **धारा-** 45

उपधारा **45(1)** को विलोपित कर दिया गया है तथा धारा **45(2)** को प्रतिस्थापित किया गया है। प्रतिस्थापित प्रावधान के अधीन यदि न्यायालय अथवा अन्य प्राधिकारी द्वारा विधितः प्रभार्य स्टाम्प शुल्क से अधिक स्टाम्प शुल्क वसूल कर लिया गया है वहां व्यथित पक्षकार ऐसे भुगतान की तिथि से **6** माह के भीतर मुख्य नियंत्रक राजस्व प्राधिकारी के समक्ष इस आशय का आवेदन प्रस्तुत कर सकता है। मुख्य नियंत्रक राजस्व प्राधिकारी समुचित जांच पश्चात् भुगतान किए गए आधिक्य स्टाम्प शुल्क को वापस कर सकता है।

6. **अन्य संशोधन -**

संशोधन अधिनियम द्वारा धारा-**47** क विलोपित कर दी गई है तथा धारा **48**ख, **73** एवं **76** क, प्रतिस्थापित की गई है। इन धाराओं का संबंध न्यायालयीन प्रक्रिया से नहीं है।

इसके अतिरिक्त मूल अधिनियम की अनुसूची-**1** क में अनुच्छेद **36** (दान) के स्पष्टीकरण, अनुच्छेद **48** (विभाजन) के स्पष्टीकरण एक, अनुच्छेद **50** (मुख्त्यारनामा) के स्पष्टीकरण एक, अनुच्छेद **54** (निर्मुक्ति) के स्पष्टीकरण तथा अनुच्छेद **57** (व्यवस्थापन) के स्पष्टीकरण -दो में शब्द "बहन" के स्थान पर "बहन, पुत्रवधु" स्थापित किए गए हैं। इस संशोधन के प्रभाव से इन सभी अनुच्छेदों में अंतर्विष्ट संव्यवहारों में कुटुम्ब के सदस्य के रूप में पुत्रवधु भी सम्मिलित हो गई है।

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The qualities desired of a Judge can be simply stated : "that if he be a good one and that he be thought to be so."

– Dr. Arijit Pasayat, J.

in Brij Mohan Lal v. Union of India, (2002) 5 SCC 1, para 7

परक्राम्य लिखत (संशोधन) अधिनियम, 2018: **प्रयोज्यता**

विधान माहेश्वरी,
सहायक संचालक,
म.प्र. राज्य न्यायिक अकादमी

दिनांक **02.08.2018** को राजपत्र में प्रकाशन के साथ पुनः धारा **138** से संबंधित मामलों के त्वरित निराकरण के उद्देश्य से परक्राम्य लिखत अधिनियम, **1881** में नवीन संशोधन समाहित किये गये हैं। परक्राम्य लिखत (संशोधन) अधिनियम, **2018** के द्वारा दो नवीन धाराएं **143**क व **148** अधिनियम में अंतःस्थापित की गई हैं। उक्त धाराएँ दिनांक **01.09.2018** से लागू हैं।

संसदीय बहस के परिशीलन से यह ज्ञात होता है कि उक्त संशोधन का मुख्य उद्देश्य चैक अनादरण के मामलों के विचारण में विलम्ब से परिवादी को हुये नुकसान की शीघ्र भरपाई करवाना एवं तुच्छ प्रकृति के प्रकरणों को न्यायालय में आने से रोकना है। संसद द्वारा यह अनुभव किया गया है कि अभियुक्त द्वारा विचारण तथा उसके पश्चात् अपील के लंबित रहने से परिवादी को हुये नुकसान की भरपाई में विलम्ब होता है एवं उसके व्यापारिक हित भी प्रभावित होते हैं।

संशोधन अधिनियम द्वारा अंतःस्थापित धारा **143**क निम्नवत हैः-

"धारा **143**क. अंतरिम प्रतिकर का निदेश देने की शक्ति - **(1)** दण्ड प्रक्रिया संहिता, **1973** में अंतर्विष्ट किसी बात के होते हुये भी, धारा **138** के अधीन अपराध का विचारण करने वाला न्यायालय चैक के लेखीवाल को **-**

(क) संक्षिप्त विचारण या किसी समन मामले में, जहाँ परिवाद में उसने किये गये अभियोग का दोषी न होने का अभिवाक् किया हो; और

(ख) किसी अन्य मामले में, आरोप विरचित किये जाने पर, परिवादी को अंतरिम प्रतिकर संदाय करने का आदेश कर सकेगा।

(2) उपधारा **(1)** के अधीन अंतरिम प्रतिकर चैक की राशि के बीस प्रतिशत से अनधिक नहीं होगा।

(3) अंतरिम प्रतिकर, उपधारा **(1)** के अधीन जारी आदेश की तारीख से साठ दिवस के भीतर या चैक के लेखीवाल द्वारा पर्याप्त कारण दर्शित किये जाने पर तीस दिवस से अनधिक ऐसी और अवधि के भीतर जिसका न्यायालय द्वारा निदेश दिया जाये, संदाय किया जायेगा।

(4) यदि चैक के लेखीवाल को दोषमुक्त कर दिया जाता है तो न्यायालय परिवादी द्वारा प्रतिकर की अंतरिम राशि लेखीवाल को, आदेश की तारीख से साठ दिवस के भीतर या परिवादी द्वारा पर्याप्त कारण दर्शित किये जाने पर तीस दिवस से अनधिक ऐसी और अवधि के भीतर, जिसका न्यायालय द्वारा निदेश दिया जाये, सुसंगत वित्तीय वर्ष के प्रारंभ पर प्रचलित बैंक दर से, जैसा भारतीय रिजर्व बैंक द्वारा प्रकाशित किया गया हो, ब्याज सहित प्रतिसंदाय करने का निदेश देगा।

(5) इस धारा के अधीन संदेय अंतरिम प्रतिकर इस प्रकार वसूल किया जायेगा, मानो वह दण्ड प्रक्रिया संहिता, **1973 (1974** का **2)** की धारा **421** के अधीन कोई जुर्माना हो।

(6) धारा **138** के अधीन अधिरोपित जुर्माने की राशि या दण्ड प्रक्रिया संहिता, **1973** की धारा **357** के अधीन अधिनिर्णीत प्रतिकर की राशि में से इस धारा के अधीन अंतरिम प्रतिकर के रूप में संदत्त या वसूल की गई राशि घटा दी जायेगी।''

धारा **143**क की प्रयोज्यता के संबंध में आगे चर्चा करने के पूर्व इस धारा में प्रयुक्त प्रमुख पदों पर विचार किया जाना आवश्यक है **-**

1. विचारण करने वाला न्यायालय - वह न्यायालय जिसके द्वारा अपराध की विशिष्टियाँ बताये जाने के पश्चात् विचारण किया जा रहा है अथवा जिसे प्रकरण अंतरण पर प्राप्त हुआ है।

2. लेखीवाल - धारा **7** परक्राम्य लिखत अधिनियम के अनुसार चेक का रचयिता उसका ''लेखीवाल'' कहलाता है।

3. अंतरिम प्रतिकर - अंतरिम प्रतिकर से तात्पर्य किसी व्यक्ति को अभियोजन में उपगत व्ययों एवं अपराध के परिणामस्वरूप हुई किसी हानि या क्षति के संबंध में एक अंतराल हेतु अनंतिम प्रतिकर से है।

4. कर सकेगा - ''कर सकेगा'' पद से अभिप्रेत है कि यह शक्ति न्यायालय के विवेकाधीन है। उक्त पद का प्रयोग यह भी दर्षाता है कि न्यायालय न्यायोचित रूप से किसी शक्ति का प्रयोग करने को स्वीकार अथवा अस्वीकार कर सकता है।

5. बीस प्रतिशत से अनधिक - चैक राशि के बीस प्रतिशत तक। उदाहरण के लिये यदि चैक एक लाख रूपये का है तो न्यायालय बीस हजार तक किसी भी राशि के संबंध में आदेश दे सकती है।

6. साठ दिवस के भीतर - साठ दिवस से अभिप्राय आदेश दिनाँक से साठ दिवस से है। धारा **9,** साधारण खंड अधिनियम, **1897** के आलोक में ''से'' शब्द हेतु पहले दिन को अपवर्जित कर गणना की जावेगी।

7. पर्याप्त कारण - पर्याप्त कारण से अभिप्राय ऐसे कारण से है जो कि प्रकरण के तथ्य एवं परिस्थितियों में पक्षकार द्वारा उपेक्षापूर्ण अथवा असद्भाव में कारित नहीं किया गया है। साथ ही वह कारण जिसके आलोक में पक्षकार पर तत्परतापूर्वक कार्य न किये जाने एवं निष्क्रिय होने के आक्षेप नहीं लगाये जा सकते हैं।

8. सुसंगत वित्तीय वर्ष का प्रारंभ - आदेश दिये जाने की दिनाँक का वित्तीय वर्ष सुसंगत होगा। धारा **2(21),** साधारण खण्ड अधिनियम, **1897** के अंर्तगत वित्तीय वर्ष से अभिप्राय अप्रैल के प्रथम दिवस से प्रारंभ होने वाले वर्ष से है।

9. प्रचलित बैंक दर - बैंक दर से अभिप्राय उक्त दर से है जो कि धारा **49** भारतीय रिजर्व बैंक अधिनियम, **1934** के अंर्तगत भारतीय रिजर्व बैंक द्वारा समय-समय पर प्रकाशित की जाती है।

धारा **143**क के अनुसार न्यायालय धारा **138** से संबंधित मामलों में अपराध की विशिष्टियां अथवा आरोप विरचित करने के पश्चात्, यदि अभियुक्त द्वारा दोषी न होने का अभिवचन किया जाता है तो न्यायालय अभियुक्त को अंतरिम प्रतिकर संदाय करने हेतु आदेशित कर सकता है जो कि चैक की राशि के बीस प्रतिशत तक का हो सकता है।

यह महत्वपूर्ण है कि धारा **143**क अंतरिम प्रतिकर के संबंध में "सकेगा" **(May)** शब्द का उपयोग करती है। उक्त शब्दों का प्रयोग यह दर्शित करता है कि अंतरिम प्रतिकर का प्रावधान आज्ञापक नहीं है एवं प्रत्येक मामले में अंतरिम प्रतिकर का यांत्रिक रूप से आदेश नहीं किया जाना है। न्यायालय द्वारा इस संबंध में संदत्त विवेकाधिकार का न्यायोचित रूप से प्रयोग किया जाना है।

उक्त प्रावधान को लागू किये जाने एवं अंतरिम प्रतिकर दिलाये जाने के विवेकाधिकार के प्रयोग के संबंध में विचार किया जावे तो मान्नीय सर्वोच्च न्यायालय द्वारा मीटर्स एण्ड इन्सट्रूमेंट्स प्रायवेट लिमिटेड व अन्य विरूद्ध कंचन मेहता, ए.आई.आर. **2017** एस.सी. **4594,** में यह अभिनिर्धारित किया गया है कि ऐसे मामलों में जिनमें अभियुक्त दोषी न होने का अभिवचन कर विचारण चाहता है वहां उससे विनिर्दिष्ट प्रतिरक्षा प्रकट करने की अपेक्षा की जावेगी। न्यायालय के लिये अभियुक्त से विनिर्दिष्ट प्रश्न पूछने का भी रास्ता खुला हुआ है।

न्यायालय द्वारा धारा **143**क के अंतर्गत अंतरिम प्रतिकर का आदेश देने के विवेकाधिकार के प्रयोग हेतु एक महत्वपूर्ण विचारणीय बिन्दु अभियुक्त द्वारा बताया जा रहा विनिर्दिष्ट बचाव हो सकता है। ऐसी परिस्थितियों में जबकि अभियुक्त द्वारा मात्र औपचारिक इंकार कर किसी प्रकार का स्पष्ट एवं सुदृढ़ बचाव नहीं बतलाया जाता है, वहां न्यायालय अंतरिम प्रतिकर पर विचार कर सकता है। वहीं दूसरी ओर यदि अभियुक्त द्वारा विचारण के प्रारंभ में अपने बचाव के प्रकटीकरण में प्रथमदृष्टया समाधानप्रद व संभाव्य आधार लिये जाते हैं, वहां न्यायालय उभयपक्ष को श्रवण कर अंतरिम प्रतिकर अस्वीकार भी कर सकता है। यह ध्यातव्य है कि संशोधन का उद्देश्य परिवादी को हुये नुकसान की शीघ्र भरपाई करवाना है न कि अभियुक्त को अंतरिम रूप से दंडित करना है। अतः आदेश पत्रिका में अभिवाक् अंकित करने एवं अभियुक्त के बचाव का विवरण लेख करने के पश्चात् न्यायालय को अंतरिम प्रतिकर के संबंध में विचार करना चाहिये। यह उल्लेखनीय है कि न्यायालय यहां आवेदन की अपेक्षा भी कर सकता है क्योंकि अंतरिम प्रतिकर परिवादी द्वारा अधिकार स्वरूप न मांगा जाकर न्यायालय के विवेक पर निर्भर है।

पुनः, धारा **143**क की उपधारा **(3)** अंतरिम प्रतिकर की अदायगी हेतु आदेश दिनाँक से साठ दिवस के भीतर की समय सीमा तय करती है। उक्त समयावधि को पर्याप्त हेतुक दर्शित करने पर तीस दिवस तक और बढ़ाया जा सकता है। चूंकि संशोधन का उद्देश्य परिवादी को हुये नुकसान की शीघ्र भरपाई कराना है, अतः न्यायालय द्वारा अंतरिम प्रतिकर राशि परिवादी को शीघ्र प्राप्त हो जाना सुनिश्चित करना चाहिये परन्तु किसी भी परिस्थिति में प्रतिकर अदायगी हेतु समयावधि कुल मिलाकर नब्बे दिवस से अधिक नहीं हो सकती है।

धारा **143**क की उपधारा **(5)** के अनुसार, यदि अंतरिम प्रतिकर निश्चित समयावधि में परिवादी को संदाय नहीं किया जाता है तो न्यायालय उसकी वसूली धारा **421** दंड प्रक्रिया संहिता के अंतर्गत अर्थदंड की वसूली की रीति से कर सकता है अर्थात साठ दिवस अथवा नब्बे दिवस के पश्चात् अंतरिम प्रतिकर संदाय न किये जाने की दषा में न्यायालय द्वारा आदेश पत्रिका में इस संबंध में उल्लेख कर नियम **352** सहपठित नियम **575 (8)** आपराधिक नियम एवं आदेश के अनुसार पृथक से विविध न्यायिक प्रकरण पंजीबद्ध किया जाना अपेक्षित है। विविध न्यायिक प्रकरण में कार्यवाही स्वतंत्र रूप एवं त्वरित रूप से परिवादी को अंतरिम प्रतिकर की राशि दिलाये जाने के उद्देश्य से किया जाना अपेक्षित होगा।

संशोधन द्वारा अंतर्विष्ट धारा **143**क की उपधारा **(6)** में ऐसी स्थिति के संबंध में उल्लेख किया गया है जबकि चैक के लेखीवाल अर्थात अभियुक्त के विरूद्ध अंतरिम प्रतिकर का आदेश दिये जाने के पश्चात् उक्त अंतरिम प्रतिकर परिवादी द्वारा प्राप्त कर लिया जाता है परन्तु अंतिम निराकरण में अभियुक्त को दोषमुक्त कर दिया जाता है। ऐसी स्थिति में न्यायालय द्वारा परिवादी को आदेश से साठ दिवस के भीतर अथवा पर्याप्त हेतुक दर्शित करने पर तीस दिवस से अनधिक ऐसी और अवधि में अभियुक्त को अंतरिम प्रतिकर वापस करने का निदेश दिया जावेगा। साथ ही उक्त अंतरिम प्रतिकर राशि पर भारतीय रिजर्व बैंक द्वारा सुसंगत वित्तीय वर्ष के प्रारंभ में प्रकाशित की गयी प्रचलित "बैंक दर" पर ब्याज भी परिवादी द्वारा संदाय होगा।

"बैंक दर" के संबंध में विचार किया जावे तो धारा **49,** भारतीय रिजर्व बैंक अधिनियम**, 1934** के अंतर्गत भारतीय रिजर्व बैंक द्वारा समय - समय पर ऐसी मानक दर का प्रकाशन किया जाता है जिस पर वह अधिनियम के अंतर्गत अर्ह होकर विनिमय पत्र या अन्य वाणिज्यिक पत्र क्रय करने या पुनः छूट देकर प्रदान करने हेतु तैयार है। उक्त दर को बैंक दर से संबोधित किया जाता है।

भारतीय रिजर्व बैंक द्वारा समय-समय पर द्वि-मासिक आर्थिक नीति विवरण जारी किया जाता है, जिसके अंतर्गत बैंक दर का निर्धारण किया जाता है। धारा **143**क उपधारा **(4)** के अंतर्गत आदेश किये जाते समय उक्त दिनाँक की बैंक दर सुसंगत न होकर वित्तीय वर्ष के प्रारंभ में प्रचलित बैंक दर सुसंगत है। वर्तमान में उक्त बैंक दर हालांकि अधिसूचना दिनांक **01** अगस्त**, 2018** के अनुसार **6.75** प्रतिशत है परन्तु वित्तीय वर्ष **2018-2019** के प्रांरभ में **6.25** प्रतिशत होने से, उक्त दर अंतरिम प्रतिकर पर ब्याज दिलाने हेतु सुसंगत है। यहां यह भी उल्लेखनीय है कि इस संबंध में जारी की गई अधिसूचना की न्यायालय द्वारा धारा **57** साक्ष्य अधिनयम**, 1872** के अंतर्गत न्यायिक अवेक्षा की जा सकती है। न्यायालय द्वारा भारतीय रिर्जव बैंक की वेबसाइट पर नोटिफिकेशन में जाकर प्रचलित बैंक दर के संबंध में जानकारी ली जा सकती है। इस संबंध में न्यायालय द्वारा निर्णय अथवा अंतिम आदेश में विनिर्दिष्टतः निदेश दिया जाना चाहिये।

धारा **143**क की उपधारा **(3)** के समान ही उपधारा **(4)** के अंतर्गत यदि परिवादी द्वारा अभियुक्त को अंतरिम प्रतिकर एवं ब्याज राशि विहित समयावधि में नहीं लौटाया जाता है तो उक्त राशि उपधारा **(5)** के अधीन "संदेय प्रतिकर" होने से परिवादी से धारा **421** दं.प्र.सं. के अनुसार अर्थदंड की वसूली के तरीके से वसूल की जा सकेगी।

धारा **143**क की उपधारा **(6)** में प्रावधित है कि विचारण के अंत में यदि अभियुक्त को दोषसिद्ध पाया जाता है तो अर्थदंड की राशि अथवा धारा **357** के अंतर्गत अधिनिर्णित प्रतिकर में से अंतरिम प्रतिकर की राशि को घटा दिया जायेगा।

संशोधन अधिनियम द्वारा लेखीवाल अथवा परिवादी को हुये नुकसान की शीघ्र भरपाई में अपील के निराकरण में होने वाले विलम्ब के प्रभाव को भी कम किये जाने का प्रयास किया गया है।

संशोधन अधिनियम द्वारा अंतःस्थापित नवीन धारा **148** निम्नवत है:-

"धारा **148.** दोषमुक्ति के विरूद्ध अपील के लंबित रहते संदाय का आदेश करने की अपीलीय न्यायालय की शक्ति-

(1) दण्ड प्रक्रिया संहिता, **1973 (1974** का **2)** में अंतर्विष्ट किसी बात के होते हुए भी, धारा **138** के अधीन लेखीवाल द्वारा की गई अपील में अपील न्यायालय अपीलार्थी को ऐसी राशि जमा करने का आदेश कर सकेगा, जो विचारण न्यायालय द्वारा अधिनिर्णीत जुर्माना या प्रतिकर का न्यूनतम बीस प्रतिशत होगी:

परन्तु इस धारा के अधीन संदेय राशि, धारा **143**क के अधीन अपीलार्थी द्वारा संदत्त किसी भी अंतरिम प्रतिकर के अतिरिक्त होगी।

(2) उपधारा **(1)** में निर्दिष्ट राशि, आदेश की तारीख से साठ दिवस के भीतर या अपीलार्थी द्वारा पर्याप्त कारण दर्शित किये जाने पर तीस दिवस से अनधिक ऐसी और अवधि के भीतर, जिसका न्यायालय द्वारा निदेश दिया जाये, जमा कराई जायेगी।

(3) अपील न्यायालय, अपील लंबित रहने के दौरान किसी भी समय अपीलार्थी द्वारा जमा की गई राशि को परिवादी को दिये जाने का निदेश दे सकेगाः

परन्तु यदि अपीलार्थी दोषमुक्त कर दिया जाता है, तो न्यायालय परिवादी को, आदेश की तारीख से साठ दिवस के भीतर या परिवादी द्वारा पर्याप्त कारण दर्शित किये जाने पर, तीस दिवस से अनधिक ऐसी और अवधि के भीतर, जिसका न्यायालय द्वारा निदेश दिया जाये, सुसंगत वित्तीय वर्ष के प्रारंभ पर प्रचलित बैंक दर पर, जैसा भारतीय रिजर्व बैंक द्वारा प्रकाशित हो, ब्याज सहित इस प्रकार दी गई राषि का अपीलार्थी को प्रतिसंदाय करने का निदेश देगा।"

धारा **148** की उपधारा **(1)** के अनुसार लेखीवाल द्वारा दोषसिद्धि के विरूद्ध अपील किये जाने पर अपीलीय न्यायालय अपीलार्थी को विचारण न्यायालय द्वारा अधिरोपित अर्थदंड अथवा प्रतिकर का न्यूनतम बीस प्रतिशत जमा करने हेतु निदेश दे सकता है। उक्त राशि धारा **143**क के अंतर्गत संदाय किये गये अंतरिम प्रतिकर के अतिरिक्त देय है।

साधारणतः मध्यप्रदेश में अपील न्यायालय द्वारा माननीय सर्वोच्च न्यायालय के न्यायदृष्टांत स्टेनी फेलिक्स पिंटो विरूद्ध मेसर्स जनगिद बिल्डर्स प्रा. लिमिटेड, ए.आई.आर. **2001** एस.सी. **659** के आलोक में दंडादेश को निलंबित करते समय अर्थदंड या प्रतिकर का एक निश्चित भाग निक्षेप कराये जाने की शर्त लगायी जाती है। संशोधन द्वारा उक्त विधि को अधिनियमित कर उक्त भाग को न्यूनतम बीस प्रतिशत निर्धारित कर दिया गया है।

संशोधन द्वारा प्रचलित प्रक्रिया में दो प्रकार के आंशिक परिवर्तन किये गये हैं। प्रथमतः अपीलीय न्यायालय द्वारा निक्षेप कराने हेतु आदेशित राशि अर्थदंड अथवा प्रतिकर की न्यूनतम बीस प्रतिशत होगी। धारा **148** द्वारा अधिकतम सीमा पर किसी प्रकार का प्रतिबंध नहीं लगाया गया है। द्वितीयतः उक्त राशि को उपधारा **(2)** के अधीन साठ दिवस जो कि आगे तीस दिवस हेतु बढ़ाया जा सकता है, के भीतर निक्षेप किया जाना अपेक्षित है।

वर्तमान में साधारणतः अपील न्यायालय द्वारा प्रतिकर का भाग निक्षेप किये जाने की अपेक्षा करते हुये कोई समय सीमा निर्धारित नहीं की जाती है। धारा **148** की उपधारा **(2)** के प्रभाव से अपीलार्थी/ अभियुक्त के पास उक्त राशि जमा करने हेतु प्रथम बार में साठ दिवस का अवसर है। अतः अपील न्यायालय द्वारा धारा **389 (1)** दं.प्र.सं. के अंर्तगत दंडादेश व प्रतिकर के संबंध में निलंबन किये जाते

समय अपील में उपसंजाति हेतु प्रतिभूति की अपेक्षा के अतिरिक्त साठ दिवस में प्रतिकर का भाग निक्षेप किये जाने की शर्त अधिरोपित की जा सकेगी।

धारा **389 (3)** के अंर्तगत विचारण न्यायालय द्वारा दंडादेश निलंबित करने एवं पृथक से प्रतिकर को स्थगित रखने संबंधी आदेश पारित किया जाता है। अपील न्यायालय से आदेश प्राप्त करने हेतु दिये गये समय के समाप्त होने पर यदि अपीलार्थी द्वारा विचारण न्यायालय के समक्ष अपील न्यायालय के निर्देशानुसार प्रतिभूति प्रस्तुत की जाती है एवं धारा **148** उपधारा **(1)** के अनुसार प्रतिकर का भाग निक्षेप कराया जाता है, तो न्यायालय इस संबंध में आदेश पत्रिका में उल्लेख कर, मूल प्रकरण का भाग बना अपील न्यायालय को प्रेषित करेगा परंतु, यदि अपीलार्थी द्वारा मात्र प्रतिभूति प्रस्तुत की जाती है एवं प्रतिकर का भाग निक्षेप करने हेतु समयावधि शेष है तो विचारण न्यायालय इस संबंध में आदेश पत्रिका में उल्लेख कर, पत्रावली को मूल प्रकरण के साथ संलग्न कर अपील न्यायालय को भेजा जावेगा। इसके पश्चात् साठ दिवस में प्रतिकर के भाग का निक्षेप न होने पर तीस दिवस तक का अतिरिक्त समय दिये जाने का क्षेत्राधिकार अपील न्यायालय को प्राप्त होगा।

धारा **148** की उपधारा **(3)** के अधीन अपीलीय न्यायालय द्वारा अर्थदंड या प्रतिकर के न्यूनतम बीस प्रतिशत की जमा की गई राशि किसी भी समय परिवादी को दिये जाने का निदेश दिया जा सकेगा। पुनः **"**सकेगा**" ("May")** शब्द का उपयोग यह दर्शित करता है कि राशि को प्राप्त करना परिवादी/प्रत्यर्थी का अधिकार नहीं है एवं उसके द्वारा आवेदन प्रस्तुत करने पर अपील न्यायालय इस संबंध में विवेक का प्रयोग करेगा। अपील के स्तर पर उक्त राशि दिये जाने के समय अपीलीय न्यायालय अभिलेख की समस्त परिस्थितयां एवं निराकरण में विलंब के परिणामस्वरूप परिवादी को संभाव्य नुकसान को विचार में ले सकता है।

धारा **148** की उपधारा **(3)** का परंतुक भी नवीन धारा **143**क की उपधारा **(4)** के समान प्रावधान करता है। यदि अपीलीय न्यायालय द्वारा अपीलार्थी को दोषमुक्त किया जाता है तो अपीलीय न्यायालय द्वारा परिवादी को दी गयी अंतरिम प्रतिकर सहित सम्पूर्ण राशि, अपीलार्थी को ब्याज राशि सह अदा करने हेतु निर्देशित करेगा। धारा **143** क की उपधारा **(4)** के ही समान उक्त ब्याज की दर वित्तीय वर्ष के प्रारंभ में प्रचलित **"**बैंक दर**"** के समान होगी एवं संपूर्ण राशि को आदेश दिनाँक से साठ दिवस के भीतर अथवा पर्याप्त हेतुक दर्शित किये जाने पर अतिरिक्त तीस दिवस में जमा कराया जाना है। राशि संदत्त न किये जाने की दशा में अपीलीय न्यायालय धारा **421** दं.प्र.सं. के अनुसार कार्यवाही करेगा।

परक्राम्य लिखत (संशोधन) अधिनियम, **2018** के लंबित प्रकरणों पर प्रभाव के संबंध में विचार किया जावे तो अधिनियम में विनिर्दिष्ट या अभिव्यक्त निरसन और व्यावृत्ति (repeal and saving) प्रावधान नहीं है। संशोधन द्वारा किसी धारा को निरसित नहीं किया गया है अपितु दो धाराएँ अंतः स्थापित की गई हैं। अतः संशोधन के प्रभाव की प्रकृति के संबंध में मुख्यतः दो आधारों पर निष्कर्ष दिया जाना है। प्रथमतः संशोधन अधिनियम का उद्देश्य एवं द्वितीयतः संशोधन सारभूत अधिकारों से संबंधित हैं अथवा प्रक्रिया से संबंधित है।

संशोधन अधिनियम के उद्देश्य के संबंध में पूर्व में चर्चा हो चुकी है। संशोधन का मुख्य उद्देश्य सद्भाविक परिवादी को विचारण में विलंब होने के परिणामस्वरूप संभावित हानि को दूर करना है। जहाँ तक धारा **143** क के अंतर्गत अंतरिम प्रतिकर एवं धारा **148** के अंतर्गत प्रतिकर के भाग को जमा कराये जाने का प्रश्न है, उक्त प्रावधान किसी के पक्ष में सारभूत अधिकार सृजित न कर मात्र प्रक्रिया के भाग हैं।

किसी भी व्यक्ति को प्रक्रिया की प्रकृति के संबंध में सारभूत अधिकार नहीं होता है। संशोधन के उद्देश्य एवं प्रक्रिया से संबंधित संशोधन को दृष्टिगत रखते हुए संशोधन का प्रभाव उन प्रकरणों पर भी होगा जो पूर्व से लंबित हैं। अतः संशोधन के पूर्व के अपराध के संबंध में भी अंतःस्थापित प्रावधान लागू होंगे यदि संबंधित प्रक्रम पर विचार के समय संशोधन प्रभाव में आ गया है।

उदाहरण के लिये यदि चैक अनादरण के संबंध में मांग सूचना पत्र की प्राप्ति उपरांत यदि हेतुक दिनांक **01.07.2017** को उत्पन्न हुआ है, परन्तु विचारण के प्रारंभ में अभियुक्त द्वारा दोषी न होने का अभिवाक् संशोधन के प्रभाव के आने की दिनांक **02.08.2018** के पश्चात् किया जाता है तो धारा **143** क का प्रावधान लागू कर अंतरिम प्रतिकर संदाय करने का आदेश किया जा सकेगा। इसी प्रकार उक्त दिनांक के पश्चात् प्रस्तुत अपील प्रकरणों में अपील न्यायालय द्वारा धारा **148** के अनुसार राशि निक्षेप किये जाने की अपेक्षा की जा सकती है।

संसद द्वारा धारा **138** से संबंधित प्रकरणों के विचारण एवं अपील के निराकरण में हो रहे विलंब को दृष्टिगत रखते हुये अंतरिम प्रतिकर दिलाये जाने हेतु संशोधन किया गया है। यह ध्यातव्य है कि न्यायालयों में पूर्व से अत्यधिक संख्या में उक्त प्रकरण लंबित हैं। ऐसे में न्यायालय को यह ध्यान रखना आवश्यक है कि वह समय-समय पर माननीय सर्वोच्च न्यायालय द्वारा जारी निर्देशों के पालन में प्रकरणों का अंतिम रूप से शीघ्र निराकरण का प्रयास करें। अंतरिम प्रतिकर हेतु आदेश देने मात्र से प्रकरण में शीघ्र निराकरण की अपेक्षा समाप्त नहीं होती है, अपितु विचारण न्यायालय द्वारा धारा **143 (3)** के अनुसार परिवाद दाखिल करने की तारीख से छः माह के भीतर विचारण के निष्कर्ष पर पहुंचने का प्रयास किया जाना आवश्यक है।

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Judges are by reason of their office and nature of work expected not to get involved in controversial matters, or to concern themselves with political issues or policies undertaken by political parties as a part of their political programme.

– A.N. Ray, J.

in Ram Pratap Sharma, In re, (1997) 1 SCC 150, para 15

PART – II

NOTES ON IMPORTANT JUDGMENTS

***151. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 3 (2)**
Exemption from application of the Act – Relevant notification exempting Public Trusts issued during the pendency of the suit – Cannot have retrospective effect – Suit will be decided under the provisions of the Act of 1961.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) - धारा 3 (2)

अधिनियम की प्रयोज्यता से छूट - लोक न्यासों को छूट प्रदान करने वाली सुसंगत अधिसूचना वाद लंबन के दौरान जारी की गई - भूतलक्षी प्रभाव नहीं रख सकती - वाद का विनिश्चय 1961 के अधिनियम के प्रावधानों के अधीन होगा।

Chunnilal v. Murti Shri Chintamani Parashvanath Bhagwan
Judgment dated 05.02.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 447 of 2017, reported in 2018 Law Suit (MP) 125

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152. ADVOCATES ACT, 1961 – Section 35
CONSTITUTION OF INDIA – Article 19 (1)(g)
Strike of Advocates – Call for strike by State Bar Council – A statutory body cannot call for an act which is impermissible – Held to be illegal and unconstitutional. (*Arunava Ghosh & ors. v. Bar Council of West Bengal, AIR 1996 Cal. 331* approved and *Ex. Capt. Harish Uppal v. Union of India, (2003) 2 SCC 45,* relied on)

अधिवक्ता अधिनियम, 1961 - धारा 35

भारत का संविधान - अनुच्छेद 19 (1)(छ)

अधिवक्तागण की हड़ताल - राज्य अधिवक्ता परिषद द्वारा हड़ताल का आव्हान - एक सांविधिक निकाय उस कृत्य का आव्हान नहीं कर सकता जो अननुज्ञेय है - अवैध तथा असंवैधानिक अभिनिर्धारित किया गया। (***अरूनव घोष और अन्य विरूद्ध पश्चिम बंगाल अधिवक्ता परिषद, ए.आई.आर. 1996 कलकत्ता 331, अनुमोदित एवं एक्स. कैप्टन. हरीश उप्पल विरूद्ध भारत संघ, (2003) 2 एससीसी 45,*** अवलंबित)

Praveen Pandey v. State of M.P. & ors.
Order dated 10.04.2018 passed by the High Court of Madhya Pradesh in Writ Petition No. 8078 of 2018, reported in 2018 Law Suit (MP) 467

Relevant extracts from the order:

The Bar Council is a creation of the Advocates Act, 1961 (in short "the Act") and is a body corporate. The function of the State Bar Council is to admit persons as Advocates on its roll and to entertain and determine cases of

misconduct against Advocates and to safeguard the rights, privileges and interests of Advocates on its roll but giving of a call by a statutory body established under the Act to entertain and to decide the cases of misconduct against Advocates, cannot itself indulge in an act which is not permissible under the Act nor is permissible in view of the Constitution Bench judgment of the Supreme Court in ***Ex-Capt. Harish Uppal v. Union of India, (2003) 2 SCC 45*** and subsequent pronouncements of the Supreme Court in ***Hussain and another v. Union of India, (2017) 5 SCC 702*** and ***Krishnakant Tamrakar v. State of Madhya Pradesh, (2018) 5 Scale 248*** as well as the decision of the Calcutta High Court in ***Arunava Ghosh & ors. v. Bar Council of West Bengal, AIR 1996 Cal. 331*** as referred to above.

If an Advocate does not appear at the time of hearing of the cases, he can be proceeded against for misconduct for negligence in defending the interest of his client. The call of the Bar Council to Advocates of the State to abstain from work, does not fall within the four corners of the Act and the role assigned to the Bar Council. The State Bar Council derives its authority from the Act and has to discharge functions which are conferred on it. None of the provisions of the Act confers power on the statutory body to call the members to abstain from judicial work which is a responsibility of every member of the Bar in terms of the provisions of the Act itself. It has been rightly held by the Calcutta High Court in ***Arunava Ghosh*** (supra) that the Act does not confer any power or jurisdiction on the State Bar Council to take away the right of an Advocate to practice as of right either temporarily or permanently or to compel him not to practice even for a day or affect his right to practice in any manner whatsoever except by way of exercising disciplinary jurisdiction under Section 35 of the Act. Therefore, the call given to the Advocates to abstain from Judicial work negates the statutory right of Advocates to practice and also is a violation of fundamental right of an Advocate where freedom to practice any profession is guaranteed under Section 19(1)(g) of the Constitution of India.

In view of the foregoing, we find that the decision of the State Bar Council calling upon the Advocates in the State to observe a week-long protest and to abstain from all judicial works and Court proceedings is illegal, unconstitutional and against the statutory provisions as well as contrary to the judgments of the Supreme Court. Therefore, we hold the call to abstain from court work vide letters dated 21st March, 2018 and 5th April, 2018 as illegal and against the provisions of the Advocates Act and the Judgments on the subject.

Consequently, we direct the Advocates in the State to resume the work forthwith so that the poor, needy, under-trials, convicts and numerous other persons desiring to seek justice from the Courts do not suffer on account of lack of legal assistance for the reason that the members of the Bar are not available to work in the Courts.

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153. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 4
CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

(i) Benami Transaction – The suit, claim, action or even defence, to enforce any right in respect of a property held benami would not lie by or on behalf of a person claiming to be the real owner of such property.

(ii) Suit based on Benami transaction – Seeking declaration of title and injunction – Not maintainable and liable to rejection under Order VII Rule 11 of the C.P.C.

बेनामी संव्यवहार (प्रतिषेध) अधिनियम, 1988 - धारा 4

व्यवहार प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11

(i) बेनामी संव्यवहार - बेनामी धारित संपत्ति के संबंध में किसी अधिकार को प्रवृत्त कराने के लिये, कोई वाद, दावा, कार्यवाही या बचाव भी, उस संपत्ति का वास्तविक स्वामी होने का अभिवाक् करने वाले व्यक्ति या उसकी ओर से संधारणीय नहीं है।

(ii) बेनामी संव्यवहार पर आधारित वाद - स्वत्व घोषणा और निषेधाज्ञा वांछित - संधारणीय नहीं है और सि.प्र.सं. के आदेश 7 नियम 11 के अधीन खारिज किये जाने योग्य है।

Sita Bai (Smt.) & ors. v. Smt. Sadda Bai

Judgment dated 02.11.2017 passed by the High Court of Madhya Pradesh in Civil Revision No. 9/2012, reported in I.L.R. (2018) MP 193

Relevant extracts from the judgment:

In a transaction wherein the property is transferred by one person for consideration paid or provided by another person would be called as ''Benami Transaction''. It is also apparent that the ''Property'' would include the movable or immovable, tangible or intangible including any right or interest in such property. As per Section 3, the person cannot be permitted to enter in the ''Benami Transaction'' but the transaction in the name of his wife and unmarried daughter is saved until contrary is proved to it. Sub-section (3) of Section 3 makes such transaction punishable under the law though Section 3 of Benami Transactions (Prohibition) Act, 1988 is omitted by Act No. 43 of 2016 with effect from 1.1.2016. Section 4 provides prohibition of the right to recover the property held ''Benami''. The said provision is relevant, however, reproduced as under:-

> **"4.** ***Prohibition of the right to recover property held benami*** **–**
>
> (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed to be the real owner of such property.

(3) Nothing in this section shall apply–

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.''

On perusal of the aforesaid, it is crystal clear that the suit, claim or action, taking a plea to enforce any right in respect of a property held benami would not lie by or on behalf of a person claiming to be the real owner of such property. By sub-section (2), similar plea has been restrained to be taken in a defence as restrained to be taken to claim the right. The exception carved out is with regard to the property held to be the coparcenery in a Hindu undivided family and the property held for the benefit of the coparcener in the family.

It is a trite law that to decide the application under Order VII Rule 11 of the C.P.C, the averments of the plaint and the objection taken are required to be seen. However, looking to the foregoing provisions of the Act of 1988, now the plea taken in the plaint by the plaintiff requires consideration to adjudicate the objection raised by the defendants in the application. Paragraph No.3 of the plaint specifies that on persuasion of the plaintiff, her husband has purchased the property of Khasra No.327/2 area 0.271 hectare of Village Tekapar, Tahsil Tendukheda, District Narsinghpur in the name of Sheela Bai her elder sister-in-law and paid the amount of consideration. To acknowledge it, during the life time, Sheela Bai executed an agreement in the shape of a *Sauda Chitthi* in the name of plaintiff in front of the witnesses acknowledging the fact that Rs. 10,000/- had been taken by her from the plaintiff towards consideration of the land and since then plaintiff was put into possession of the property. It is further said, Sheela Bai died on 08.01.2011 but prior to her death, she executed a sale deed in favour of defendant No.1 on 06.10.2010, by which the defendant No.1 does not acquire any right and title because Sheela Bai herself was not having any right in the suit property because the amount of consideration was paid by the husband of the plaintiff, therefore, the real owner was the husband of the plaintiff and Sheela Bai would not be owner thereof merely because of the sale deed in her name. However, the declaration of the ownership on the basis of the agreement mentioning the said fact and the injunction has been sought for in the suit.

Thus, looking to the plea taken by the plaintiff in the suit, it is with respect to the immovable property based on the transaction of a property in the name of Sheela Bai to which consideration was paid by the husband of the plaintiff and during the life time Sheela Bai executed an agreement by way of *Sauda Chitthi* in the name of the plaintiff and relying upon the said plea, the right has been claimed in the property. As per Section 2 (a), it would fall within the purview of ''Benami Transaction'' and any immovable property purchased by such transaction would be the benami property as specified in Section 2(c). Section 4 of the Act of 1988 prohibits the right to recover the property held benami, however, the word ''held benami'' is having some relevance to the finding recorded by the Trial Court. In this respect, it is relevant to mention here, that admission by the parties is best piece of evidence to the plea taken in the proceedings. In the present case, the foundation of the pleading in the suit is based upon the plea of benami transaction seeking declaration of title and injunction acknowledged in the agreement dated 30.09.1990 in contradistinction to the registered sale deed in the name of Sheela Bai, however, the suit on the basis of such plea asking declaration cannot be maintained. By the said pleading itself, the property in question which is purchased in the name of Sheela Bai, claimed by the plaintiff *in lieu* of payment of consideration by her husband on insistence of the plaintiff itself would be called as ''Benami Transaction'' and such property would fall within the purview of property ''held benami''.

In my considered opinion, the aforesaid pleading apparently brings the case of the plaintiff with in the purview of property ''held benami'' purchased by ''Benami Transaction'' and the right to recover the said property has been prohibited, therefore, the objection taken by the defendants in the application under Order VII Rule 11 of the C.P.C dismissing the suit as barred by law is valid and the rejection of such application by the Trial Court is illegal and in excess to the jurisdiction without appreciating the provisions of the law, therefore, it is liable to be set aside. The foregoing discussion fortifies from the judgment of ***Anand Kumar v. Vijay Kumar & ors., 2012 (3) MPLJ 129***. Therefore, the irresistible conclusion, which can be arrived in the present case is to set aside the impugned order dated 24.11.2011 allowing the application under Order VII Rule 11 of the C.P.C and to direct to reject the suit filed by the plaintiff.

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***154. CIVIL PROCEDURE CODE, 1908 – Section 10**

Stay of suit – Earlier suit filed for specific performance of contract – Subsequent suit for eviction by defendant of earlier suit – Fate of the subsequent suit is dependant upon the earlier suit – Stay of the subsequent suit held to be proper.

सिविल प्रक्रिया संहिता, 1908 - धारा 10

वाद का रोक दिया जाना - पूर्ववर्ती वाद संविदा के विनिर्दिष्ट अनुपालन हेतु संस्थित किया गया - पूर्ववर्ती वाद के प्रतिवादी द्वारा बेदखली हेतु पश्चात्वर्ती वाद -

पश्चात्वर्ती वाद का परिणाम, पूर्ववर्ती वाद पर निर्भर - पश्चात्वर्ती वाद का रोका जाना उचित अभिनिर्धारित किया गया।

Fajal Ahmed v. Syed Sultan Ahmed

Order dated 20.03.2018 passed by the High Court of Madhya Pradesh in Misc. Petition No. 698 of 2017, reported in 2018 Law Suit (MP) 529

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155. CIVIL PROCEDURE CODE, 1908 – Section 11

Principle of *Res Judicata* – Exceptions

(i) Erroneous decision as to jurisdiction of Court in earlier suit.

(ii) Erroneous decision given on statutory prohibition, thereby not giving effect to it.

(iii) Matter in issue being issue of law, different from that in the earlier suit.

सिविल प्रक्रिया संहिता, 1908 - धारा 11

पूर्व न्याय का सिद्धांत - अपवाद

(i) पूर्ववर्ती वाद में न्यायालय के क्षेत्राधिकार के संबंध में त्रुटिपूर्ण निर्णय।

(ii) विधिक प्रतिषेध पर गलत निर्णय दिया गया, तद्द्वारा उसे प्रभावी नहीं बनाया गया।

(iii) मामले में विवादग्रस्त विषय विधि का विवाद्यक है, जो पूर्ववर्ती वाद के विषय से भिन्न है।

Canara Bank v. N.G. Subbaraya Setty and anr.

Judgment dated 20.04.2018 passed by the Supreme Court in Civil Appeal No. 4233 of 2018, reported in AIR 2018 SC 3395

Relevant extracts from the judgment:

Given the conspectus of authorities, the law on the subject may be stated as follows:

(1) The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are *res judicata* in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law and issues of law.

(2) To this general proposition of law, there are certain exceptions when it comes to issues of law:

(i) Where an issue of law, decided between the same parties in a former suit or proceeding relates to the jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not *res judicata* in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a Court

competent to try such suit. When read with Explanation (I) to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in Courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a Court cannot clothe that Court with jurisdiction where it has none. Obviously, a Civil Court cannot send a person to jail for an offence committed under the Indian Penal Code. If it does so, such a judgment would not bind a Magistrate and/or Sessions Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Penal Code. Equally, a Civil Court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special Court with jurisdiction to decide such suits. As an example, under Section 28 of the Bombay Rent Act, 1947, the Small Causes Court has exclusive jurisdiction to hear and decide proceedings between a landlord and a tenant in respect of rights which arise out of the Bombay Rent Act, and no other Court has jurisdiction to embark upon the same. In this case, even though the Civil Court, in the absence of the statutory bar created by the Rent Act, would have jurisdiction to decide such suits, it is the statutory bar created by the Rent Act that must be given effect to as a matter of public policy. (See- ***Natraj Studios (P) Ltd. v. Navrang Studios & anr., (1981) 2 SCR 466*** at 482). An erroneous decision clothing the Civil Court with jurisdiction to embark upon a suit filed by a landlord against a tenant, in respect of rights claimed under the Bombay Rent Act, would, therefore, not operate as *res judicata* in a subsequent suit filed before the Small Causes Court between the same parties in respect of the same matter directly and substantially in issue in the former suit.

(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata* if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in ***Natraj Studios*** (supra) it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.

(iii) Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This

can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different.

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***156. CIVIL PROCEDURE CODE, 1908 – Section 11, Order 7 Rule 11 and Order 2 Rule 2**

(i) Rejection of plaint – Consideration of pleading in written statement – Permissibility – Principles reiterated – Held, defence projected in written statement cannot be considered while deciding application under Order 7 Rule 11 CPC.

(ii) *Res judicata* – Material facts about two unsuccessful previous litigations suppressed by plaintiff – Defendant raised bar of *res judicata* in written statement and application under Order 7 Rule 11 – Held, recourse to Order 7 Rule 11 CPC is not appropriate – Proper course would be to frame issues and decide the issue of maintainability of suit in the first instance.

सिविल प्रक्रिया संहिता, 1908 - धारा 11, आदेश 7 नियम 11 एवं आदेश 2 नियम 2

(i) वाद का नामंजूर किया जाना - लिखित कथन के अभिवचनों को विचार में लेना - अनुज्ञेयता - सिद्धांत पुनरुद्धरित किये गये - अभिनिर्धारित कि, लिखित कथन में प्रक्षेपित बचाव आदेश 7 नियम 11 सि.प्र.सं. के आवेदन के निराकरण के समय विचार में नहीं लिया जा सकता है।

(ii) पूर्व न्याय - वादी ने पूर्व के दो असफल प्रकरणों से सबंधित महत्वपूर्ण तथ्यों को छिपाया - प्रतिवादी ने अपने लिखित कथन एवं आदेश 7 नियम 11 के आवेदन में पूर्वन्याय की बाधा होने का बचाव लिया - अभिनिर्धारित कि, ऐसे मामले में आदेश 7 नियम 11 सि.प्र.सं. के अनुसार कार्यवाही करना उचित नहीं है - उचित प्रक्रिया यह होगी कि विवाद्यक स्थिर किये जायें एवं वाद की प्रचलनशीलता का विवाद्यक पहले निर्धारित किया जाये।

Soumitra Kumar Sen v. Shyamal Kumar Sen and ors.

Judgment dated 21.02.2018 passed by the Supreme Court in Civil Appeal No. 1513 of 2018, reported in (2018) 5 SCC 644

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***157. CIVIL PROCEDURE CODE, 1908 – Section 96**

Powers of first Appellate Court – Scope – Jurisdiction of first appellate court is very wide like of trial court – It is the duty of the first appellate court to appreciate the entire evidence and arrive at its own independent conclusion, either of affirmance or difference with reasons.

सिविल प्रक्रिया संहिता, 1908 - धारा 96

प्रथम अपीलीय न्यायालय की शक्तियाँ - विस्तार - प्रथम अपीलीय न्यायालय की क्षेत्राधिकारिता विचारण न्यायालय की क्षेत्राधिकारिता के समान ही व्यापक है - संपूर्ण साक्ष्य की विवेचना करना एवं दिये गये कारणों पर या तो मतैक्य अथवा मतभिन्नता के अनुसार स्वयं का स्वतंत्र निष्कर्ष निकालना प्रथम अपीलीय न्यायालय का कर्तव्य है।

C. Venkata Swamy v. H.N. Shivanna (dead) by L.Rs. and another
Judgment dated 04.12.2017 passed by the Supreme Court in Civil Appeal No. 670 of 2011, reported in 2018 (2) MPLJ 585 (SC)

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***158. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 and Order 21 Rule 97**

Resistance – Objection to execution on basis of possession – Maintainability of separate suit – Suit for declaration and injunction filed by the possession holder resisting the execution of a decree passed in earlier suit – Proper remedy is to file an application under Order 21 Rule 97 before the executing Court – Separate suit is not maintainable – Plaint is liable to be rejected.

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11 एवं आदेश 21 नियम 97

प्रतिरोध - आधिपत्य के आधार पर निष्पादन पर आक्षेप - पृथक वाद की पोषणीयता - आधिपत्यधारी द्वारा पूर्ववर्ती वाद में पारित आज्ञप्ति के निष्पादन का प्रतिरोध करते हुए घोषणा तथा व्यादेश हेतु वाद - उचित उपचार आदेश 21 नियम 97 के अंर्तगत निष्पादन न्यायालय के समक्ष आवेदन संस्थित करना है - पृथक वाद पोषणीय नहीं है - वादपत्र नामंजूर किये जाने योग्य है।

Usman & ors. v. Vikram & ors.
Order dated 08.02.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in Civil Revision No. 102 of 2017, reported in 2018 Law Suit (MP) 716

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***159. CIVIL PROCEDURE CODE, 1908 – Order 18 Rule 4 and Order 6 Rule 2**

Pleadings and proof – Evidence with regard to facts not pleaded, whether can be considered? Held, No – Party cannot introduce new facts or documents along with affidavit of evidence under Order 18 Rule 4 in absence of pleading. (*Nandkishore Lalbhai Mehta v. New Era Fabrics Private Limited and ors., (2015) 9 SCC 755,* relied on)

सिविल प्रक्रिया संहिता, 1908 - आदेश 18 नियम 4 एवं आदेश 6 नियम 2

अभिवचन एवं सबूत - क्या अभिवचन के अभाव में तथ्यों के साक्ष्य के संबंध पर विचार किया जा सकता है? अभिनिर्धारित, नहीं - अभिवचन के अभाव में आदेश 18 नियम 4 के तहत साक्ष्य के शपथ पत्र के साथ पक्षकार नवीन तथ्य एवं दस्तावेजों को प्रस्तावित नहीं कर सकता है। (***नन्दकिशोर लालभाई मेहता वि. न्यू ऐरा फेब्रिक्स प्राईवेट लिमिटेड और अन्य, (2015) 9 एससीसी 755,*** अवलंबित)

Kamal Singh and others v. Bhav Singh Rajpoot and others

Order dated 15.03.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 843 of 2012, reported in 2018 (2) MPLJ 705

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160. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 23A and Order 27 Rule 5B

(i) Appeal – Remand of case – When called for? Held, where the appellate court is of the view that the appellant has not proved his case by examining a particular witness or by producing certain document – Then, he should be given an opportunity to adduce proper evidence in his favour – Instead of dismissing appeal, case should be remanded to the trial court by taking recourse to the powers under Order 41 Rule 23A CPC.

(ii) Suits against Government – Duty of Court – To make every endeavour to assist parties in arriving at a settlement.

सिविल प्रक्रिया संहिता, 1908 - आदेश 41 नियम 23क एवं आदेश 27 नियम 5ख

(i) अपील - प्रकरण का प्रतिप्रेषण - कब किया जाना चाहिये? अभिनिर्धारित कि, जहां अपीलीय न्यायालय का यह मत है कि अपीलीर्थी ने अपना वाद किसी विशिष्ट साक्षी की परीक्षा न कराने अथवा कोई विशिष्ट दस्तावेज प्रस्तुत न करने के कारण प्रमाणित नहीं किया है - वहां, उसे अपने पक्ष में उचित साक्ष्य प्रस्तुत करने का अवसर दिया जाना चाहिये - ऐसे मामलों में अपील खारिज करने की अपेक्षा, सि.प्र.सं. के आदेश 41 नियम 23क का सहारा लेकर प्रकरण विचारण न्यायालय को प्रतिप्रेषित किया जाना चाहिये।

(ii) राज्य के विरुद्ध वाद - न्यायालय का कर्तव्य - पक्षकारों को समझौते पर लाने के लिये सहायता करने का हर संभव प्रयास करना चाहिये।

Mohan Kumar v. State of Madhya Pradesh and ors.

Judgment dated 07.03.2017 passed by the Supreme Court in Civil Appeal No. 1412 of 2008, reported in 2018 (II) MPJR 324 (SC)

Relevant extracts from the judgment:

The need to remand the case is called for because we find that the High Court while dismissing the appellant's first appeal recorded a finding that since the appellant (plaintiff) failed to prove his ownership over the suit land in asmuch as the plaintiff did not examine his vendor to prove his sale deed, the Trial Court was not justified in decreeing the appellant's suit and granting declaration of ownership in his favour in relation to the suit land. In other words, the High Court was of the view that it was obligatory upon the appellant (plaintiff) to prove his title by examining his vendor and since it was not done, the decree passed by the Trial Court in plaintiff's favour was not legally sustainable. This finding of the High Court, as mentioned above, resulted in dismissal of the appeal and the suit as well.

In our considered opinion, assuming that the High Court was right in its view, it should have given an opportunity to the appellant to prove his title by allowing him to adduce proper evidence in support of his case and for that, the High Court should have remanded the case to the Trial Court for retrial of the suit. It was more so because we find that the appellant suffered more damage to his case in prosecuting his own appeal. In the absence of any challenge laid by the defendants to the part of the decree passed in plaintiff's favour by the Trial Court, the appellate Court virtually passed the order in respondents' (defendants) favour in appellant's appeal.

In other words, the High Court having held that the plaintiff was not able to prove his title to the land in the suit due to non-examination of his vendor, all that the High Court, in such circumstances, should have done was to remand the case to the Trial Court by affording an opportunity to the appellant to prove his case (title to the land) and adduce proper evidence in addition to what he had already adduced. This, the High Court could do by taking recourse to powers under Order 41 Rule 23A of the CPC.

X X X

Before parting with the case, we consider it apposite to bring to the notice of Trial Court the provisions of Order 27 Rule 5B of the Code of Civil Procedure which reads as under.

> "*5B. Duty of Court in suits against the government or a public officer to assist in arriving at a settlement–*
>
> (1) In every suit or proceeding to which the government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.
>
> (2) If, in any such suit or proceedings, at any stage, it appears to the Court that there is a reasonable

possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred under sub-rule (2) is in addition to any other power of the Court to adjourn proceedings."

Since we find that the case at hand is against the State Government and local bodies, it is the duty of the Court to make, in the first instance, every endeavor to assist the parties to settle in respect of subject matter of the suit and, if for any reason, settlement is not arrived at then proceed to decide the suit on merits in accordance with law.

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161. CONTEMPT OF COURTS ACT, 1971 – Section 12
HINDU MARRIAGE ACT, 1955 – Section 9

(i) Civil contempt – Duty of court – Held, Court should decide whether the contemner has violated the directions issued by the Court? Without positive finding on such question, holding contemner guilty of contempt – Not proper.

(ii) Restitution of conjugal rights – Consent order – *Inter alia* contained a direction in form of decree for restitution of conjugal rights – Held, such a decree/order cannot be executed as much as the other spouse cannot be forced to resume the conjugal relations – Not obeying such orders have other consequences including right to seek divorce.

न्यायालय अवमानना अधिनियम, 1971 - धारा 12

हिन्दू विवाह अधिनियम, 1955 - धारा 9

(i) सिविल अवमान - न्यायालय का कर्तव्य - अभिनिर्धारित, न्यायालय को सर्वप्रथम यह विनिश्चय करना चाहिये कि क्या अवमाननाकर्ता ने न्यायालय के निर्देशों का उल्लंघन किया है? उक्त प्रश्न पर सकारात्मक निष्कर्ष दिये बिना अवमाननाकर्ता को अवमानना के लिये दोषी करार देना - उचित नहीं है।

(ii) दाम्पत्य अधिकारों का प्रत्यास्थापन - सहमतिपूर्ण आदेश - अन्य निर्देश के साथ-साथ आदेश में दाम्पत्य अधिकारों के प्रत्यास्थापन की आज्ञप्ति के प्रकार का निर्देश था - अभिनिर्धारित कि, ऐसी आज्ञप्ति/आदेश का निष्पादन नहीं कराया जा सकता है क्योंकि पति या पत्नी को दाम्पत्य संबंधों को पुनः आरम्भ करने के लिये मजबूर नहीं किया जा सकता है - ऐसे आदेश का पालन न करने के अन्य परिणाम हो सकते हैं जिनमें विवाह विच्छेद सम्मिलित है।

Meenal Bhargava v. Naveen Sharma

Judgment dated 09.05.2018 passed by the Supreme Court in Civil Appeal No. 1606 of 2018, reported in AIR 2018 SC 2839

Relevant extracts from the judgment:

We have duly considered the submissions of counsel for both the parties. As noted in detail, both the parties are blaming each other for the failure of settlement terms. In this backdrop, we have gone through the impugned order passed by the High Court. In the entire judgment, the High Court has not adverted to the important aspect that needed attention in such a case, namely, whether it was the appellant who was responsible for not adhering to the terms of the consent order and thereby violated the directions issued by the High Court in its orders dated May 09, 2017. After all, the respondent had filed the contempt petition attributing breach of the directions on the part of the appellant. In reply, the appellant had taken up the stand that she was not responsible for the happenings and squarely blamed the respondent therefor. The High Court has not discussed these aspects. On the contrary, the approach of the High Court was to insist the appellant to adhere to the settlement terms even at that stage and on her refusing to do so it arrived at a finding that she had committed the contempt of the Court's order as the aforesaid conduct was found to be abhorrent. It is, thus, the stubborn attitude shown by the appellant during the hearing of the contempt petition which has weighed by the High Court. That, according to us, was not the correct approach for punishing the appellant for contempt of Court. The contempt petition was filed by the respondent alleging that the appellant had not fulfilled her obligations under the consent terms and the directions given by the High Court in this behalf. It was, thus, necessary for the High Court to discuss and consider, in the first instance, as to whether these allegations of the respondent were correct.

X X X

In a case like this whether the High Court could force the appellant to join the company of the respondent and live with him, if he had decided for certain reasons not to do so? Even when a decree of conjugal rights is filed by a competent Court of law in favour of one of the spouses, such a decree cannot be executed and the other spouse who is directed to resume the conjugal relations, cannot be forced to do so. It is a different matter that for not obeying such a decree, other consequence follow including right to the decree holder to seek divorce. When that is the position even in respect of a decree passed by competent Court of law forcing the appellant to join the company of the respondent and on her failing to do so punishing her in committing contempt of the Court's order, that too by awarding maximum civil imprisonment in law cannot be countenanced.

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162. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 173 and 190

(i) Further investigation – Whether the power to order further investigation under Section 156 (3) Cr.P.C. can be exercised repeatedly? Held, No.

(ii) Closure Report (*Khatma*) – Procedure explained and directions issued.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 156 (3), 173 एवं 190

(i) अग्रिम अनुसंधान - क्या धारा 156 (3) द.प्र.सं. के अधीन पुनः अन्वेषण के आदेश बार-बार दिये जा सकते हैं? अभिनिर्धारित, नहीं।

(ii) खात्मा प्रतिवेदन - प्रक्रिया की व्याख्या की गई एवं निर्देश जारी किये गये।

Kuntal Baran Chakraborty & ors. v. Central Bureau of Investigation & anr.

Order dated 03.10.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 9969 of 2016, reported in ILR (2018) MP 215

Relevant extracts from the order:

The Supreme Court in ***Abhinandan Jha & ors v. Dinesh Mishra, AIR 1968 SC 117***, had given three options to the Magistrate to deal with a closure report filed by the police u/s 173(2) Cr.P.C. The three options were (1) to reject the closure report and proceed to take cognizance of the offences against the accused on the basis of the evidence on record u/s. 190(1)(b) Cr.P.C and issue process to the accused, or (2) it could accept the closure report filed by the police and close the case after giving the Complainant an opportunity to protest against the closure report, or (3) it could direct the police to conduct further investigation u/s. 156(3) Cr.P.C. What the Supreme Court explicitly forbade and rendered unlawful for the Magistrate, was an order directing the police to file a charge sheet instead of a closure report. In ***Vasanti Dubey v. State of Madhya Pradesh, (2012) 2 SCC 731***, the Supreme Court had quashed the proceeding against the Petitioner therein on the ground that Trial Court was misplaced in exercising jurisdiction u/s 156(3) Cr.P.C in a case where the investigating agency had informed the Court that there was no sanction u/s 19 of the PC Act and that the Ld. Special Judge had ordered for further investigation with the direction to the investigating agency to secure a sanction against the accused.

The power of the Magistrate to direct the police to further investigate u/s 156(3), before taking cognizance u/s 190 Cr.P.C when a final report u/s 173(2) Cr.P.C is filed, is no longer *res integra*. Such exercise is not restricted only to a situation where a closure report is filed but also in a situation where the charge sheet has been filed against the accused and the Magistrate empowered to take cognizance of the offence is of the view that there are lacunae in the investigation which need to be further investigated and there by returns the charge sheet to the police with a direction to further investigate into specific areas which require it. However, an order u/s. 156(3) Cr.P.C cannot be passed only because the Magistrate is empowered to do so but only when the Magistrate is satisfied, for reasons to be stated, as to why a further investigation is necessitated in a given case. Though the Supreme Court in ***Abhinandan Jhas's case*** (supra) empowered the Magistrate to direct the police to further investigate in a case where the police files a closure report, by its elucidation of the extent and scope of the Magistrate's powers u/s 156(3)Cr.P.C, what it has expressly prohibited is the Magistrate directing the police to file a charge sheet instead of

a closure report. This prohibition imposed upon the Magistrate cannot be circumvented by a process of "Subliminal Coercion" viz., a process by which the Magistrate, though does not direct the investigating agency to file a charge sheet and there by adheres to the law in its letter, violates it in spirit by creating an environment of subconscious pressure on the investigating agency by repeated directions to further investigate the offence u/s. 156 (3) where the veiled desire of the Magistrate is that nothing less than filing a charge sheet instead of a closure report would please it. Such subliminal coercion by the Magistrate by resorting to jurisdiction under section 156(3) *ad nauseum*, till the investigating agency, which after having filed closure reports earlier or more than one occasion, ultimately files a charge sheet, would be a violation of the law laid down by the Supreme Court in ***Abhinandan Jha's case*** (supra). Such a charge sheet can only be considered as a fruit of subliminal coercion by the Magistrate, rendering it unlawful, an abuse of process of the law and a colourable exercise of judicial powers.

The power under section 156(3) Cr.P.C ought to be exercised only once by the Magistrate and that too for reasons to be recorded. This power may be exercised where a closure report is filed by the police or even when a charge sheet is filed, where the Magistrate is of the opinion that the investigation done by the police is incomplete or inadequate and directs it to further investigate along prescribed lines. As the power ought to be exercised only once, the Magistrate would be well advised to seek the assistance of the Public Prosecutor whose avowed function is to ensure that the final report filed by the police is of such quality that it endures judicial scrutiny during the trial. With the assistance of the Public Prosecutor, the Magistrate can direct the police u/s. 156(3) to further investigate along well defined lines to fulfil the shortcomings of the investigation done earlier. In the event the police files a closure report, or what in common parlance is called a *"Khatma"*, a second time after the order for further investigation by the Magistrate, then the Magistrate is forbidden from directing the investigating agency to further investigate after having already done so once, else that would be in violation of the spirit of the law laid down by the Supreme Court in ***Abhinandan Jha's*** case (supra) as the same would be an act of subliminal coercion on the part of the Magistrate, subconsciously directing the police to file a charge sheet instead of a closure report as already discussed in the preceding paragraph. In such a situation, the Magistrate can resort to taking cognizance of the offences u/s. 190 (1)(b) Cr.P.C, the closure report not withstanding, and summon the accused to stand trial. However, a question does arise if the Magistrate is powerless to carry out a fact-finding enquiry in the light of a second closure report by the investigating agency, where the Magistrate is of the opinion that the material on record, while raising a suspicion of an offence having been committed, required additional material to be brought on record before it could be said that a ***prima facie*** case against the accused was made out, justifying the issuance of process to stand trial? The answer is an emphatic NO and the powers vested with the Magistrate under the Cr.P.C to deal with such a situation are elaborated in the succeeding paragraphs.

POWER TO PROCEED UNDER CHAPTER XXIV OF THE Cr.P.C

The purpose of the procedural law is to aid and assist the Court in the dispensation of justice, a veritable handmaiden. In some cases, the investigation may be influenced by the powers that be and the investigating agency may file a closure report even in a case where evidence may be forthcoming to file a charge sheet. In cases where the de-facto Complainant is a private party, he or she may feel aggrieved by the investigating agency filing a closure report in favour of the accused and thus willing to protest against the closure report and why the same ought not to be accepted by the Magistrate. Insuch a case, nothing prevents the Magistrate from converting the case which was originally initiated under Chapter XII of the Cr.P.C arising from the registration of an FIR to a complaint case under Chapter XV of the Cr.P.C where the de-facto Complainant prefers a protest petition against the closure report. In such a case, the Magistrate can take cognizance u/s 190(1) (a) Cr.P.C and exercise jurisdiction u/s 202 Cr.P.C and carry out an inquiry, either himself or an investigation through any other person so authorised by him or even the police. The distinction between a further investigation by the police u/s. 156(3) Cr.P.C and of an inquiry conducted by the police on the orders of a Magistrate u/s. 202 Cr.P.C is that further investigation by the police is done u/s. 156(3) at the pre-cognizance stage whereas, the inquiry by the police u/s. 202 Cr.P.C is at the post cognizance stage. There may be a difficulty in a case where previous sanction is required u/s. 197 Cr.P.C or under a special statute like the Prevention of Corruption Act, 1988. In such a case the Magistrate cannot pass an order u/s. 202 Cr.P.C for conducting an inquiry in the absence of a previous sanction, as the power to order an enquiry u/s. 202 Cr.P.C is a power exercised post-cognizance. This raises the question if the Magistrate hits a *cul de sac* where he is forbidden from exercising jurisdiction u/s 156(3) more than once in a case where previous sanction is required for cognizance?

Chapter XXIV of the Cr.P.C deals with General Provisions as to Inquiries and Trials and section 311Cr.P.C reads as under;

> *"Power to summon material witness, or examine person present.*– Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

Before the question whether the power u/s. 311 Cr.P.C can be exercised by the Magistrate where the trial has not even commenced, it will be essential to examine the intent and purpose of the Chapter in which the said provision finds a place, the power to summon and examine witnesses at a stage preceding trial itself and of course, the meaning of the term "Inquiry" as used in the Cr.P.C.

From the title of Chapter XXIV, it is clear that the provisions which find a place in the said chapter are applicable at the stage of both, inquiry as well as trial.

The term "Inquiry" has been defined in the section 2(g) of the Cr.P.C which reads as "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court". Simply put, an inquiry can be defined as a fact finding endeavour undertaken by a Magistrate or a Court which is not a trial. The Code is silent in defining the term "Trial". Black's Law Dictionary, Tenth Edition defines "Trial" as "A formal judicial examination of evidence and determination of legal claims in an adversary proceeding". The system of criminal justice administration in India is adversarial / accusatorial viz.,that the same is a contest between the prosecution and the defence with the judge donning the mantle of an impartial arbiter. In this system, the Judge does not play a role in the investigation of the offence or the collection of evidence. That is the function of the State through the investigating agency. As opposed to this, an inquisitorial system is one where the judge participates actively in the process of collecting evidence against the prospective accused. The Cr.P.C enjoins a trial procedure which is completely adversarial/ accusatorial in character. However, at the stage before the commencement of trial, certain powers are vested with the Magistrate or the Court which are inquisitorial in nature. The very fact that section 2(g) of the Cr.P.C defines "inquiry" as every inquiry other than a trial by the Magistrate or a Court, vests the Magistrate or the Court with inquisitorial powers which can be exercised before the commencement of the trial. Though inquiry is defined in section 2(g) in the context of the Cr.P.C, we have to resort to the dictionary for the meaning of the word "inquiry". Black's Law Dictionary gives the meaning of the word inquiry as **"1. Int'l law. FACT FINDING (2).Parliamentary law. A request for information, either procedural or substantive". The Oxford Advanced Learners Dictionary gives the meaning of Enquiry/Inquiry as "the official process to find out the cause of something or to find out information about something".** From the above, it is clear that the inquiry u/s. 2(g) Cr.P.C is the power of the Magistrate or the Court to collect facts essential to a stage preceding the trial.

Section 311 Cr.P.C which empowers any Court, at any stage of any inquiry, trial or other proceeding under this Code to examine a person as a witness, thus enables the Magistrate before whom a closure report is filed a second time by the investigating agency after it was directed by the Court to further investigate u/s. 156(3) Cr.P.C, to inquire on its own by summoning any person/ persons as witness before it and recording his evidence under section 311 Cr.P.C. That coupled with the power u/s. 91 Cr.P.C would adequately empower the Magistrate to conduct an inquiry u/s. 311 Cr.P.C in cases where there is a statutory prohibition in taking cognizance in the absence of a sanction order from the State or a Statutory Authority. After such an inquiry u/s. 311 Cr.P.C, which can be done at a stage before taking cognizance, the Magistrate is of the view that the case against the prospective accused ought to go to trial, it should place the closure report of the police u/s. 173(2) along with the findings of the Court

in the inquiry u/s. 311 Cr.P.C before the sanctioning authority and after it receives sanction, the Court can proceed to take cognizance of the offence against the accused and proceed in accordance with law.

In those cases where no previous sanction is required for taking cognizance, the closure report of the investigating agency notwithstanding, the Magistrate can proceed under Chapter XV of the Cr.P.C, take cognizance of the offence against the accused and examine the Complainant and his witnesses u/s. 200 Cr.P.C and direct the police to investigate u/s. 202 Cr.P.C. The difference between an order u/s. 156(3) and 202 Cr.P.C is that in compliance of an order u/s. 156(3) Cr.P.C, the same must culminate with the filing of a final report u/s. 173(2) Cr.P.C by the investigating agency. However, an order to the police to investigate u/s. 202 Cr.P.C, is more in the nature of an inquiry which is conducted by the police to clear the cob webs of doubt the Magistrate may have before he issues process to the accused u/s. 204 Cr.P.C or dismisses the complaint u/s. 203 Cr.P.C.

From the discussion in the preceding paragraphs, it becomes amply clear that the option available to the Magistrate, where the investigating agency files a closure report, is not to repeatedly pass orders u/s.156(3) Cr.P.C and thereby compel the police to ultimately file a charge sheet by "subliminal coercion" and consequently fall foul of the law laid down by the Supreme Court in ***Abhinandan Jha's case*** (supra) which prohibits the Magistrate from directing the police u/s. 156(3) Cr.P.C to file a charge sheet. The power u/s.156(3) has the hallowed objective of ensuring that an investigation by the police does not suffer from inherent defects which would aid the accused in the course of the trial and at the same time ensure that an innocent person is not wrongly made to suffer the rigours of a criminal trial despite the absence of adequate evidence against him.

Under the circumstances, this Court feels it essential to pass the following guidelines for the exercise of power u/s. 156 (3) Cr.P.C by the Magistrate/Court:

(i) Where the police/investigating agency files a closure report or a charge sheet u/s. 173(2) Cr.P.C after the completion of investigation, the Court may, if it is not satisfied by the investigation conducted by the police, direct further investigation u/s. 156(3) Cr.P.C. Such an order may be passed only once by the Court. However, before passing such an order, the Magistrate shall study the final report diligently and shall be assisted in this endeavour by the Public Prosecutor, who bears upon his shoulders the responsibility of ensuring that the final report filed by the police is such that the same can effectively stand the scrutiny of a criminal trial. He must assist the Magistrate in the scrutiny of the charge sheet/closure report, if called upon to do so by the Magistrate. Thereafter, the order u/s. 156(3) passed by the Court shall be precise giving clear cut directions to investigating agency

to further investigate into specific areas, hitherto not done by the investigating agency.

(ii) Where the investigating agency in compliance of the order u/s. 156(3) Cr.P.C files a closure report yet again or a charge sheet which is not to the satisfaction of the Court, it shall not indulge in the subliminal coercion of the investigating agency by passing an order u/s. 156(3) Cr.P.C a second time and instead, where the offence is one for which no previous sanction of the State is required to take cognizance of the offence, proceed under Chapter XV of the Cr.P.C and issue notice to the defacto Complainant, take cognizance of the offence u/s.190(1)(a) Cr.P.C, record the statement of the Complainant and his witnesses and if need be, direct the police or anyone else to investigate u/s. 202 Cr.P.C and file a report and thereafter decide whether a case exists for the issuance of process against the accused u/s. 204 Cr.P.C or whether the case ought to be dismissed u/s. 203 Cr.P.C.

(iii) Where the offence is one which requires previous sanction of a sanctioning authority before cognizance can be taken, the Court may exercise the power of inquiry on its own u/s. 311 Cr.P.C without taking cognizance of the offence and, if necessary summon and examine as witnesses all such persons whose testimony the Court feels would be essential to unravel the truth and also exercise powers u/s. 91 Cr.P.C and direct a person to produce a document or thing which the Court considers desirable for the purposes of the inquiry. Thereafter, if the Court is of the opinion that there lies before it a case fit for trial, it shall place the report of the police u/s. 173(2) Cr.P.C as well as the material collected by it in the course of its inquiry u/s. 311 Cr.P.C before the sanctioning authority (through the investigating agency).

(iv) The sanctioning authority shall, as soon as possible, decide on the question of sanction, preferably within three months from the receipt of material forwarded by the Court through the police. If sanction is granted, the Court shall proceed to take cognizance of the offence u/s. 190(1)(b) Cr.P.C and issue process to the accused person. If sanction is declined, the case shall be closed by the Court.

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163. CRIMINAL PROCEDURE CODE, 1973 – Section 157
NDPS ACT, 1985 – Sections 35 and 54

(i) Fair investigation – Special statute containing specific provision of reverse burden of proof – Necessarily postulates that the informant and the investigator must not be the same person.

(ii) Role of Investigator – Investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused.

(iii) Presumptions – Burden of proof – The stringent provisions of the NDPS Act, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused – The case of the prosecution cannot be allowed to rest on preponderance of probabilities.

दण्ड प्रक्रिया संहिता, 1973 - धारा 157

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, 1985 - धाराएं 35 एवं 54

(i) ऋजु अन्वेषण - प्रतिगामी सबूत के भार के विनिर्दिष्ट प्रावधान रखने वाली विशेष संविधि - आवश्यक रूप से प्रतिपादित करता है कि सूचनाकर्ता और अन्वेषक एक ही व्यक्ति नहीं होने चाहिये।

(ii) अन्वेषक की भूमिका - दांडिक अपराधों के अन्वेषण को आपत्तिजनक लक्षणों अथवा ऐसी दुर्बलताओं, जो वैध रूप से अभियुक्त को शिकायत का आधार देते हों, से स्वतंत्र होना चाहिये।

(iii) उपधारणायें - प्रमाण भार - स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम के कठोर उपबंध अभियोजन को अनुसंधान उपरांत संदेह से परे प्रथम दृष्टया मामला स्थापित करने से छूट प्रदान नहीं करते हैं, मात्र उनके स्थापित होने पर ही सिद्धभार अभियुक्त पर अंतरित होगा - अभियोजन के प्रकरण को साक्ष्य की अधिसंभाव्यता पर आधारित होने की अनुमति नहीं दी जा सकती है।

[Readers are requested to go through the law laid down in ***S. Jeevanantham v. State, (2004) 5 SCC 230*** and ***Surendra@Kala v. State of Haryana, AIR 2016 SC 508***]

Mohan Lal v. State of Punjab

Judgment dated 16.08.18 passed by the Supreme Court in Criminal Appeal No. 1880 of 2011 reported in AIR 2018 SC 3853 (Three Judges Bench) .

Relevant extracts from the judgment:

Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that

the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35 (2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a ***prima facie*** case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.

A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

That investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part of the accused was noticed in ***Babubhai v. State of Gujarat, (2010) 12 SCC 254***.

In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion.

The discussion in the present case may not be understood as confined to the requirements of a fair investigation under the NDPS Act only carrying a reverse burden of proof. ***State of Punjab v. Baldev Singh, (1996) 6 SCC 172*** related to a prosecution under Section 165A of the IPC. Nonetheless, it observed that if

the informant were to be made the investigating officer, it was bound to reflect on the credibility of the prosecution case. ***Megha Singh v. State of Haryana, (1996) 11 SCC 709*** concerned a prosecution under the Terrorist and Disruptive Activities (Prevention) Act, 1985. It was held that the Head Constable being the complainant himself, could not have proceeded with the investigation and it was a practice, to say the least, which should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation. ***Rajangam State by Inspector of Police, Narcotics Intelligence Bureau Madurai, Tamil Nadu v. Rajangam, (2010) 15 SCC 369*** was a prosecution under the NDPS Act, an objection was taken that PW-6 who apprehended the accused could not have investigated the case. Upholding the objection, relying on ***Megha Singh*** (supra) the accused was acquitted.

In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the Courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a pre-determined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

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164. CRIMINAL PROCEDURE CODE, 1973 – Sections 170, 173 and 437
Requirement of producing accused while presenting Final Report – Offence of non-bailable nature – Police Officer is bound to forward the accused in custody – Judgment in case of *Rajendra Kori* overruled – Further held, in absence of accused after notice, Court may order issuance of non-bailable warrant.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 170, 173 एवं 437

अंतिम रिपोर्ट प्रस्तुत किये जाते समय अभियुक्त को प्रस्तुत किये जाने की आवश्यकता - गैर - जमानतीय प्रकृति का अपराध - पुलिस अधिकारी अभियुक्त को अभिरक्षा में भेजने के लिये बाध्य है - राजेन्द्र कोरी मामले का निर्णय उलटा गया - आगे अभिनिर्धारित, सूचना के पश्चात् अभियुक्त की अनुपस्थिति - न्यायालय गैर-जमानतीय वारण्ट जारी करते हुए आदेश कर सकेगा।

S.N. Vijaywargiya v. Central Bureau of Investigation
Order dated 21.12.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 26749 of 2017, reported in 2017 Law Suit (MP) 1942 (DB)

Relevant extracts from the order:

The First Schedule relating to the classification of the offences show the offence under Sections 467 and 468 of the IPC as non-bailable offence whereas Section 468 of the IPC is a cognizable offence whereas an offence under Section 467 of the IPC, which leads to imprisonment for life is cognizable whereas, the offence which leads to imprisonment for 10 years is non-cognizable. Thus, the petitioner is an accused of a non-bailable and cognizable offence. The petitioner is to be tried as in a warrant case, since the punishment for the offences charged, is for a term exceeding two years. In respect of an offence, which is to be tried as a warrant case, the process to compel appearance is contained in Chapter V and Part-B of the Chapter VI of the Code, whereas, Chapter XII relates to the power of the police to investigate.

The police officer was bound to produce an accused in custody to the Court in terms of Sub Section (1) of Section 170 of the Code. The accused are charged for an offence under Sections 467, 468 and 471 of the IPC. There is no assertion that the petitioner was granted pre-arrest bail during investigations. Therefore, there was mandate to the CBI to produce the accused for the non-bailable offences in custody alone. Since the CBI did not produce the accused in custody, the Court was within its jurisdiction to take the accused in custody. The petitioner was informed that the charge sheet shall be filed before the Court of Special Judge on 23.11.2017. Therefore, it was incumbent for the petitioner to make himself available to the Court.

X X X

In ***Rajendra Kori v. The State of Madhya Pradesh, order dated 20.10.2016 in MCRC No. 17501/2016,*** the attention of the learned Single Bench has not been drawn to Section 170 of the Code, which directs an police officer, in case of non-bailable offence, after completion of the investigations that there is sufficient evidence or reasonable ground to forward an accused to a Magistrate (in the present case Special Judge) for trial. Therefore, the said judgment is not the correct enunciation of law and is thus overruled. Thus, learned Special Judge was within its jurisdiction to issue non-bailable warrant in the first instance in view of the judgment of the Supreme Court in ***Raghuvansh Dewanchand Bhasin v. State of Maharashtra, (2012) 9 SCC 791***.

X X X

The Supreme Court examined the role of the Investigating Officer and the duty of the Court in a judgment (***M.C. Mehta (Taj Corridor Scam) v. Union of India and others, 2007 1 SCC 110***). It was held that when a cognizable offence is reported to the police, they may, after investigation take action under Section 169 or Section 170 of the Code. If the police think that there is not sufficient evidence against the accused, it may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, it may, under Section 170 of the Code, forward the accused to a competent Magistrate. In either case, the police has to submit a report of the action taken, under Section 173 of the

Code, to the competent Magistrate who considers it judicially under Section 190 of the Code and that it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)(b) of the Code or decline to take cognizance. The relevant extract from the judgment reads as under:-

> "21. In ***Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117***, this Court held that when a cognizable offence is reported to the police they may after investigation take action under Section 169 or Section 170 CrPC. If the police think that there is not sufficient evidence against the accused, it may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, it may, under Section 170, forward the accused to a competent Magistrate. In either case the police have to submit a report of the action taken, under Section 173, to the competent Magistrate who considers it judicially under Section 190 and takes the following action:
>
> (a) If the report is a charge-sheet under Section 170 it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)(b); or decline to take cognizance. But he cannot call upon the police to submit a report that the accused need not be proceeded against on the ground that there was not sufficient evidence.
>
> (b) If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report he can give directions to the police under Section 156(3) to make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed; but if the police is still of the opinion that there was not sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take cognizance under Section 190(1)(c). But the Magistrate cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1)(a) or (c), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to

such opinion. This judgment shows the importance of the opinion to be formed by the officer in charge of the police station. The opinion of the officer in charge of the police station is the basis of the report. Even a competent Magistrate cannot compel the police officer concerned to form a particular opinion. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer-in-charge of the police station. There is no provision in the Code empowering a Magistrate to compel the police to form a particular opinion. This Court observed that, although the Magistrate may have certain supervisory powers under the Code, it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. The formation of the said opinion, by the officer in charge of the police station, has been held to be a final step in the investigation, and that final step has to be taken only by the officer in charge of the police station and by no other authority."

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165. CRIMINAL PROCEDURE CODE, 1973 – Section 227
INDIAN PENAL CODE, 1860 – Section 420

(i) Cheating – Essential ingredients – reiterated.

(ii) Discharge – Ingredients of Section 420 of Code not made out either from FIR or from other material – Held, it is a fit case for discharge.

दण्ड प्रक्रिया संहिता, 1973 - धारा 227

भारतीय दण्ड संहिता, 1860 - धारा 420

(i) छल - आवश्यक तत्व - पुनरुद्धरित।

(ii) उन्मोचन - संहिता की धारा 420 के आवश्यक घटक प्रथम सूचना रिपोर्ट अथवा अन्य सामग्री से पूरे नहीं होते हैं - अभिनिर्धारित, यह उन्मोचित करने का उपयुक्त मामला है।

Samir Sahay @ Sameer Sahai v. State of U.P. and ors.

Judgment dated 25.08.2017 passed by the Supreme Court in Criminal Appeal No. 1541 of 2017, reported in 2018 (1) ANJ (SC) 373

Relevant extracts from the judgment :

In the case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus: ***S.W. Palanitkar v. State of Bihar, 2002 (1) SCC 241.***

"10. The ingredients of an offence of cheating are:

(i) there should be fraudulent or dishonest inducement of a person by deceiving him,

(ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by, (ii) (b) the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

X X X

It is clear that ingredients of Section 420 Indian Penal Code are not made out in the present case, either from the First Information Report or from any other material. From the First Information Report as extracted above only allegation made against the Appellant was that he accompanied his father Major P.C. Sahay (Retd.) when he assured that the money of the applicants will not be lost and it shall be the responsibility of his father (late P.C. Sahay). Following allegations made in the First Information Report need to be specially noticed:

"Along with him his son Samir Sahay Advocate who was already acquainted with the applicant also accompanied his father. Major PC Sahay gave the above said assurance, and the applicant and his wife Smt. Uma Devi deposited Rupees one Lakh with Major P.C. Sahay in this regard and he gave the receipt of the same to the applicant of which the applicant is enclosing the photocopy. Like this Major P.C. Sahay (retired) has got deposited total amount of ` 86,000/- from me and my wife But after some days it came to know that the said company has ran away along with the lakhs of rupees of the depositors after closing its office."

In the First Information Report even allegation of making assurance was not made against the Appellant but was made against Major P.C. Sahay (Retd.), father of the Appellant. There was no allegation that the Appellant fraudulently or dishonestly induced the complainant to deposit money. This Court in ***Arun Bhandari v. State of Uttar Pradesh and ors., (2013) 2 SCC 801***, has held that it is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

We are, thus, of the considered opinion that in the present case ingredients of Section 420 Indian Penal Code were not made out so as to frame any charge under Section 420 of the Indian Penal Code against the appellant.

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166. CRIMINAL PROCEDURE CODE, 1973 – Sections 299 and 438

Whether anticipatory bail may be granted to an absconding accused against whom chargesheet/challan has been filed under Section 299 Cr.P.C. and against whom Magistrate has issued warrant of arrest? Held, No. [*State of M.P. v. Pradeep Sharma, (2014) 2 SCC 171* relied on]

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 299 एवं 438

क्या ऐसे फरार अभियुक्त को अग्रिम जमानत का लाभ दिया जा सकता है जिसके विरुद्ध द.प्र.सं. की धारा 299 के अधीन अभियोग-पत्र/चालान प्रस्तुत किया जा चुका हो एवं जिसके विरुद्ध मजिस्ट्रेट द्वारा गिरफ्तारी वारण्ट जारी किया हो ? अभिनिर्धारित, नहीं। **(*म.प्र. राज्य वि. प्रदीप शर्मा, (2014) 3 एससीसी 171* अवलंबित)**

[Readers are requested to go through the law laid down by the High Court of Madhya Pradesh in ***Ghanshyam v. State of M.P., MCrC No. 20105 of 2016 dated 29.11.2016*** and ***Om Prakash Agarwal v. State of M.P., MCrC No. 9654 of 2016 dated 18.11.2016*** (Bench Indore)]

Sobran Batham v. State of Madhya Pradesh

Order dated 02.05.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 4357 of 2017, reported in 2018 (II) MPJR 252

Relevant extracts from the order:

If a person is absconding and is running away from the law enforcement agencies and the Court, then he is not entitled for anticipatory bail under Section 438 of CrPC. When the investigation is pending and if the person is running away from the Investigating Agency, then it can be said that he has a reasonable apprehension of his arrest and, therefore, during the pendency of the investigation, the application under Section 438 of CrPC for grant of anticipatory bail would be maintainable but once the charge-sheet is filed invoking Section 299 of CrPC and the Magistrate has issued the warrants against the accused, then in the considered opinion of this Court, the application for grant of anticipatory bail would not be maintainable in the light of the judgment passed by the Supreme Court in the case of ***State of M.P. v. Pradeep Sharma, (2014) 2 SCC 171***.

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167. CRIMINAL PROCEDURE CODE, 1973 – Section 437 (6)

Bail – Considerations – Grant of bail on expiry of sixty days from the first date fixed for taking evidence – Inalienable right subject to exceptions – Grant of bail is a norm – Can be dismissed only on existence of "Compelling Reasons" – Persuasive guidelines laid down.

दंड प्रक्रिया संहिता, 1973 - धारा 437 (6)

जमानत - विचार योग्य बिंदु - साक्ष्य लिये जाने हेतु नियत तिथि के प्रथम दिवस से 60 दिवसों के अवसान पर जमानत मंजूर करना - अहस्तांतरणीय अधिकार अपवादों के अधीन है - जमानत मंजूर करना नियम है - मात्र ''बाध्यकर कारणों'' की विद्यमानता पर ही खारिज की जा सकती है - अनुकरणीय दिशा निर्देश प्रतिपादित किये गये।

Pramod Kumar Vishwakarma v. State of M.P.

Order dated 19.04.2018 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 13444 of 2018, reported in 2018 Law Suit (MP) 718

Relevant extracts from the order:

Section 437(6) Cr.P.C. provides that in every case, which is triable by a Magistrate, of an offence which is non-bailable and where the trial cannot be concluded within a period of 60 days, from the first date fixed for taking evidence, then the accused shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless, for reasons to be recorded in writing, the Magistrate otherwise directs. The provision is unambiguous in its intent to protect the fundamental right of the accused under Article 21 of the Constitution by taking cognizance of his right to a speedy trial. The provision unequivocally mandates the release of such a person after the end of sixty days from the first date fixed for the recording of evidence. His continued incarceration is an exception to be exercised for reasons to be recorded by the Magistrate.

Relief under section 437(6) Cr.P.C can only be availed of in trails by a Magistrate and not in sessions trials. Offences triable by Magistrate are not grave offence which shock the human conscience. Section 29 Cr.P.C enables a Chief Judicial Magistrate to pass a sentence of imprisonment not exceeding seven years. A Judicial Magistrate First Class may pass a sentence of imprisonment not exceeding three years and a Judicial Magistrate Second Class may pass a sentence of imprisonment not exceeding one year. Section 29 Cr.P.C clarifies that the Court of the Magistrate are meant for the trial of minor offences punishable with a maximum term of imprisonment extending to seven years. Thus, the section 437(6) creates an inalienable right to be enlarged on bail, subject to the exception provided therein.

The right of an accused to a speedy trial has been held time and again by the Supreme Court as an inviolable right directly linked with his right to life and personal liberty under Article 21 of the Constitution. Sub-section (6) of section 437 Cr.P.C. has only gone a step further to give a practical effect to that right to a speedy trial. The legislature has disclosed its intention that a case which is exclusively triable by a Court of a Magistrate ought to be concluded within a period of 60 days and where such a trial cannot be concluded within the stipulated period then the accused who is languishing in judicial custody ought to be released. The power to hold otherwise is an extra-ordinary power granted to a Magistrate. Where the right is being denied to the accused, the reasoning must also be extra-ordinary and the same cannot be similar to the reasons which are given for refusing bail under sections 437 or 439 Cr.P.C.

While considering an application for bail u/ss. 437 and 439 Cr.P.C, reasons for denying bail can range from (a) the gravity of the offence, (b) the repercussions of the offence and its social consequences, (c) the antecedents of the applicant which reveal that he is a recidivist and is prone to sliding back

into a life of crime, if released, (d) the prospects of the accused influencing the witnesses by force or inducement, (e) the prospects of the complainant absconding and not making himself available to stand trial and lastly (f) that the nature and manner in which the offence is committed is so shocking to human conscience that the very enlargement of the accused on bail would result in a miscarriage of justice.

Thus, it is clear that those consideration that are germane for the rejection of a bail application u/s. 437 (1) Cr.P.C cannot be considered apt for the rejection of an application u/s. 437 (3) Cr.P.C. The denial of bail u/s. 437 (3) must be a rare exception. In other words, bail must be granted u/s. 437 (3) as a norm. The “reasons to be recorded” while rejecting such an application cannot be routine reasons and most certainly, ought not to be the same considerations normally cited while dismissing an application u/s. 437 (1) Cr.P.C. The reasons for dismissing such an application must be “Compelling Reasons”. The Court of the Ld. Magistrate must realise that the provision u/s. 437 (6) is inspired by the right to life and personal liberty of an individual as enshrined under Article 21 of the Constitution of India in which is included the right to a fair and speedy trial. The legislative intent is clear, that in a case which is triable by a Magistrate, the same must conclude within a period of two months from the first date set for evidence. If the trial continues beyond that period, there is a presumption that the right of the accused to a speedy trial is affected and thereby violates his right under Article 21 of the Constitution.

This court feels compelled to lay down, not as an indelible dictate, but as a persuasive guideline for the Magistrate to take into consideration while deciding an application u/s. 437 (3) Cr.P.C. (A) The Court must only deny bail under this section if it arrives at a considered opinion that the release of the accused would jeopardise the conduct of the trial itself, either on account of the accused absconding or influencing the witnesses of the case. (B) The apprehension of the accused attempting to impede the progress of the trial must be real and informed based upon material on record which strongly supports such an apprehension and not merely fanciful and convenient done only with the intent of defeating the right of the accused u/s. 437 (6). (C) Even where there is a reasonable apprehension as above, the Magistrate using his judicial skill must devise a method to grant bail to the accused while laying down such condition which are tough, though not unduly harsh and extreme, which will ensure the participation of the accused in the trial process. (D) The magnitude and severity of the offence ought not to be a consideration while deciding the application u/s. 437 (6) as notwithstanding the severity of the offence, it is apparent that no punishment can be inflicted which is more than seven years of imprisonment (where the Court of the Magistrate is the Chief Judicial Magistrate and three years and one-year imprisonment in the case of the Judicial Magistrate First Class and Second Class respectively). (E) The antecedents of the accused ought not to be given excessive importance while deciding the application as that was already a factor considered at the time of rejecting his bail u/s. 437 (1).

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

CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Eye witnesses – Reaction – Evidence cannot be disbelieved because a person did not interfere or reacted in a particular manner.

(ii) Omission in FIR – Omission as to names of the assailants or witnesses – Cannot be the sole ground to doubt the prosecution – Prompt registration of FIR – No other indication of fabrication – Omission is not fatal.

साक्ष्य अधिनियम, 1872 - धारा 3

दंड प्रक्रिया संहिता, 1973 - धारा 154

(i) चक्षुदर्शी साक्षी - प्रतिक्रिया - साक्ष्य पर अविश्वास नहीं किया जा सकता कि किसी व्यक्ति ने किसी विशेष ढंग से विरोध या प्रतिक्रिया व्यक्त नहीं की।

(ii) प्रथम सूचना रिपोर्ट में लोप - हमलावर अथवा साक्षीगण के नाम का लोप - अभियोजन पर संदेह का एक मात्र आधार नहीं हो सकता - प्रथम सूचना रिपोर्ट का त्वरित पंजीयन - मिथ्या रचना का कोई अन्य संकेत नहीं - लोप घातक नहीं है।

Motiram Padu Joshi and others v. State of Maharashtra

Judgment dated 10.07.2018 passed by the Supreme Court in Criminal Appeal No. 1479 of 2015, reported in AIR 2018 SC 3245

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***169. EVIDENCE ACT, 1872 – Sections 63, 65 and 66**

Admissibility of photocopy – Foundational facts – The party is required to explain the circumstances under which the photocopy was prepared, who was in possession of the original at the time of preparing the same and the copy sought to be produced is in fact true copy of the original – Permitting a party to lead secondary evidence is an exception and not the rule.

साक्ष्य अधिनियम, 1872 - धाराएं 63, 65 एवं 66

छायाप्रति की ग्राह्यता - आधारभूत तथ्य - संबंधित पक्षकार के लिये यह आवश्यक है कि वह उन परिस्थितियों को वर्णित करे जिनके अधीन छायाप्रति तैयार की गई थी, छायाप्रति तैयार करते समय मूल किसके आधिपत्य में थी तथा प्रस्तुत की जाने वाली प्रति वास्तव में मूल की सत्यप्रति है - पक्षकार को द्वितीयक साक्ष्य प्रस्तुत करने की अनुमति देना एक अपवाद है न कि नियम।

Makhanlal v. Balaram & ors.

Judgment dated 08.12.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No.1907 of 2016, reported in ILR (2018) MP 94

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170. EVIDENCE ACT, 1872 – Section 116
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1)(f)
POWER OF ATTORNEY ACT, 1882 – Section 2

(i) Evidence of Power of Attorney holder, extent of – The power of attorney holder can depose for the principal in respect of "acts" which are done by him or which are within his personal knowledge. (*Janki Vasudev Bhojwani and another v. Indusind Bank Ltd. and other, AIR 2005 SC 439,* relied on)

(ii) Estoppel – Landlord-tenant relationship – Once tenant has admitted tenancy and factum of payment of rent is established, then tenant is estopped from challenging title of landlord by virtue of Section 116 of the Evidence Act.

(iii) Proof of ownership in eviction matter – Degree of proof required to establish ownership – Law explained.

साक्ष्य अधिनियम, 1872 - धारा 116

म.प्र. स्थान नियंत्रण अधिनियम, 1961 - धारा 12 (1)(छ)

मुख्तारनामा अधिनियम, 1882 - धारा 2

(i) मुख्तारनामा धारक की साक्ष्य की सीमा - मुख्तारनामा धारक ऐसे ''कृत्यों'' के संबंध में मालिक के लिये अभिसाक्ष्य दे सकता है जो उसके द्वारा किये गये हों या जो उसकी व्यक्तिगत जानकारी में हों। (जानकी वासुदेव भोजवानी और अन्य वि. इंडसइंड बैंक लिमिटेड और अन्य, एआईआर 2005 एससी 439, अवलंबित)

(ii) विबंध - भू-स्वामी एवं अभिधारी का संबंध - जब अभिधारी द्वारा अभिधृति को एक बार स्वीकार किया गया तथा भाड़े के संदाय का तथ्य स्थापित किया गया तो धारा 116, साक्ष्य अधिनियम के आलोक में अभिधारी भू-स्वामी के स्वत्व को चुनौती देने से विबंधित है।

(iii) बेदखली के मामलों में स्वामित्व का सबूत - स्वामित्व स्थापित करने हेतु आवश्यक सबूत की मात्रा - विधि की व्याख्या की गई।

Rashid and anr. v. Gul Mohammad alias Gulloo Pahalwan
Judgment dated 20.03.2018 passed by the High Court of Madhya Pradesh in Second Appeal No. 1260 of 2010, reported in 2018 (2) MPLJ 557

Relevant extracts from the judgment:

In the light of principles laid down by the Supreme Court, there is no doubt that the power of attorney holder can depose for the principal in respect of such "acts" which were done by him or which were within his personal knowledge. The ancillary issue is whether this principle gives any benefit to the present appellants in the present case. The argument relating to the extent of deposition by power of attorney holder is raised to contend that the plaintiff is claiming ownership on the basis of a partition which had taken place during the period

when the deponent/ power of attorney holder was not even born. Thus, by no stretch of imagination, the deponent could have any personal knowledge about any such oral or written partition or execution of any Will. Thus, factum of ownership, is not proved. The aforesaid argument, on the first blush, appears to be attractive. However, on a deeper scrutiny, I find no substance in the said contention. No doubt, in section 12(1)(f), the Legislature has used the words "landlord" and "owner" both. This Court in ***Dayal Das v. Rajendra Prasad Gautam, 2012 (2) MPLJ 460,*** considered the said aspect and opined that the intention of Legislature is clear while using both the words aforesaid that the plaintiff has to establish that he is "landlord and owner" both. In the present case, although the factum of ownership was denied in the written statement by appellant No.1 but during cross-examination, he categorically admitted that plaintiff is the owner. Interestingly, during the course of arguments, reliance was placed by the appellants on ***Mussammat Sasiman Chowdhurain v. Shib Narayan Chowdhury, (1922) 24 Bombay Law Report 576.*** The learned Judge opined that the Urdu word which he has translated "of a landlord" is "Malikiyat". The word "Malik' was also considered by holding that "Malik" is one who holds "mulk" or "land". It was treated to be in relation to the terms of the deed. In my opinion, the word "Malik" is an Urdu word which is being used commonly. The dictionary meaning of word "Malik" is "owner" (See : ***Legal Glossary published by Ministry of Law and Justice, Rajbhasha Division, 1988***). In common parlance also, the word "Malik" is used in relation to "owner". Thus, I am unable to hold that the judgment of ***Shib Narayan*** (supra) is of any assistance to the appellants.

The Courts below have considered the statement of appellant No.1 who unequivocally admitted that he treats the plaintiff as owner of the suit shop. In view of this candid and specific admission of appellant No.1, it can be safely concluded that he admitted that plaintiff is the owner of the property. This is not in dispute that the factum of landlord was already established by the plaintiff. No attack was made by the appellants on that aspect. In the case of ***Sheela and others v. Firm Prahlad Rai Prem Prakash, (2002) 3 SCC 375,*** the Apex Court opined as under:-

> While seeking an ejectment on the ground of bonafide requirement under clause (f) above said the landlord is required to allege and prove not only that he is a 'landlord' but of also that he is the 'owner' of the premises. The definition of 'landlord' and 'tenant' as given in clauses (b) and (i) of section 2 of the Act make it clear that under the Act the concept of landlordship is different from that of ownership. A person may be a 'landlord' though not an 'owner' of the premises. The factor determinative of landlordship is the factum of his receiving or his entitlement to receive the rent of any accommodation. Such receiving or right to receive the rent may be on the own account of the landlord or on account of or for the benefit of any other

person. A trustee, a guardian and a receiver are also included in the definition of landlord. Such landlord would be entitled to seek an eviction of the tenant on one or more of such grounds falling within the ambit of Section 12(1) of the Act which do not require the landlord to be an owner also so as to be entitled to successfully maintain a claim for eviction. Clause (f) contemplates a claim for eviction being maintained by an owner- landlord and not a landlord merely. Though of course, we may hasten to add, that the concept of ownership in a landlord-tenant litigation governed by Rent Control Law has to be distinguished from the one in a title suit. Ownership is a relative term the import whereof depends on the context in which it is used. In Rent Control Legislation, the landlord can be said to be owner if he is entitled in his own legal right, as distinguished from for and on behalf of someone else, to evict the tenant and then to retain, control, hold and use the premises for himself. What may suffice and hold good as proof of ownership in a landlord tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit. In ***M.M. Quasim v. Manoharlal Sharma, (1981) 3 SCC 36,*** it was held that an 'owner-landlord' who can seek eviction on the ground of his personal requirement is one who has a right against the whole world to occupy the building in his own right and exclude anyone holding a title lesser than his own. In ***Dilbagrai Punjabi v. Sharad Chandra, (1988) Supp SCC 710,*** this Court held that it was essential to sustain a claim of eviction under Section 12 (1)(f) of the Act to establish that the plaintiff was the owner of the premises. However, the Court upheld the ownership of the landlord having been proved on the basis of an admission of the ownership of the plaintiff made by the defendant in reply to notice given before the institution of the suit and the recital of the name of the plaintiff as the owner of the property contained in the receipts issued by the landlord to the tenant over a period of time. Thus, the burden of proving ownership in a suit between landlord and tenant where the landlord-tenant relationship is either admitted or proved is not so heavy as in a title suit and lesser quantum of proof may suffice than what would be needed in a suit based on title against a person setting up a contending title while disputing the title of the plaintiff. Nevertheless pleading and proving ownership, in the sense as it carries in Rent Control Law, is one of the ingredients of the ground under Section 12 (1)(f) of the Act.

This court in its recent judgment passed in ***Prakash Pahuja v. Devendra Kumar Jain, 2018 (3) MPLJ 68,*** opined that "A bare perusal of principle laid down in this judgment makes it clear that in a suit for eviction, the plaintiff is not required to prove his title on the basis of same principles which are applicable in the suit for declaration of title. The Apex Court considered the aspect of ownership in this judgment and opined that in landlord tenant litigation, the landlord can be said to be owner if he is entitled in his own legal right to evict the tenant and then to retain, control, hold and use the premises for himself. To determine these aspects, the Court has to examine the facts and circumstances of each case and no straight jacket formula can be laid down. Thus, the core issue is whether the Court below was justified in answering the Issue No.1 in favour of the plaintiff. No doubt, the Court below erroneously opined that Ex.P/1 and P/2 shows that these documents are related with partition. These documents also became reason to hold that the plaintiff is the landlord. A plain reading of Ex.P/1 and P/2 shows that these documents were executed way back on 21.02.1958 and 10.06.1959. Thus, these documents, by no stretch of imagination, can be said to of be related with partition of the suit property. To this extent, I find substance in the argument of learned counsel for the appellant. These documents cannot be basis to decide Issue No.1 in favour of the plaintiff. However, a minute reading of para 6 of the impugned judgment shows that the Court below has taken into account the statement of present appellant wherein it was categorically admitted by him that rent has been continuously paid to the plaintiff. It was specifically admitted that plaintiff has been recognized by the defendant as his landlord. In view of this candid admission of present appellant during cross-examination, the Court below opined that after having admitted the relationship and factum of payment of rent to the plaintiff, the appellant is "estopped" under Section 116 of the Evidence Act. The deposition of the appellant shows that his admission regarding payment of rent to the plaintiff is clear and unequivocal. The appellant clearly stated that he treats Shri Devendra Kumar Jain as the landlord. He paid rent to plaintiff since beginning. He did not pay rent to anybody else. He received receipts of rent from plaintiff and he is still treating the plaintiff as the landlord."

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171. EXCISE ACT, 1915 (M.P.) – Sections 34 and 61
CRIMINAL PROCEDURE CODE, 1973 – Section 190 (1)(b)

(i) Cognizance of offence – FIR registered on complaint of Constable – Offence relating to breach of the conditions of licence – Held, Section 61 of the M.P. Excise Act as amended in 2014, puts an embargo on the power of Magistrate to take cognizance except upon complaint filed by the Collector or officer authorised by the Collector.

(ii) Cognizance – Effect of mistake – Held, where a Court has wrongly taken cognizance of the matter then all the subsequent proceedings would be without jurisdiction and nullity.

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

दण्ड प्रक्रिया संहिता, 1973 - धारा 190 (1)(ख)

(i) अपराध का संज्ञान - प्रथम सूचना रिपोर्ट आरक्षक की शिकायत पर पंजीबद्ध की गई - अनुज्ञा पत्र की शर्तों के उल्लंघन का अपराध - अभिनिर्धारित, म.प्र. आबकारी अधिनियम की 2014 में यथासंशोधित धारा 61 मजिस्ट्रेट की संज्ञान लेने की शक्ति पर एक प्रतिबंध लगाती है सिवाय इसके कि कलेक्टर अथवा उनके द्वारा प्राधिकृत अधिकारी द्वारा परिवाद प्रस्तुत किया जाये।

(ii) संज्ञान - त्रुटि का प्रभाव - अभिनिर्धारित, जहां न्यायालय द्वारा प्रकरण का गलत संज्ञान लिया गया हो वहां संपूर्ण पश्चातवर्ती कार्यवाही अधिकारिता रहित एवं शून्य होगी।

Girish Bhatnagar v. State of Madhya Pradesh

Order dated 28.04.2017 passed by the Madhya Pradesh High Court in M.Cr.C. No. 4639 of 2017, reported in 2018 (II) MPJR 262

Relevant extracts from the order:

Newly amended Section 61 of the Act reads as under:-

"61. *Limitation of prosecution*.-

(1) No Court shall take cognizance of an offence punishable – (a) under [Section 34 for the contravention of any condition of a licence, permit or pass granted under this Act, Section 37, Section 38, Section 38-A, Section 39, except on a complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer as may be authorised by the Collector in this behalf; (b) under any other Section of this Act other than section 49 except on the complaint or report of an Excise Officer or Police Officer.

(2) Except with the special sanction of the State Government no Judicial Magistrate shall take cognizance of any offence punishable under this Act, or any rule or order thereunder, unless the prosecution is instituted within six months from the date on which the offence is alleged to have been committed."

Complaint has been defined under Section 2 (d) of Cr.P.C. which reads as under:-

"2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

It is clear that if a person is found to be flouting the conditions of licence and if he is required to be prosecuted then the complaint has to be filed by the

Collector or an Officer authorised by the Collector as contemplated under Section 61 of the Act.

However, if the facts and circumstances of the present case are considered, then it would be clear that in view of Section 61 of M.P. Excise Act, the Court cannot take cognizance of an offence except on the complaint whereas in the present case, the cognizance has been taken by the Magistrate on the basis of the charge-sheet filed by the police. Thus, it is clear that the Magistrate has wrongly taken cognizance of the charge-sheet which has been filed by the police. Where the Court has wrongly taken cognizance of the matter then all the subsequent proceedings would be without jurisdiction and would be nullity.

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***172. HINDU MARRIAGE ACT, 1955 – Section 9**

(i) Restitution of conjugal rights – Reasonable excuse to withdraw from society of spouse – What constitutes? Explained – When conduct of spouse falls short of cruelty or any other matrimonial offence – Would be a defence to suit for restitution under Section 9 – It would be a reasonable excuse.

(ii) Husband disputing the paternity of child – He offered no maintenance to wife and child – And refused to keep them with himself – He suppressed the fact relating to gift of scooter by his in-laws – No efforts made by him to reconcile the dispute – Held, there is no reasonable excuse on the part of husband to withdraw from the society of wife.

हिन्दू विवाह अधिनियम, 1955 - धारा 9

(i) दाम्पत्य अधिकारों का प्रत्यास्थापन - पति या पत्नी के दाम्पत्य से प्रत्याहृत करने का युक्तियुक्त बचाव - क्या गठित करेगा? व्याख्या की गई - जब पति या पत्नी का आचरण क्रूरता अथवा किसी अन्य वैवाहिक अपकार से कुछ कम रह जाता है - धारा 9 के अधीन प्रत्यास्थापन के वाद में एक बचाव हो सकता हो - ऐसा आचरण युक्तियुक्त बचाव होगा।

(ii) पति ने बच्चे के पितृत्व को अस्वीकार किया - उसने अपनी पत्नी एवं बच्चे के भरण-पोषण की व्यवस्था भी नहीं की - उन्हें अपने साथ रखने से भी इंकार किया - ससुराल से दान में स्कूटर प्राप्त होने के तथ्य को छिपाया - पत्नी के साथ विवाद के समाधान का प्रयास भी नहीं किया - अभिनिर्धारित, पति के पास पत्नी के दाम्पत्य से प्रत्याहृत करने का युक्तियुक्त आधार नहीं है।

Hemant Rawat v. Smt. Anubha Rawat

Judgment dated 19.04.2018 passed by the Madhya Pradesh High Court in First Appeal No. 947 of 2015, reported in AIR 2018 MP 164 (DB)

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***173. HINDU MARRIAGE ACT, 1955 – Section 24**
CRIMINAL PROCEDURE CODE, 1973 – Section 125
Maintenance – Interim maintenance granted under Section 24 HMA over maintenance granted under Section 125 CrPC, effect of – Maintenance granted under Section 24 HMA would supersede the maintenance granted under Section 125 CrPC – The Order under Section 125 CrPC would not hold the field.

हिन्दू विवाह अधिनियम, 1955 - धारा 24

दण्ड प्रक्रिया संहिता, 1973 - धारा 125

भरण-पोषण - धारा 125 द.प्र.सं. के अधीन अनुदत्त किये गये भरण-पोषण के बावजूद हिन्दू विवाह अधिनियम की धारा 24 के अधीन अंतरिम भरण-पोषण अनुदत्त किये जाने का प्रभाव - हिन्दू विवाह अधिनियम की धारा 24 के अधीन अनुदत्त भरण-पोषण द.प्र.सं. की धारा 125 के अधीन अनुदत्त भरण-पोषण को अधिक्रांत करेगा - द.प्र.सं. की धारा 125 के अधीन आदेश प्रभाव नहीं रखेगा।

Sanjay Kumar Sinha v. Asha Kumari and another
Judgment dated 09.04.2018 passed by the Supreme Court in Civil Appeal No. 3658 of 2018, reported in (2018) 5 SCC 333

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174. HINDU SUCCESSION ACT, 1956 – Sections 6 and 8
Ancestral Property – Property acquired by partition of ancestral property between father and sons – It retains the character of ancestral property as regards coparcener – Sons and grandsons have right in the said property from the moment of their birth.

हिन्दू उत्तराधिकार अधिनियम, 1956 - धाराएं 6 एवं 8

पैतृक संपत्ति - पिता एवं पुत्रों के मध्य पैतृक संपत्ति के विभाजन के द्वारा संपत्ति अर्जित की गई - सहदायिक के संबंध में यह पैतृक संपत्ति का स्वरूप प्रतिधारित रखती है - पुत्रों एवं पौत्रों को उक्त संपत्ति में उनके जन्म से ही अधिकार है।

Shyam Narayan Prasad v. Krishna Prasad and ors.
Judgment dated 02.07.2018 passed by the Supreme Court in Civil Appeal No. 5415 of 2011, reported in AIR 2018 SC 3152

Relevant extracts from the judgment:

Having regard to the contentions urged, the first question for consideration is whether the property allotted to defendant No.2 in the partition dated 31.07.1987 retained the character of a coparcenary property. Admittedly, Gopalji Prasad and his five sons partitioned the property by a deed of partition dated 31.07.1987. It is clear from the materials on record that Gopalji Prasad retained certain properties in the partition. Certain properties had fallen to the share of defendant No.2 who is the father of plaintiff Nos. 1 to 3 and grandfather of plaintiff No. 4. Certain properties had fallen to the share of the first defendant.

The trial Court has held that the properties are ancestral properties. The High Court has confirmed the finding of the trial Court. We do not find any ground to disagree with this finding of the Courts below.

It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

In ***C. Krishna Prasad v. C.I.T, Bangalore, (1975) 1 SCC 160,*** this Court was considering a similar question. In the said case, C. Krishna Prasad, the appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under:

> "The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten".

In ***M. Yogendra and ors.v. Leelamma N. and ors, (2009) 15 SCC 184,*** it was held as under:

> "It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener

allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

In ***Rohit Chauhan v. Surinder Singh and ors., (2013) 9 SCC 419,*** a contention was raised by the defendant No.1 that after partition of the joint Hindu family property, the land allotted to the share of defendant No. 2 became his self acquired property and he was competent to transfer the property in the manner he desired. It was held that the property which defendant No. 2 got by virtue of partition decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to defendant No. 2. It was held thus:

"A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the plaintiff he was the sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out their remedies in appropriate proceeding."

Therefore, the properties acquired by defendant No.2 in the partition dated 31.07.1987 although are separate property qua other relations but it is a coparcenary property insofar as his sons and grandsons are concerned. In the instant case, there is a clear finding by the trial court that the properties are ancestral properties which have been divided as per the deed of partition dated 31.07.1987. The property which had fallen to the share of defendant No.2 retained the character of a coparcenary property and the plaintiffs being his sons and grandson have a right in the said property. Hence, it cannot be said that the suit filed by the plaintiffs was not maintainable.

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***175. INDIAN FOREST ACT, 1927 – Section 52**

Confiscation of vehicle – Applicability of Section 52 – Held, Section 52 can only be invoked when forest produce is also seized alongwith the vehicle – Confiscation in violation of Section 52 – Illegal.

भारतीय वन अधिनियम, 1927 - धारा 52

वाहन का अधिहरण - धारा 52 का लागू होना - अभिनिर्धारित, धारा 52 वहीं लागू हो सकती है जहां वाहन के साथ-साथ वनोपज भी जप्त किया गया हो - धारा 52 के उल्लंघन में किया गया अधिहरण - अवैधानिक है।

Rasum Bai (Smt.) v. State of M.P. and ors.

Judgment dated 08.12.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 11568 of 2015, reported in 2018 (1) ANJ (MP) 375

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***176. INDIAN PENAL CODE, 1860 – Sections 300 Exception 4, 302 and 304 Part I**

(i) Murder and culpable homicide – Distinction – Enunciated.

(ii) Accused husband was charged for committing murder of deceased wife – Accused came to house at midnight – Thereafter, deceased and accused went to sleep – Sudden quarrel took place between them – Accused gave a kick to the deceased due to which she was hit by flagstone of the almirah – Thereafter, accused strangulated her with an artificial plait – Cause of death in PM report was asphyxia – Held, the incident had occurred all of a sudden without premeditation – Accused had not taken any undue advantage or acted in a cruel or unusual manner – Therefore, accused is entitled to the benefit of Exception 4 of Section 300.

भारतीय दण्ड संहिता, 1860 - धाराएं 300 अपवाद 4, 302 एवं 304 भाग I

(i) हत्या एवं आपराधिक मानव वध - भिन्नता - व्यक्त की गई।

(ii) आरोपी पति पर अपनी पत्नी की हत्या का आरोप था - अभियुक्त मध्य रात्रि को घर वापस आया था - इसके बाद, अभियुक्त एवं मृतका सोने चले गये -

अचानक दोनों में विवाद हो गया - अभियुक्त ने मृतका को लात मारी जिससे वह आलमारी के पत्थर से जा टकराई - इसके बाद अभियुक्त ने नकली चोटी से उसका गला घोंट दिया था - शव परीक्षण प्रतिवेदन में मृत्यु का कारण श्वासावरोध पाया गया था - अभिनिर्धारित, घटना अचानक बिना पूर्वचिन्तन के घटित हुई थी - अभियुक्त ने कोई अनुचित लाभ नहीं उठाया था और न ही क्रूरतापूर्ण अथवा अप्रायिक रीति से कार्य किया था - अतः, अभियुक्त धारा 300 के अपवाद 4 का लाभ प्राप्त करने का अधिकारी है।

State of Madhya Pradesh v. Abdul Latif

Judgment dated 12.03.2018 passed by the Supreme Court in Criminal Appeal No. 1427 of 2008, reported in (2018) 5 SCC 456

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177. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3
CRIMINAL TRIAL

(i) Witness – Interested witness versus related witness – Distinctions – Reiterated – Held, while appreciating evidence of interested witnesses, courts have to be cautious and exclude possibility of false implication.

(ii) Prosecution was based on testimony of witnesses closely related with accused – Independent witnesses turned hostile – Both the related witnesses had inimical terms with accused over property belonging to deceased – A property dispute was also pending between them – Held, related witnesses had pecuniary interest in getting accused punished, thus, they are interested witnesses.

(iii) Prosecution relied only upon the testimony of interested witnesses – There were material infirmities, irregularities and contradictions in testimony of material witnesses – In admission register of hospital was written "history of fall" - Injuries in PM report supports the case of fall and not strangulation as projected by prosecution – Held, the case of prosecution is unsupported by independent witnesses, ridden with contradictions, good motive for false prosecution and filled with suspicious circumstances – Conviction set aside.

भारतीय दण्ड संहिता, 1860 - धारा 302

साक्ष्य अधिनियम, 1872 - धारा 3

आपराधिक विचारण

(i) साक्षी - हितबद्ध साक्षी विरूद्ध संबंधी साक्षी - भिन्नता - पुनरूद्धरित - अभिनिर्धारित, हितबद्ध साक्षियों की साक्ष्य का मूल्यांकन करते समय न्यायालयों को सतर्क रहते हुए मिथ्या अभियोजन की संभावना को पृथक कर देना चाहिए।

(ii) जहां अभियोजन का मामला ऐसे साक्षियों की अभिसाक्ष्य पर आधारित था जो अभियुक्त के निकट संबंधी थे - स्वतंत्र साक्षी पक्षद्रोही हो गए थे - दोनों संबंधी साक्षियों की अभियुक्त से मृतक की संपत्ति को लेकर वैमनस्यता थी - उनके मध्य संपत्ति को लेकर एक वाद भी लंबित था - अभिनिर्धारित किया गया, कि संबंधी साक्षियों का अभियुक्त को दण्डित कराने में वित्तीय हित था, अतः वे हितबद्ध साक्षी थे।

(iii) अभियोजन का मामला हितबद्ध साथियों की अभिसाक्ष्य पर आधारित था - महत्वपूर्ण साक्षियों की अभिसाक्ष्य में तात्विक विसंगतियां, अनियमितताएं एवं विरोधाभास थे - अस्पताल की प्रविष्टि पंजी में ''गिरने का वृत्तांत'' उल्लेखित था - शव परीक्षण प्रतिवेदन में उल्लेखित चोटें गिरने की संभावना का समर्थन करती थीं जो अभियोजन द्वारा प्रायोजित श्वासावरोध के विपरीत थीं - अभिनिर्धारित किया गया कि, अभियोजन का मामला स्वतंत्र साक्षियों से असमर्थित है, विरोधाभासों से ग्रसित है, मिथ्या अभियोजन के लिए अच्छा हेतुक विद्यमान है एवं कई संदेहास्पद परिस्थितियां हैं - दोषसिद्धि अपास्त की गई।

Sudhakar alias sudharasan v. State Represented by the Inspector of Police, Srirangam Police station Trichy, Tamil Nadu

Judgment dated 12.03.2018 passed by the Supreme Court in Criminal Appeal No. 381 of 2018, reported in (2018) 5 SCC 435

Relevant extracts from the judgment:

The whole basis for the Courts below to convict the accused appears to be the version of the prosecution that the accused was arrested on 18.1. 2013 at about 11 a.m. at bus stand, in presence of PWs 11 and 12, and brushed aside the plea of alibi presented by the accused with due support by the evidence of DW1. It is worthwhile to note that both of these witnesses (PWs 11 & 12) in their examination-in-chief denied the prosecution story about their presence at the time of arrest and seizure of material objects from the possession of the accused and they turned hostile. This fact casts serious doubts on the veracity of prosecution story about the arrest of the accused.

Admittedly, at the time of alleged incidence, PW 5 (wife of PW1) and PW 6 (son of PWs 1 & 5) were not present near the alleged scene of offence. As regards the evidences of independent witnesses (PWs 2, 3 and 4), who were residents of the same street as that of the deceased and who were examined as ocular witnesses, PW 2 (tenant of PW 5) turned hostile and did not support the prosecution case. He deposed that on 17.1.2013 at 7 pm when he found some crowd in front of the house of deceased he rushed there and found the deceased in unconscious condition. Then, he along with PWs 3 and 4 took the deceased to Srirangam Government Hospital and informed the same to PWs 1 & 5, they asked them to bring the deceased to ABC Hospital where PWs 1 & 5 joined them later on. In his cross examination, he stated that PW 1 was not present in Srirangam on the date of incident. PWs 3 and 4 also turned hostile and similar

statements were made by them also. Another shortfall in the prosecution case is that PW1 deposed that he gave oral complaint to police, but a contrary statement was put forth by PW15 I.O. stating that he got a written complaint from PW1.

From the above stated facts, it emerges that the entire prosecution case rests on the evidences of PWs 1 and 5 who are closely related to the appellant-accused. The accused is none other than the son of PW 5's brother and PW 1 is the husband of PW5 and PW6 is the son of PWs 1 & 5. Clearly, the relations between the accused appellant and PWs 1 & 5 were strained over property issues and they were in inimical terms. Apparently, there was also a civil suit pending between them for partition of properties.

It is settled law that there cannot be any hard and fast rule that the evidence of interested witness cannot be taken into consideration and they cannot be termed as witnesses. But, the only burden that would be cast upon the Courts in those cases is that the Courts have to be cautious while evaluating the evidence to exclude the possibility of false implication. Relationship can never be a factor to affect the credibility of the witness as it is always not possible to get an independent witness.

Then, next comes the question 'what is the difference between a related witness and an interested witness?'. The plea of "interested witness", "related witness" has been succinctly explained by this Court that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. In this case at hand PW 1 and 5 were not only related witness, but also 'interested witness' as they had pecuniary interest in getting the accused petitioner punished. [refer ***State of U.P. v. Kishanpal and ors., (2008) 16 SCC 73***]. As the prosecution has relied upon the evidence of interested witnesses, it would be prudent in the facts and circumstances of this case to be cautious while analyzing such evidence. It may be noted that other than these witnesses, there are no independent witnesses available to support the case of the prosecution.

Now, it would be appropriate to consider whether the Courts below exercised the judicial discretion in evaluating the evidence of PW1 and PW5 while convicting the accused. It may be noted that there is nothing on record to support the version of PWs 1 & 5 that on earlier occasions also and particularly on the date of incident, the accused quarreled with his grandmother demanding money and to settle the house in his favor. Further, it is on record that when the deceased was brought to the hospital, in the Accident Register, it was written as 'history of fall'. According to the prosecution's case, blood came out from the mouth and nose of the deceased, but there appears no seizure of bloodstained clothes of the deceased and chemical analysis. Thus, the inconsistent evidence by the alleged eyewitnesses as well as investigation agency would cause dent to the edifice on which the prosecution case is built, and it adversely affects the substratum of the prosecution case.

We further find, to a certain extent, material infirmities, irregularities and contradictions in the prosecution case as also in the evidence of prosecution witnesses including the deposition of PWs 1 & 5, who are material witnesses. PW 1 in his cross examination categorically stated that his wife (PW 5) has filed a suit for partition against the accused and his family members whereas PW 5 in her cross examination denied the same. Likewise, there are contradictory statements of witnesses, primarily to the aspect of happening of incident, taking the victim to the hospital, the presence of PW1 at the time of alleged incident, detaining the accused from bus stand or from his mother-in-law's house, recovery of material objects from the possession of accused and lodging of complaint by PW1 etc, and the whole story appears to be an utterly incredible one. More so, there was no explanation forthcoming from the prosecution side on the questions raised by the defense that soon after reaching the ABC hospital with victim, how can the PWs 1 & 5 directly approached Dr. Mohammed Ghouse Khan (PW8) without going to Emergency Ward and why the Doctors at ABC hospital did not inform police when it was a medico legal case. Both the Courts below have simply noted that the variations and contradictory statements are not material in proving the guilt of the accused. We feel that the reasoning given by the Courts below is *ex facie* illegal.

This Court in ***Latesh v. State of Maharastra, Criminal Appeal No. 1301 of 2015,*** decided on January 30, 2018 has explained that the reasonable doubt in a lucid manner as a mean between excessive caution and excessive indifference to a doubt. Moreover, it has been explained that reasonable doubt should be a practical one and not an illusory hypothesis.

In view of the above discussion, we are of the view that there exists reasonable doubt in this case as the case of prosecution is unsupported by independent witnesses, ridden with contradictions, good motive for false prosecution and filled with suspicious circumstances. Further, we are of the considered opinion that there is not only insufficiency of evidence but also lack of credibility on the trustworthiness of PWs 1 & 5 culminated into disproving the prosecution case and alleged guilt of the accused.

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***178. INDIAN PENAL CODE, 1860 – Section 304-A**
AYURVIGYAN PARISHAD ADHINIYAM, 1987 (M.P.) – Section 24
Medical Negligence – Allopathy medicines given by Homoeopathic Doctor – Death of the patient – Charge sheet filed without report of independent doctor/Medical Board – Challenged – Held, accused not competent to prescribe allopathic medicines – Directions issued by the Supreme Court in *Jacob Mathew v. State of Punjab, AIR 2005 SC 3180,* not applicable.

भारतीय दण्ड संहिता, 1860 - धारा 304-क

आयुर्विज्ञान परिषद अधिनियम, 1987 (म.प्र.) - धारा 24

चिकित्सीय उपेक्षा - होम्योपैथिक चिकित्सक द्वारा ऐलोपैथिक दवाईयाँ दी गईं - मरीज की मृत्यु - किसी स्वतंत्र चिकित्सक/मेडिकल बोर्ड की रिपोर्ट के बिना अभियोगपत्र दाखिल किया गया - चुनौती - अभिनिर्धारित, अभियुक्त ऐलोपैथिक दवाईयाँ लिखने के सक्षम नहीं - ***जैकब मैथ्यू विरूद्ध पंजाब राज्य, एआईआर 2005 एससी 3180*** के मामले में उच्चतम न्यायालय द्वारा जारी दिशा निर्देश लागू नहीं।

Dr. Ashish Khare v. State of M.P. and anr.
Judgment dated 07.02.2018 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 1736 of 2018, reported in 2018 Law Suit (MP) 133

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***179. INDIAN PENAL CODE, 1860 – Section 376**

(i) Rape and consensual sex – Promise of marriage – Mere failure to keep promise cannot be inferred as false promise.

(ii) Appreciation of evidence – Charge of rape on false promise of marriage – Prosecutrix 26 years of age – She consented for sexual intercourse – Accused insisted her to send marriage proposal to his parents – He has not kept his relationship secret – Held, at the most it could be breach of promise to marry rather than false promise to marry.

भारतीय दण्ड संहिता, 1860 - धारा 376

(i) बलात्कार एवं सहमतिपूर्ण सहवास - विवाह करने का वचन - वचन का पालन न कर पाने मात्र से मिथ्या वचन का अनुमान नहीं लगाया जा सकता है।

(ii) साक्ष्य का मूल्यांकन - विवाह के मिथ्या वचन के आधार पर बलात्कार का आरोप - अभियोक्त्री 26 वर्षीय वयस्क थी - उसने सहवास के लिये सहमति दी थी - अभियुक्त ने ही उसे जोर दिया था कि वह उसके माता-पिता को विवाह का प्रस्ताव भेजे - अभियुक्त ने अपने संबंध को छिपाया नहीं था - अभिनिर्धारित किया गया कि, यह कृत्य अधिक से अधिक विवाह के वचन का भंग हो सकता है न कि विवाह का मिथ्या वचन।

Rishabh Saxena v. State of M.P.
Judgment dated 08.08.2017 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 2906 of 2014, reported in 2018 (1) ANJ (MP) 354

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180. LAND ACQUISITION ACT, 1894 – Sections 4 and 6
CIVIL PROCEDURE CODE, 1908 – Section 9
Jurisdiction of Civil Court – Civil Court has no jurisdiction to decide the validity of Acquisition Notifications and proceedings arising therefrom u/s 4 and 6 of the Act – Power of Civil Court to take cognizance of such cases under Section 9 CPC stands excluded – Only High Court can consider such matter under Article 226 of the Constitution. (*Bangalore Development Authority v. Brijesh Reddy & anr., (2013) 3 SCC 66* relied on)

भू-अर्जन अधिनियम, 1894 - धाराएं 4 व 6

सिविल प्रक्रिया संहिता, 1908 - धारा 9

सिविल न्यायालय का क्षेत्राधिकार - सिविल न्यायालय को अधिनियम की धारा 4 व 6 के अधीन अर्जन अधिसूचनाओं तथा उनसे उत्पन्न कार्यवाहियों की वैधता विनिश्चित करने की अधिकारिता नहीं है - सिविल न्यायालय की ऐसे मामलों का संज्ञान लेने की शक्ति धारा 9 व्य.प्र.सं के अधीन अपवर्जित है - संविधान के अनुच्छेद 226 के अधीन मात्र उच्च न्यायालय ऐसे मामले पर विचार कर सकता है। (***बंगलौर डेवलपमेंट अथॉरिटी विरूद्ध बृजेश रैड्डी तथा अन्य, (2013) 3 एससीसी 66,*** अवलंबित)

H. N. Jagannath and others v. State of Karnataka and others

Judgment dated 06.12.2017 passed by the Supreme Court in Civil Appeal No. 20930 of 2017, reported in AIR 2017 SC 5805

Relevant extracts from the judgment:

The Division Bench has erroneously conferred jurisdiction upon the civil Court to decide the validity of the acquisition. This Court has repeatedly held in a number of judgments that, by implication, the power of a civil Court to take cognizance of such cases under Section 9 of the CPC stands excluded and the civil Court has no jurisdiction to go into the question of validity under Section 4 and declaration under Section 6 of the Land Acquisition Act. It is only the High Court which will consider such matter under Article 226 of the Constitution. So, the civil suit, per se is not maintainable for adjudicating the validity or otherwise of the acquisition notifications and proceedings arising therefrom.

This Court in the case of ***Bangalore Development Authority v. Brijesh Reddy and anr., (2013) 3 SCC 66,*** while considering the acquisition notifications issued under BDA Act observed thus:

> "It is clear that the Land Acquisition Act is a complete Code in itself and is meant to serve public purpose. By necessary implication, the power of the civil Court to take cognizance of the case under Section 9 CPC stands excluded and a civil Court has no jurisdiction to go into the question of the validity or legality of the notification under Section 4, declaration under Section 6 and subsequent proceedings except by the High Court in a proceeding under Article 226 of the Constitution. It is thus clear that the civil Court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act. The only right available for the aggrieved person is to approach the High Court under Article 226 and this Court under Article 136 with self-imposed restrictions on their exercise of extraordinary power."

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181. LIMITATION ACT, 1963 – Section 14

(i) Limitation – Computation of period – Exclusion of time under Section 14 – Object stated.

(ii) Section 14 – Is intended to provide remedy – Where a litigant institutes proceeding which cannot be decided on merits or may be dismissed due to some technical defects or for selection of a wrong forum – Requires liberal view.

परिसीमा अधिनियम, 1963 - धारा 14

(i) परिसीमा - काल की गणना - धारा 14 के अधीन काल का अपवर्जन -उद्देश्य स्पष्ट किया गया।

(ii) धारा 14 - प्रावधान का उद्देश्य उपचार उपलब्ध कराना है - जहां पक्षकार ऐसी कार्यवाही संस्थित करता है जो गुणदोष पर निर्णित नहीं की जा सकती है अथवा तकनीकि त्रुटि या गलत फोरम के चुनाव के कारण निरस्त की जा सकती है - वहां उदार रुख अपेक्षित है।

Mohinder Singh (Dead) through Legal Representatives v. Paramjit Singh and others

Judgment dated 28.03.2018 passed by the Supreme Court in Civil Appeal No. 10222 of 2017, reported in (2018) 5 SCC 698

Relevant extracts from the judgment:

The expanse of Section 14 of the Act, therefore, is not limited to mere jurisdictional issue but also other cause of a like nature. Taking cue from this decision, the appellant would contend that the plaintiff, immediately after compromise judgment was pronounced on 20th August, 1963, took recourse to Execution Petition No.433/1964 on 23rd December, 1964 but the same was dismissed by the Executing Court on 7th August, 1965, as being premature. The plaintiff verily believed that the execution of the decree passed in the previous suit would result in getting possession of the property albeit after the death of Ujjagar Singh. Consequently, after the death of Ujjagar Singh on 14th January, 1971, the plaintiff moved second execution petition on 18th February, 1971 and in those proceedings moved an application for summoning the file with a decree sheet. It transpired that the decree was drawn and the decree sheet was made ready on 19th August, 1972, but the said execution petition stood dismissed for default on 2nd February, 1973. For that reason, the appellant on the same day moved the third execution petition i.e. on 2nd February, 1973 which, however, was dismissed on 2nd February, 1974 on the ground that the remedy for the plaintiff to get possession of the suit property was to file a suit for possession on the basis of the declaratory decree. It is only thereafter the plaintiff resorted to the subject suit, being Civil Suit No.173/1974 filed on 11th June, 1974.

Notably, the respondents did not question the decisions of the Executing Court – be it on the ground that it was premature or on the ground that the remedy for the plaintiff was to file a suit for possession. Indubitably, the

proceedings such as execution petition resorted to by the plaintiff would be a civil proceeding. Further, the Trial Court as well as the Appellate Court have found that the plaintiff was pursuing that remedy in good faith. That finding has not been disturbed by the High Court. The reasons which weighed with the Executing Court for dismissing the execution petitions were just causes covered by the expression "defect of jurisdiction" and in any case, "other cause of a like nature", ascribed by the Executing Court for its inability to grant relief of possession of suit property to the plaintiff. The fact situation of the present case would certainly satisfy the tests specified in Section 14 of the 1963 Act, for showing indulgence to the plaintiff to exclude the period during which the plaintiff pursued execution proceedings for reckoning the period of limitation for filing the suit for possession on 11th June, 1974.

Both sides have relied on the exposition in the case of ***Consolidated Engineering Enterprises v. Deptt. of Irrigation, (2008) 7 SCC 169***. In that case, the Court noted that Section 14 of the 1963 Act envisages that it is a provision to afford protection to a litigant against bar of limitation when he institutes a proceeding which by reason of some technical defects cannot be decided on merits and is dismissed. While considering the provisions of Section 16 and its application, this Court observed that a proper approach will have to be adopted and the provisions will have to be interpreted so as to advance cause of action rather than abort the proceedings, inasmuch as the section is intended to provide relief against bar of limitation in cases of mistaken remedy or selection of a wrong forum.

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***182. LIMITATION ACT, 1963 – Articles 60 and 65**

HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 4 (b), (c), 6, 8 and 11

Limitation – Alienation of minor's property by *de facto* guardian (step mother) without legal necessity – Suit filed by minor for setting aside the alienation – Limitation – Held, since the transfer by step mother is *void ab initio* and not voidable, Article 65 which provides limitation of 12 years shall be applicable and Article 60 of the Limitation Act will not apply.

परिसीमा अधिनियम, 1963 - अनुच्छेद 60 एवं 65

हिन्दू अवयस्कता एवं संरक्षकता अधिनियम, 1956 - धाराएं 4 (ख), (ग), 6, 8 एवं 11

परिसीमा - विधिक आवश्यकता के बगैर वस्तुतः संरक्षक (सौतेली माता) द्वारा अवयस्क की संपत्ति का अन्यसंक्रामण - अवयस्क द्वारा अन्यसंक्रामण को अपास्त कराने हेतु वाद संस्थित किया गया - परिसीमा - अभिनिर्धारित, चूँकि अन्यसंक्रामण आरंभ से ही शून्य है एवं शून्यकरणीय नहीं है, इसलिये परिसीमा अधिनियम के अनुच्छेद 65 में यथाविहित 12 वर्षों की परिसीमा लागू होगी और अनुच्छेद 60 लागू नहीं होगा।

Mahila Beti Bai v. Jagdish Singh and others
Judgment dated 08.02.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 25 of 2003, reported in 2018 (2) MPLJ 698

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***183. LIMITATION ACT, 1963 – Articles 64 and 65**
SPECIFIC RELIEF ACT, 1963 – Section 34

(i) Adverse Possession – Pleading and Proof – Party claiming plea of adverse possession is required to plead and prove since when his possession became adverse – Mere long possession is not enough for proving adverse possession.

(ii) Plea of Adverse Possession, maintainability of – Party claiming title and possession over disputed property on strength of sale deed as well as on adverse possession – Held, plea of ownership and adverse possession are mutually destructive and inconsistent with each other, and not maintainable. (*Mohanlal (Through LRs) v. Mirza Abdul Gaffar and another, 1996 JLJ 354,* relied on)

(iii) Declaratory suit – Evidence and Proof of title – Party claiming relief is required to discharge his burden to prove his title by filing documents of his title and title of predecessor – Adverse inference to be drawn in absence of documents. (*Sabastiao Luis Fernandes v. K.V.P. Shastri and others, (2013) 15 SCC 161* and *State of M.P. v. Maharani Usha Devi, AIR 2015 SC 2699,* relied on)

परिसीमा अधिनियम, 1863 - अनुच्छेद 64 एवं 65

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 34

(i) विरोधी आधिपत्य - अभिवचन एवं प्रमाण - विरोधी आधिपत्य का दावा करने वाले पक्षकार को यह अभिवचन कर प्रमाणित करना होता है कब से उसका आधिपत्य विरोधी हो गया है - मात्र दीर्घ आधिपत्य विरोध आधिपत्य साबित करने हेतु पर्याप्त नहीं है।

(ii) विरोधी आधिपत्य के अभिवाक् की पोषणीयता - पक्षकार द्वारा विक्रय विलेख के और साथ ही साथ विरोधी आधिपत्य के बल पर विवादित भूमि में स्वत्व और आधिपत्य का दावा किया गया - अभिनिर्धारित, स्वामित्व और विरोधी आधिपत्य का अभिवाक् परस्पर विनाशकारी और एक दूसरे से असंगत है और पोषणीय नहीं है। (***मोहनलाल (द्वारा विधिक प्रतिनिधि) वि. मिर्जा अब्दुल गफ्फार एवं अन्य, 1996 जेएलजे 354,*** अवलंबित)

(iii) घोषणात्मक वाद - साक्ष्य एवं स्वत्व का सबूत - अनुतोष की वांछा करने वाले पक्षकार को उसके स्वत्व को साबित करने के लिए अपने एवं अपने पूर्वाधिकारियों के स्वत्व और उसके पूर्वजों को दस्तावेज प्रस्तुत कर अपने भार से निर्मुक्त होना होता है - दस्तावेजों के अभाव में प्रतिकूल निष्कर्ष निकाला जायेगा। (***साबस्टिया लुईस फर्नेन्डेस वि. के.वी.पी. शास्त्री और अन्य, (2013) 15 एससीसी 161 एवं म.प्र. राज्य वि. महारानी उषा देवी, एआईआर 2015 एससी 2699,*** अवलंबित)

Municipal Corporation, Ujjain and others v. Bachhraj Factories Ltd.
Judgment dated 07.02.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in First Appeal No. 43 of 2003, reported in 2018 (2) MPLJ 539

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***184. MADHYA PRADESH MADHYASTHAM ADHIKARAN ADHINIYAM, 1983 – Section 7A**

ARBITRATION AND CONCILIATION ACT, 1996 – Section 2(4)

(i) State Act of 1983 and Central Act of 1996 – Held, State law will prevail – Where the dispute is not arbitrable under State Act, Central Act will not apply – Parties need to move to Civil Court.

(ii) Ascertained money – What constitutes – Held, Ascertained money, is not only which is 'known' or 'made certain' or 'fixed' or 'determined' or 'quantified' but includes all amounts which could be quantified as without consequential relief.

मध्यप्रदेश माध्यस्थम् अधिकरण अधिनियम, 1908 - धारा 7 क

माध्यस्थम् एवं सुलह अधिनियम, 1996 - धारा 2(4)

(i) 1983 का राज्य अधिनियम एवं 1996 का केन्द्रीय अधिनियम - अभिनिर्धारित, म.प्र. का राज्य अधिनियम प्रभावी होगा - जहां विवाद म.प्र. अधिनियम में मध्यस्थता योग्य नहीं है, वहां केन्द्रीय अधिनियम लागू नहीं होगा - पक्षकारों को सिविल न्यायालय जाना चाहिए।

(ii) अभिनिश्चित धन - क्या गठित करता है - अभिनिर्धारित, अभिनिश्चित धन न केवल 'ज्ञात' या 'निश्चित' या 'अवधारित' या 'माप किया गया' होता है अपितु इसमें ऐसी सभी राशि सम्मिलित हैं जो पारिणामिक अनुतोष से अन्यथा निर्धारित की जा सकती हैं।

Shri Gouri Ganesh Shri Balaji Constructions v. Executive Engineer, PWD
Judgment dated 03.05.2018 passed by the High Court of Madhya Pradesh in Arbitration Case No. 40 of 2016, reported in AIR 2018 MP 134 (FB)

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***185. MOTOR VEHICLES ACT, 1988 – Sections 2 (21) and 149**

Driving licence – Whether a person holding licence to drive a Light Motor Vehicle (LMV) is entitled to drive a Light Commercial/Transport Vehicle (LCV)? Held, Yes – LMV includes a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kgs or a tractor or roadroller, the unladen weight of which does not exceed 7500 kgs. (*Mukund Dewangan v. Oriental Ins. Co. Ltd., AIR 2017 SC 3668,* followed).

मोटरयान अधिनियम, 1988 - धाराएं 2 (21) एवं 149

चालन अनुज्ञप्ति - क्या हल्का मोटर यान चलाने की अनुज्ञप्ति रखने वाला व्यक्ति हल्का व्यावसायिक/ट्रांसपोर्ट यान चलाने की पात्रता रखता है? अभिनिर्धारित, हाँ - हल्के मोटर यान में मालवाहक एवं सर्वोपयोगी मोटर यान भी सम्मिलित हैं जिनका सकल यान वजन 7500 किलोग्राम से अधिक नहीं है अथवा ट्रैक्टर या रोडरोलर सम्मिलित हैं जिनका भार उतारा हुआ वजन 7500 किलोग्राम से अधिक नहीं है। (***मुकुन्द देवांगन विरूद्ध ओरियन्टल इंश्योरेंस कं. लि., एआईआर 2017 एससी 3668,*** अनुसरित)

Jagdish Kumar Sood v. Unitd India Insurance Co. Ltd. and ors.
Judgment dated 06.03.2018 passed by the Supreme Court in Civil Appeal No. 240 of 2017, reported in AIR 2018 SC 2906

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186. MOTOR VEHICLES ACT, 1988 – Sections 149 (2) and 66
Motor accident claim – Insurer's liability – Breach of policy – Absence of valid permit to use vehicle – Held, is a fundamental breach absolving insurance company from liability – The insurance company is directed to pay and then recover the compensation from owner/driver – Further held, absence of permit cannot be equated with absence of licence or fake licence or violation as to number of passengers.

मोटरयान अधिनियम, 1988 - धाराएं 149 (2) एवं 66

मोटर दुर्घटना दावा - बीमाकर्ता का दायित्व - पाॅलिसी का उल्लंघन - वाहन का उपयोग करने की वैध अनुज्ञा का अभाव - अभिनिर्धारित, सारभूत उल्लंघन है जो बीमा कंपनी को दायित्व से अभिमुक्ति देती है - बीमा कंपनी को भुगतान करने के बाद वाहन स्वामी/चालक से प्रतिकर वसूल करने का निर्देश दिया गया - यह भी अभिनिर्धारित किया गया, कि अनुज्ञा का अभाव होने की तुलना चालन अनुज्ञप्ति के न होने अथवा जाली चालन अनुज्ञप्ति होने अथवा वाहन में यात्रियों की संख्या के उल्लंघन से नहीं की जा सकती है।

Amrit Paul Singh and anr. v. TATA AIG General Insurance Co. Ltd. and ors.
Judgment dated 17.05.2018 passed by the Supreme Court in Civil Appeal No. 2253 of 2018, reported in AIR 2018 SC 2662

Relevant extracts from the judgment:

In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section

66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66.

The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in ***National Insurance Co. Ltd. v. Swaran Singh and ors, AIR 2004 SC 1531,*** and ***Lakhmi Chand v. Reliance General Insurance, AIR 2016 SC 315,*** in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence.

Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in ***Swaran Singh*** (supra) and other cases pertaining to pay and recover principle.

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187. MOTOR VEHICLES ACT, 1988 – Section 163-A

Compensation – Death of Driver of offending vehicle in accident alongwith death of two other persons and injury to two others – Defence of negligence by driver raised by insurance company in claiming absolvement from liability to pay compensation to legal heirs of deceased driver – Held, In a proceeding under Section 163-A, the insurer cannot raise any defence of negligence on the part of the victim ie. deceased driver to counter a claim for compensation – Insurance Company held liable to pay compensation.

मोटर यान अधिनियम, 1988 - धारा 163-क

क्षतिपूर्ति - दुर्घटना में आक्षेपित वाहन के ड्रायवर की मृत्यु के साथ दो अन्य व्यक्तियों की मृत्यु व दो अन्य को चोटें - मृत ड्रायवर के विधिक प्रतिनिधियों को क्षतिपूर्ति अदा करने से मुक्ति प्रदान करने हेतु ड्रायवर की लापरवाही का बचाव बीमा कंपनी द्वारा लिया गया - अभिनिर्धारित, धारा 163-क के तहत कार्यवाही में, क्षतिपूर्ति के दावे के विरोध में बीमाकर्ता, आहत अर्थात मृत ड्रायवर की लापरवाही का बचाव नहीं ले सकता - बीमा कंपनी को क्षतिपूर्ति अदा करने हेतु दायी ठहराया गया।

Shivaji and another v. Divisional Manager, United India Insurance Co. Ltd. and others

Judgment dated 09.08.2018 passed by the Supreme Court in Civil Appeal No. 2816 of 2018, reported in AIR 2018 SC 3705

Relevant extracts from the judgment:

The appellants are parents of Shaji Shivaji Dudhade, who was the driver of a car bearing Registration No. MH-06/W-604, which met with an accident on 15 June 2010. The accident occurred when the car dashed into a truck, bearing Registration No. KA-25/B-5363, resulting in his death; the death of two other persons and injuries to two more persons, all of whom were travelling in the car.

The appellants filed a claim petition seeking compensation under Section 163A of the Motor Vehicles Act, 1988. The Tribunal noted that since the claim petition had been filed under Section 163A of the Act, the question of proving that the accident happened due to the rash and negligent act of the driver did not arise. By its award dated 30 July 2011, the Tribunal allowed a claim of Rs. 4,60,800/- together with interest at the rate of 9% per annum.

The insurer preferred an appeal before the High Court of Karnataka. The appellants also filed an appeal before the High Court seeking enhancement of compensation awarded by the Tribunal. The High Court, by its impugned judgment, allowed the insurer's appeal and set aside the order of the Tribunal. The High Court opined that the idea behind enacting Section 163A is to ensure that even in the absence of any mistake on the part of the driver of the offending vehicle, the injured person or the legal heirs of the deceased person are compensated by the owner and the insurer. As a result, under this provision, since the victim has been contemplated to be an innocent third party, protection is extended only to the injured person or to the legal heirs of the deceased victim, and not to the driver who is responsible for causing the accident, the High Court held that compensation could not have been awarded to the appellants.

The issue which arises before us is no longer *res integra* and is covered by a recent judgment of three judges of this Court in ***United India Insurance Co. Ltd. v. Sunil Kumar & anr., AIR 2017 SC 5710,*** wherein it was held that to permit a defence of negligence of the claimant by the insurer and/or to understand Section 163A of the Act as contemplating such a situation would be inconsistent with the legislative object behind introduction of this structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an undue long time. The Court observed that if an insurer was permitted to raise a defence of negligence under Section 163A of the Act, it would "bring a proceeding under Section 163A of the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention. Consequently, it was held that in a proceeding under Section 163A of the Act, the insurer cannot raise any defence of negligence on the part of the victim to counter a claim for compensation.

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188. MOTOR VEHICLES ACT, 1988 – Section 165

Accident Claim – Tractor was being used for digging well in the field of the respondent with blasting machine – Battery was installed in a tractor and explosives for blasting were charged by the battery – During blasting operations, a heavy stone came flying and fell on the head of the deceased resulting in his death – Held, tractor was being used as stipulated under Section 165 of the Act – Further, conceptual meaning of the phrase "arising out of the use of motor vehicle" explained – The causal relationship should exist between violation and the accident caused.

मोटरयान अधिनियम, 1988 - धारा 165

दुर्घटना दावा - ट्रैक्टर का उपयोग ब्लास्टिंग मशीन से अनावेदक के खेत में कुंआ खोदने के लिए किया जा रहा था - बैटरी ट्रैक्टर में स्थापित थी तथा ब्लास्टिंग के लिए विस्फोटक को बैटरी से चार्ज किया जा रहा था - ब्लास्टिंग के दौरान, एक भारी पत्थर उड़ता हुआ मृतक के सिर पर गिरा जिससे उसकी मृत्यु हो गई - अभिनिर्धारित, ट्रैक्टर का उपयोग अधिनियम की धारा 165 में बताए अनुसार किया जा रहा था - आगे, वाक्यांश ''मोटरयान के उपयोग से उत्पन्न'' के संकल्पनात्मक अर्थ की व्याख्या की गई - दुर्घटना होने और उल्लंघन के मध्य कारणात्मक संबंध विद्यमान होने चाहिये।

Kalim Khan and ors. v. Fimidabee and ors.

Judgment dated 03.07.2018 passed by the Supreme Court in Civil Appeal No. 8785 of 2015, reported in AIR 2018 SC 3209

Relevant extracts from the judgment:

The assertion in the claim petition was that land situated in survey number 136 of village Kajleshwar, Tq Karanja, Washim District was belonging to Respondent No. 1 who had commenced the work for digging of well in the above agricultural land. On 08.04.2005 at about 4.15 p.m., when the deceased was returning towards his house after purchasing certain articles from the grocery shop, a heavy stone came flying and fell on his head, as a consequence of which, he sustained grievous injuries and was carried for treatment in a jeep to the hospital where he was declared dead. The case of the claimants before the Tribunal was that the stone fell on the deceased due to blasting operation carried out for digging of well in the field of respondent No. 1. It is further putforth that the tractor belonging to the 1st respondent and insured with the respondent No. 4 was used for digging up well by keeping the blasting machine and, therefore, the causing of death by the use of the tractor was established. The tribunal, appreciating the materials brought on record, came to hold that digging of the well with use of blasting machine was carried on in the field of the owner and the tractor was used for digging of the well with the blasting machine.

Keeping in view the evidence on record, we agree with the view expressed by the tribunal that the battery was still installed on the vehicle and the power

was drawn from the battery for explosive purposes. Having arrived at the aforesaid conclusion, we shall proceed to deal with the concept of 'use' and determine whether the accident could be regarded as a vehicle accident.

Section 165 deals with the claims tribunals. It uses the word 'use of motor vehicles'. For the sake of completeness, we reproduce the relevant part of the said provision:

"Section *165. Claims Tribunals.* –

(1) State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both….."

The aforesaid provision makes it vivid that the tribunal can adjudicate the claims for compensation in respect of accidents arising out of use of motor vehicles. Thus, the fundamental requirement is that the accident should arise out of the use of the motor vehicle. If there is no use of the motor vehicle, the question of vehicular accident will not arise.

In this context, reference to certain definitions, as stated in the dictionary clause would be apt. Section 2(28) defines 'motor vehicle' or 'vehicle'. It reads as follows:

"(28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimeters;"

Section 2(44) defines 'tractor' to mean a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller.

Keeping the aforesaid definitions in view, we are required to analyze whether the use of the vehicle in the manner in which it is done can be treated as use of the vehicle to cause a vehicular accident. This Court in ***Shivaji Dayanu Patil and another v. Smt. Vatschala Uttam More, AIR 1991 SC 1769,*** was dealing with conceptual meaning of the phrase "arising out of the use of motor vehicle" as contained in Section 92A of the Motor Vehicles Act, 1939 (hereinafter referred to as 'the 1939 Act'). We may note with profit that Section 92A(1) used the words "an accident

arising out of the use of a motor vehicle" and Section 165 of the Act that has been reproduced hereinabove also uses the words "arising out of the use of motor vehicles". Thus, there has been no change in this part of the provision.

In ***Patil's*** case (supra) this Court referred to the Statement of Objects and Reasons for introduction of Section 92A to Section 92E of the Motor Vehicles (Amendment) Act, 1982. Analyzing, Chapter VIIA of the 1939 Act which was amended by Act 47 of 1982 dealt with "Liability without fault in certain cases", the Court referred to the anatomy of Section 92A, the purpose behind it, the concept of beneficial legislation and proceeded to interpret the words 'arising out of the use of motor vehicle'. Be it noted, on behalf of the petitioners there in, a contention was raised that the tanker had ceased to be a mechanically propelled vehicle. The Court relied on the decision in ***Newberry v. Simmonds, (1961) 2 ALL ER 318,*** wherein it was held that the motor car does not cease to be a mechanically propelled vehicle upon the mere removal of the engine if the evidence admits the possibility that engine may shortly be replaced and the moving power restored. The Court further referred to the authority in ***Smart v. Allan, (1962) 3 ALL ER 893,*** where the defendant had brought a car for £ 2 and subsequently sold it as scrap for 30 cents. It was found that the engine was in a rusty condition and was incomplete and it did not work, and there was no gearboxor electric batteries; and the car was incapable of moving under its own power, having been towed from place to place and that it could only have been put in running order again by supplying a considerable number of spare parts and effecting considerable repairs, the cost of which would have been out of all proportion to its value. It was contended before the House of Lords that every vehicle which starts its life as a mechanically propelled vehicle remains as such until it is physically destroyed.The said submission was rejected by Lord Parker, CJ who observed thus:

> "...it seems to me as a matter of common sense that some limit must be put, and some stage must be reached, when one can say: 'This is so immobile that it has ceased to be a mechanically propelled vehicle'. Where, as in the present case, and unlike ***Newberry v. Simmonds*** (supra) there is no reasonable prospect of the vehicle ever being made mobile again, it seems to me that, at any rate at that stage, a vehicle has ceased to be a mechanically propelled vehicle."

This Court agreed with the aforesaid formulation and reasoning and came to hold that the petrol tanker had not ceased to be a motor vehicle.

The two Judge Bench thereafter proceeded to interpret the expression 'use of the motor vehicle', for it was urged that a vehicular accident could only take place when the vehicle is mobile.

Learned counsel for the petitioner therein urged for placing a narrow meaning on the word 'use' by confining it to a situation only when the vehicle is mobile. On behalf of the respondent, it was suggested that a wider connotation for the word

'use' should be taken so as to include the period when the vehicle is stationary. On behalf of the respondents, observations made in ***Elliott v. Grey, (1959) 3 All ER 733, Government Insurance Office of New South Wales v. R.J. Green & Lloyd Pty. Ltd., (1965) 114 CLR 437, Pushpa Rani Chopra v. Anokha Singh, 1975 ACJ 396 (Del HC), General Manager, K.S.R.T.C. v. S.Satalingappa, 1979 ACJ 452 (Kant HC)*** and ***Oriental Fire and General Insurance Co.Ltd. v. Suman Navnath Rajguru, 1985 ACJ 243 (Bom HC),*** were pressed into service. The Court, after referring to the decisions cited by the respondent and the analysis made by the High Court, opined:

> "26. ...In our opinion, the word "use" has a wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle does not cease on account of the vehicle having been rendered immobile on account of a breakdown or mechanical defect or accident. In the circumstances, it cannot be said that the petrol tanker was not in the use at the time when it was lying on its side after the collision with the truck."

After so holding, the Court proceeded to consider whether explosion and fire which caused injuries to the insured and eventual death of one could be said to have taken place due to an accident arising out of the use of the motor vehicle, i.e., the petrol tanker. In that context, the question of causal relationship between the user of the motor vehicle and the accident which has resulted in death or disablement arose. Be it stated, the stand of the petitioner that the deceased and the injured persons were engaged in pilferage of petrol and the explosion of fire took place because of the unlawful activities was negative as the finding recorded by the tribunal on the said score had been overturned by the learned Single Judge whose view had been approved by the appellate Bench of the High Court.

The Court referred to ***Heyman v. Darwins Ltd., (1942) 1 All ER 337, Union of India v. E.B. Aaby's Rederi A/S, (1974) 2 All ER 874*** and ***Samick Lines Co. Ltd.v. Owners of the Antonis P. Lemos, (1985) 2 WLR 468*** and thereafter adverted to the decision of the High Court of Australia in ***Government Insurance office of New South Wales v. R.J. Green and Llyod Pvt. Ltd., (1965) 114 CLR 437,*** wherein Lord Barwick, C.J. has stated:

> *"Bearing in mind the general purpose of the Act I think the expression 'arising out of' must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words 'caused by'. It may be that an association of the injury with the use of the vehicle while it cannot be said that that use was causally related to the injury may yet be enough to satisfy the expression 'arise out of' as used in the Act and in the policy."*

The observation of Windeyer, J. that was reproduced by the Court is to the following effect:

"The words 'injury caused by or arising out of the use of the vehicle' postulate a causal relationship between the use of the vehicle and the injury. 'Caused by' connotes a 'direct' or 'proximate' relationship of cause and effect. 'Arising out of' extends this to a result that is less immediate; but it still carries a sense of consequence."

The two Judge Bench, appreciating the wider connotation, proceeded to lay down:

"36. This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connotation. The expression "caused by" was used in Sections 95(1)(b)(i) and (ii) and 96 (2)(b)(ii) of the Act. In Section 92A, Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under Section 92A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in Section 92A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

"37. ...In our view, in the facts and circumstances of the present case, this question must be answered in the affirmative. The High Court has found that the tanker in question was carrying petrol which is a highly combustible and volatile material and after the collision with the other motor vehicle the tanker had fallen on one of its sides on the sloping ground resulting in escape of highly inflammable petrol and that there was grave risk of explosion and fire from the petrol coming out of the tanker. In the light of the aforesaid circumstances the learned Judges of the High Court have rightly concluded that the collision between the tanker and the other vehicle which had occurred earlier and the escape of petrol from the tanker which ultimately resulted in the explosion and fire were not unconnected but related events and merely because there was interval of about four to four and half hours between the said collision and the explosion and fire in the tanker, it cannot be necessarily inferred that there was no causal relation between explosion and fire. In the circumstances, it must be held that the explosion and fire resulting in the injuries which led to the death of Deepak Uttam More was due to an accident arising out of the use of the motor vehicle viz. the petrol tanker No. MKL 7461."

The aforesaid analysis throws immense light to understand the concept of "related events" and "causal relation". They have been distinguished from an event which is not connected. Needless to say, the appreciation of causal relation is a question of fact in each case and is to be weighed and appreciated on the basis of the materials brought on record.

In ***Union of India v. United India Insurance Co. Ltd. and others, (1997) 8 SCC 683,*** a two Judge Bench has opined that the words 'use of the motor vehicle' is to be construed in a wider manner. The learned Judges referred to the decision in ***Patil's case*** (supra) wherein reference was made to the Australian case in ***R.J. Green*** (supra) and to the observations of Lord Barwick, C.J. that those words have to be widely construed. The Court, in the latter case, referred to the observations of Windeyer, J. in ***R.J. Green's case*** (supra) which read thus:

> "...no sound reason was given for restricting the phrase, 'the use of a motor vehicle' in this way. The only limitation upon it ... that I can see is that the injury must be one in any way a consequence of a use of the vehicles as a motor vehicle."

The aforesaid passage emphasizes on "consequence of a use". It is equated with a "related event".

From the aforesaid authorities, it is limpid that the expression 'use of the vehicle' under certain circumstances can be attracted when the vehicle is stationary or static. A Division Bench of the High Court of Orissa in ***Kanhei Rana and another v. Gangadhar Swain and others, AIR 1993 Ori. 89,*** while dealing with a situation where the deceased labourer after loading the truck with logs lost his life. The tribunal had categorically found that death was on the account of fall of a log, when the truck was being loaded with logs. The learned Single Judge, in appeal, had concurred with the view of the tribunal by opining that the fall of the log had no nexus with the use of the vehicle not even remotely, and there was no material to show that the fall of the log was occasioned due to use of the vehicle. He had further held that the careless handling of goods being loaded on or unloaded from a vehicle had no connection to the vehicle itself. Reversing the conclusion of the learned single Judge, the Division Bench opined that the concept of movement being not intrinsically or inherently connected with the use and the term 'use' having been connotatively expanded, there can be no doubt that the same can also be extended to the arena/sphere of a claim advanced under Section 110 of the 1939 Act. Heavy onus is cast on the driver to avoid negligence while the vehicle is in use. If the term 'use' in its conceptual sweep engulfs no motion or no movement or stationariness, then by logical corollary it is made essential that the driver or for that matter any agent of the owner should be careful and non-negligent. Negligence in driving is regarded as a fact that the vehicle is in motion. But the definition of 'use' having been expanded in its broader canvas, it has to clothe in its sweep other categories of negligence. To elaborate, when a vehicle remains static, it cannot constitute that the driver is negligent because of his rash and negligent driving. On the

contrary, it has to embody some other different types of negligence. Of course that would depend upon the facts and circumstances of each case. The Division Bench of the High Court went on to say that the Apex Court in ***Patil*** (supra) was dealing with the negligence so far as it was concerned with Section 92 of the Act, but as the language of Section 92A and Section 110 of the old Act used the same phraseology and there is absence of any etymological distinction, the same meaning should be given to the expression under Section 110 of the old Act. The appellate Bench held that there was causal relationship with the accident which had resulted in the death of the claimant.

We entirely agree with the aforesaid analysis, for it is in accord with the view of the decisions of this Court.

It may be reiterated here that the causal relationship should exist between violation and the accident caused. There has to be some act done by the person concerned in causing the accident. The commission or omission must have some nexus with the accident. The word 'use' as has been explained by the authorities of this Court need not have an intimate and direct nexus with the accident. The Court has to bear in mind that the phraseology used by the legislature is "accident arising out of use of the motor vehicle". The scope has been enlarged by such use of the phraseology and this Court taking note of the beneficial provision has placed a wider meaning on the same. There has to be some causal relation or the incident must relate to it. It should not be totally unconnected. Therefore, in each case what is required to be seen is whether there has been some causal relation or the event is related to the act.

Presently, we shall scrutinse the factual score in the case at hand. As is evincible, the battery was installed in the tractor and the explosives were charged by the battery. The purpose was to dig the well in the field. In such an obtaining factual matrix, it would be an erroneous perception to say that the vehicle was not in use as stipulated under Section 165 of the Act. Hence, we have no hesitation in holding that the Division Bench has fallen into error on the said score.

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***189. MOTOR VEHICLES ACT, 1988 – Section 168**

Compensation – Assessment of income – Contradiction between Salary Certificate and Income Tax Return – Tribunal relied upon the Salary Certificate and assessed on the basis of it – Possibility of income from other sources as well – Held, income should be adjudged on the basis of Income Tax Return.

मोटरयान अधिनियम, 1988 - धारा 168

प्रतिकर - आय का निर्धारण - वेतन प्रमाणपत्र तथा आयकर रिटर्न में विरोधाभास - अधिकरण ने वेतन प्रमाणपत्र पर विश्वास किया तथा इसके आधार पर निर्धारण किया - अन्य स्त्रोतों से भी आय की संभावना थी - अभिनिर्धारित, आय का निर्धारण आयकर रिटर्न के आधार पर किया जाना चाहिए।

United India Insurance Co. Ltd. v. Indiro Devi and ors.

Judgment dated 03.07.2018 passed by the Supreme Court in S.L.P. (Civil) No. 7104 of 2016, reported in AIR 2018 SC 3107

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190. N.D.P.S. ACT, 1985 – Section 18

CRIMINAL PROCEDURE CODE, 1973 – Section 378

(i) Facts necessary to prove for the prosecution to establish the offence under the NDPS Act, explained.

(ii) General principles regarding the powers of the appellate court while dealing with an appeal against the order of acquittal – reiterated.

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, 1985 - धारा 18

दण्ड प्रक्रिया संहिता, 1973 - धारा 378

(i) स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम के अधीन अभियोजन को अपराध स्थापित करने हेतु साबित किये जाने वाले आवश्यक तथ्यों की व्याख्या की गई।

(ii) दोषमुक्ति के विरूद्ध अपील के मामलों में अपीलीय न्यायालय की शक्तियों संबंधी सामान्य सिद्धांत - पुनुरोद्धरित।

Mohinder Singh v. State of Punjab

Judgment dated 14.08.2018 passed by the Supreme Court in Criminal Appeal No. 2182 of 2010 (Unreported case)

Relevant extracts from the judgment:

For proving the offence under the NDPS Act, it is necessary for the prosecution to establish the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

In ***Vijay Jain v. State of Madhya Pradesh, (2013) 14 SCC 527,*** this Court reiterated the necessity of production of contraband substances seized from the accused before the trial court to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the accused is not sufficient. It was held as under:-

> "10. On the other hand, on a reading of this Court's judgment in ***Jitendra v. State of M.P., (2004) 10 SCC 562,*** we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove

this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in ***Ashok v. State of M.P., (2011) 5 SCC 123,*** this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial Court as material exhibit and there was no explanation for its non production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

In an appeal against acquittal, the High Court will not interfere unless there are substantial and compelling reasons to reverse the order of acquittal. The mere fact that on re-appreciation of evidence the appellate Court is inclined to arrive at a conclusion which is at variance with the trial Court, the same cannot be the reason for interference with the order of acquittal. After referring to various judgments in ***Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415,*** this Court summarised the general principles regarding the powers of the appellate Court while dealing with an appeal against the order of acquittal and held as under :-

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the

reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

The same principles were reiterated in number of judgments ***viz. Jugendra Singh v. State of Uttar Pradesh, (2012) 6 SCC 297, State of Uttar Pradesh v. Ram Sajivan and others, (2010) 1 SCC 529, Bhaskar Ramappa Madar and others v. State of Karnataka, (2009) 11 SCC 690, Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415*** and other judgments.

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191. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 139 Presumption – Holder of cheque – Mere denial of the debt by the accused is not sufficient – Defence of stolen cheque – Absence of any evidence by the accused – Court cannot doubt existence of the loan in absence thereof – Failure to discharge the burden – Conviction by trial Court held to be proper.

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 138 एवं 139

उपधारणा - चैक का धारक - अभियुक्त द्वारा मात्र ऋण का प्रत्याख्यान पर्याप्त नहीं है - चैक के चोरी होने की प्रतिरक्षा - अभियुक्त द्वारा किसी भी साक्ष्य का अभाव - न्यायालय इसके अभाव में ऋण की वास्तविकता पर संदेह नहीं कर सकता - भार निर्वहन करने में विफलता - विचारण न्यायालय द्वारा दोषसिद्धि उचित होना अभिनिर्धारित किया गया।

Kishan Rao v. Shankargouda

Judgment dated 02.07.2018 passed by the Supreme Court in Criminal Appeal No. 803 of 2018, reported in AIR 2018 SC 3173

Relevant extracts from the judgment:

In the present case, the trial Court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to

the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial Court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

Another judgment which needs to be looked into is ***Rangappa v. Sri Mohan, (2010) 11 SCC 441***. A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:

> "26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in ***Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54,*** may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.
>
> 27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two Courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW.1, himself has not been explained by the High Court.

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192. POLICE ACT, 1861 – Section 44
POLICE REGULATIONS (M.P.)
LAW OF PRECEDENTS

(i) General diary/Station diary/Daily diary/*Rojnamcha sanha* – Absence of entries in – As to preliminary inquiry before registering FIR – Is not necessarily fatal to the prosecution – It may have consequences, which is a matter of trial. (*Lalita Kumari, (2014) 2 SCC 1* followed)

(ii) Law of precedent – Judgments are not legislations, they have to be read in context and background discussions.

पुलिस अधिनियम, 1861 - धारा 44
पुलिस विनियमन (म.प्र.)
पूर्व निर्णय की विधि

(i) सामान्य डायरी/स्टेशन डायरी/ दैनिक डायरी/रोजनामचा सान्हा - में प्रविष्टियों का न होना - प्रथम सूचना रिपोर्ट पंजीबद्ध करने के पूर्व की गई प्राथमिक जांच से संबंधित - अभियोजन के लिए प्रत्येक मामले में घातक नहीं है - इस दोष के कुछ दुष्परिणाम हो सकते हैं परन्तु यह विचारण का प्रश्न है कि वे क्या होंगे। (***ललिता कुमारी, (2014) 2 एस.सी.सी. 1,*** अनुसरित)

(ii) पूर्व निर्णय की विधि - निर्णय विधान नहीं हैं, इन्हें उल्लेखित पृष्ठभूमि और संदर्भ में ही पढ़ा जाना चाहिये।

State by Lokayukta Police v. H. Srinivas

Judgment dated 18.05.2018 passed by the Supreme Court in Criminal Appeal No. 775 of 2018, reported in AIR 2018 SC 2701

Relevant extracts from the judgment:

The absence of entries in the General Diary concerning the preliminary enquiry would not be ***per se*** illegal. Our attention is not drawn to any bar under any provision of CrPC barring investigating authority to investigate into matter, which may for some justifiable ground, not found to have been entered in the General Diary right after receiving the Confidential Information. It may not be out of context to mention that nothing found in the paragraph 120.8 of the ***Lalitha Kumari v. Govt. of U.P., AIR 2014 SC 187,*** justifies the conclusion reached by the High Court by placing a skewed and literal reading of the conclusions reached

by the Bench therein. It is well-settled that judgments are not legislations, they have to be read in the context and background discussions [refer : ***Smt. Kesar Devi v. Union of India and ors., AIR 2003 SC 4195***.]

As the concept of maintaining General Diary has its origin under Section 44 of the Police Act of 1861 as applicable to States, which makes it an obligation for the concerned Police Officer to maintain a General Diary, but such non-maintenance ***per se*** may not be rendering the whole prosecution illegal. However, on the other hand, we are aware of the fact that such non-maintenance of General Diary may have consequences on the merits of the case, which is a matter of trial. Moreover, we are also aware of the fact that the explanation of the genesis of a criminal case, in some cases, plays an important role in establishing the prosecution's case. With this background discussion we must observe that the binding conclusions reached in the paragraph 120.8 of ***Lalitha Kumari Case*** (supra) is an obligation of best efforts for the concerned officer to record all events concerning an enquiry. If the Officer has not recorded, then it is for the trial Court to weigh the effect of the same for reasons provided therein. A Court under a writ jurisdiction or under the inherent jurisdiction of the High Court is ill equipped to answer such questions of facts. The treatment provided by the High Court in converting a mixed question of law and fact concerning the merits of the case, into a pure question of law may not be proper in light of settled jurisprudence.

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***193. PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Section 32**

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) (SIX MONTHS TRAINING) RULES, 2014

(i) Training Rules of 2014 – Validity – Affirmed – Rationale behind training – Explained.

(ii) Judgment of Delhi High Court in *Indian Radiological and Imaging Assn. (IRAI) v. Union of India, (2016) 227 DLT 538* – Stayed – Further directed that judgment of Supreme Court in *Voluntary Health Association of Punjab, (2016) 10 SCC 265,* shall be strictly enforced by all States and UTs.

गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, 1994 - धारा 32

गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) (6 माह का प्रशिक्षण) नियम, 2014

(i) 2014 के प्रशिक्षण नियम - वैधता - पुष्टि की गई - प्रशिक्षण का औचित्य - स्पष्ट किया गया।

(ii) दिल्ली उच्च न्यायालय द्वारा इण्डियन रेडियोलाजिकल एवं इमेजिंग एसोसियेशन वि. भारत संघ, (2016) 227 डी.एल.टी. 538, में पारित निर्णय - स्थगित किया गया - यह निर्देश भी जारी किये गये कि सर्वोच्च न्यायालय द्वारा वालन्टरी हेल्थ एसोशियेशन आफ पंजाब, (2016) 10 एस.सी.सी. 265, में पारित निर्णय का सभी राज्य एवं केन्द्र शासित क्षेत्र सख्ती से पालन करें।

Union of India v. Indian Radiological and Imaging Association and ors.

Judgment dated 14.03.2018 passed by the Supreme Court in SLP No. 16657 of 2016, reported in (2018) 5 SCC 773

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***194. PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)**
SPECIAL POLICE ESTABLISHMENT ACT, 1947 (M.P.) – Section 3
CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 193 and 465
Cognizance – Illegality in investigation – Effect – Once the charge-sheet is filed, it cannot be quashed, merely because the investigating agency had no jurisdiction to investigate the matter, as it is not possible to say that cognizance on an invalid police report is prohibited and is, therefore, a nullity. [*H.N. Rishbudand another v. State of Delhi, AIR 1955 SC 196,* followed]

भ्रष्टाचार निवारण अधिनियम, 1988 - धारा 13(1)

म.प्र. विशेष पुलिस स्थापना अधिनियम, 1947 - धारा 3

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 190, 193 एवं 465

संज्ञान - अन्वेषण में अवैधता - प्रभाव - एक बार अभियोग पत्र प्रस्तुत कर दिया जाता है तो इसे मात्र इस आधार पर अभिखण्डित नहीं किया जा सकता है कि अन्वेषण एजेंसी को मामले के अन्वेषण की अधिकारिता नहीं थी, क्योंकि ऐसा कहा जाना संभव नहीं है कि अविधिपूर्ण पुलिस प्रतिवेदन पर संज्ञान निषेधित है और इसलिये यह शून्यता है। (***एच.एन. रिश्बुदंद व अन्य विरूद्ध स्टेट आफ देल्ही, एआईआर 1955 एससी 196***, अनुसरित)

Manish Kumar Thakur v. State of M.P. & ors.

Order dated 11.10.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 16687 of 2017, reported in ILR (2018) MP 235

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195. REGISTRATION ACT, 1908 – Sections 35 and 66
SPECIFIC RELIEF ACT, 1963 – Section 31
Sale deed – Challenge on the ground of fraud – Whether after registration of a sale deed, Sub-Registrar has any authority to cancel the registration on the allegations of fraud or impersonation? Held, No – After registration of an instrument, any illegality or irregularity can be questioned only before a Civil Court.

रजिस्ट्रीकरण अधिनियम, 1908 - धाराएं 35 एवं 36

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 31

विक्रय पत्र - छल के आधार पर आक्षेप - क्या किसी विक्रय पत्र के पंजीयन उपरांत, उप-पंजीयक को छल अथवा प्रतिरूपण के आधार पर उसका पंजीयन निरस्त करने की अधिकारिता है? अभिनिर्धारित, नहीं - किसी लिखत के पंजीयन उपरांत उससे सबंधित कोई भी अवैधता अथवा अनियमितता मात्र सिविल न्यायालय में ही प्रश्नगत की जा सकती है।

Smt. Kusum Lata v. State of U.P. and ors.

Judgment dated 18.05.2018 passed by the Allahabad High Court in Writ Civil No. 2973 of 2016, reported in AIR 2018 All 210 (FB)

Relevant extracts from the judgment:

Being in absolute agreement with the law laid down by the Division Bench in the case of ***Krishna Kumar Saxena and another v. State of U.P. and 9 others, 2018 (127) AIR 466,*** we adopt the reasoning given therein. It is pertinent to note that the Division Bench while settling the ratio also relied upon land mark judgment of Hon'ble Supreme Court in ***Satya Pal Anand v. State of Madhya Pradesh and others, AIR 2016 SC 4995,*** wherein the Full Bench judgment of the Andhra Pradesh High Court in the case of ***Yanalla Malleswari v. Ananthalu Sayamma, AIR 2007 AP 57 (FB),*** too was considered. The Apex Court held that the registering authority could not decide whether the document which was executed by a person who had title as was recited in the given instrument. The authority, as such, was not expected to decide the title/right of the parties to the agreement nor was expected to examine the document to ascertain whether the same was legal and permissible in law or undertake any analysis thereof. If the document registered by the Registering Authority was illegal or if there was any irregularity then the course to question that was by invoking appropriate proceedings before a Civil Court.

In light of whatever stated above, we are having no doubt in arriving at the conclusion that once a sale deed has been registered, the Registering Authority is having no power or authority under the Act, 1908 to cancel the registration, even if an allegation of impersonation/fraud is alleged.

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***196. SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Sections 13 and 34**

(i) Bar on jurisdiction of Civil Court – No Civil Court can entertain any suit or proceeding for which DRT or DRAT is empowered under the SARFAESI Act – Nor any injunction can be granted in respect of any action taken under the Act.

(ii) Jurisdiction of Civil Court – Respondents 5 and 6 sold suit property to respondents 2 to 4/debtors – Debtors deposited the sale deed with bank and secured loan by creating equitable

mortgage – Bank initiated action under SARFAESI Act –Respondents 5 and 6 alleged their right, title and interest in suit property before DRT & DRAT – Both the forums rejected their claim – Their Writ Petition was accepted by High Court with direction to approach appropriate forum (Civil Court) – Held, approach of High Court is completely fallacious and untenable in law.

प्रतिभूतिकरण और वित्तीय आस्तियों का पुनर्गठन एवं प्रतिभूति हितों को प्रभावी करने का अधिनियम, 2000 - धाराएं 13 एवं 34

(i) सिविल न्यायालय की अधिकारिता का वर्जन - कोई सिविल न्यायालय ऐसे वाद अथवा कार्यवाही की सुनवाई नहीं कर सकता है जिसके लिये अधिनियम में ऋण वसूली अधिकरण अथवा ऋण वसूली अपीलीय अधिकरण सशक्त हैं - साथ ही अधिनियम में किये गये किसी कृत्य के विरुद्ध कोई व्यादेश भी जारी नहीं किया जा सकता है।

(ii) सिविल न्यायालय की अधिकारिता - प्रत्यर्थी क्रमांक 5 व 6 ने वादग्रस्त संपत्ति प्रत्यर्थी क्रमांक 2 से 4/ऋणियों को विक्रय कर दी थी - ऋणियों ने विक्रय पत्र बैंक में जमा कर साम्यिक बंधक करते हुए ऋण प्राप्त किया - बैंक ने सरफेसी अधिनियम के अधीन कार्यवाही प्रारंभ की - प्रत्यर्थी क्रमांक 5 व 6 ने वादग्रस्त संपत्ति में अपने अधिकार, स्वत्व व हित का दावा ऋण वसूली अधिकरण एवं ऋण वसूली अपीलीय अधिकरण में किया - दोनों अधिकरणों द्वारा उनका दावा अस्वीकार किया गया - उच्च न्यायालय से उनकी रिट याचिका इस निर्देश के साथ स्वीकार की गई कि वे उचित फोरम (सिविल न्यायालय) में जा सकते हैं - अभिनिर्धारित किया गया कि, उच्च न्यायालय का दृष्टिकोण तर्कहीन एवं विधि में स्थिर रखे जाने योग्य नहीं है।

Authorised Officer, State Bank of India v. M/s Allwyn Alloys Pvt. Ltd. and ors.

Judgment dated 17.05.2018 passed by the Supreme Court in Civil Appeal No. 5248 of 2018, reported in AIR 2018 SC 2721

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***197. SUITS VALUATION ACT, 1887 – Sections 3 and 4**
COURT FEES ACT, 1870 – Section 7 (iv)
CONSTITUTION OF INDIA – Article 141
CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

(i) Valuation – For jurisdiction – Suit for declaration and permanent injunction – In case of independent relief of declaration the suit will be governed by section 4 read with section 3 of Suits Valuation Act – Plaintiff is bound to value the suit land for the purpose of jurisdiction in accordance with market value. [*Kalyandas v. Narayan Singh, 2001 (5) MPHT 374,* followed.]

(ii) Law of Precedents – The decision of earlier Coordinate Bench, unless distinguished by Division Bench, is binding on the Bench of similar strength – Since the provisions of Suits Valuation Act and the judgment in case of *Kalyan Das* (supra) was not considered in two later judgments of similar strength Bench namely *Shabbir Hussain & ors. v. Naade Ali & ors., 2002 (1) MPLJ 489* and *Dharamraj Singh v. Vaidya Nath & ors., 2002 (1) MPLJ 458,* the earlier judgment in *Kalyan Das* (supra) will be a binding precedent. [*Jabalpur Bus Operators v. State of M.P. & anr., AIR 2003 MP 81,* followed.]

(iii) Rejection of plaint – The litigant must approach the Court with clean hands, clean mind, clean heart and clean objectives – If litigant deliberately misleads the Court in order to get a relief which is otherwise not due to him, his petition/ plaint etc. may be dismissed on this ground alone, while deciding an application under Order 7 Rule 11 of CPC. [*Rajendra Singh Rawat v. State of M.P. and others, ILR 2012 MP 2660,* followed and case law discussed.]

वाद मूल्यांकन अधिनियम, 1887 - धाराएं 3 एवं 4

न्यायालय फीस अधिनियम, 1870 - धारा 7 (iv)

भारत का संविधान - अनुच्छेद 141

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11

(i) मूल्यांकन - क्षेत्राधिकार के लिए - घोषणा एवं शाश्वत व्यादेश का दावा - ऐसा वाद जिसमें घोषणा का अनुतोष स्वतंत्र रूप से चाहा गया हो न्यायालय फीस अधिनियम की धारा 4 सहपठित धारा 3 से शासित होता है - वादी क्षेत्राधिकार के प्रयोजन से वाद का मूल्यांकन विवादित भूमि के बाजार मूल्य पर करने के लिए बाधित है। (कल्याण दास विरूद्ध नारायण सिंह, 2001 (5) एमपीएचटी 374, अनुसरित)

(ii) पूर्व निर्णय की विधि - समसंख्यक पीठ द्वारा पूर्व में दिया गया निर्णय पश्चात्वर्ती समसंख्यक पीठ पर बंधनकारी होता है जब तक कि खण्डपीठ द्वारा पूर्व निर्णय को विभेदित न किया जाये - चूंकि शब्बीर हुसैन एवं अन्य विरूद्ध नादे अली एवं अन्य, 2002 (1) एम.पी.एल.जे. 489 और धर्मराज सिंह विरूद्ध वैद्य नाथ एवं अन्य, 2002 (1) एमपीएलजे 458, के पश्चातवर्ती निर्णयों में समसंख्यक पीठ द्वारा वाद मूल्यांकन अधिनियम के उपबंधों और कल्याण दास वाले निर्णय पर विचार नहीं किया गया था, अतः कल्याण दास वाला पूर्व निर्णय बंधनकारी है। (जबलपुर बस आॅपरेटर्स विरूद्ध स्टेट आॅफ एम.पी. एवं अन्य, एआईआर 2003 एमपी 81, अनुसरित)

(iii) वादपत्र नामंजूर किया जाना - पक्षकार को स्वच्छ हाथ, स्वस्थ मस्तिष्क, स्वच्छ हृदय और स्पष्ट प्रयोजनों से न्यायालय में आना चाहिये - यदि पक्षकार जानबूझकर न्यायालय को ऐसे अनुतोष प्राप्त करने हेतु भ्रमित करते हैं जो उन्हें अन्यथा प्राप्त न होता तब उनकी याचिका/वाद को मात्र इसी आधार पर आदेश 7 नियम 11 सि.प्र.सं. के आवेदन के निराकरण के समय निरस्त किया जा सकता है। (राजेन्द्र सिंह रावत विरूद्ध मध्यप्रदेश राज्य एवं अन्य, आईएलआर 2012 एमपी 2660, अनुसरित एवं निर्णय विवेचित)

Sardar Singh & anr. v. Shaitan Singh & ors.

Order dated 14.12.2017 passed by the Madhya Pradesh High Court in Civil Revision No. 162 of 2012, reported in 2018 (II) MPJR 30

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***198. SUITS VALUATION ACT, 1887 – Section 9**

COURT FEES ACT, 1870 – Section 7(v)

Suit for partition – Property acquired by the father in the year 1979 – Valuation on the basis of consideration paid in the year 1979 – Right to partition was not acquired then – Objective standard for valuation – Consideration paid in 1979 cannot be said to be such standard.

वाद मूल्यांकन अधिनियम, 1887 - धारा 9

न्यायालय फीस अधिनियम, 1870 - धारा 7(अ)

विभाजन हेतु वाद - पिता द्वारा वर्ष 1979 में संपत्ति अर्जित की गई - वर्ष 1979 में संदत्त प्रतिफल के आधार पर मूल्यांकन - विभाजन का अधिकार तब अर्जित नहीं किया था - वाद मूल्यांकन हेतु मानक आधार - 1979 में संदत्त प्रतिफल ऐसा मानक नहीं कहा जा सकता।

Gulam Jilani v. Gulam Dastagir and ors.

Judgment dated 07.03.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in W.P. No. 5218 of 2017, reported in 2018 Law Suit (MP) 536

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***199. TRANSFER OF PROPERTY ACT, 1882 – Sections 54 and 123**

EVIDENCE ACT, 1872 – Section 68

Sale deed – Proof of execution – Execution of sale deed does not require any attesting witness like execution of gift deed under Section 123 of TP Act – Examination of attesting witness under Section 68 Evidence Act does not apply to sale deed – Sale deed is governed by Section 54 of TP Act.

संपत्ति अंतरण अधिनियम, 1882 - धाराएं 54 एवं 123

साक्ष्य अधिनियम, 1872 - धारा 68

विक्रय विलेख - निष्पादन का सबूत - संपत्ति अंतरण अधिनियम की धारा 123 के अधीन दान विलेख के निष्पादन की भाँति विक्रय विलेख के निष्पादन हेतु अनुप्रमाणक साक्षियों की आवश्यकता नहीं होती है - साक्ष्य अधिनियम की धारा 68 के अधीन अनुप्रमाणक साक्षियों का परीक्षण विक्रय विलेख पर लागू नहीं होता है - विक्रय विलेख संपत्ति अंतरण अधिनियम की धारा 54 से शासित है।

Bayanabai Kaware v. Rajendra

Judgment dated 23.11.2017 passed by the Supreme Court in Civil Appeal No. 19625 of 2017, reported in 2018 (2) MPLJ 636 (SC)

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200. TRANSFER OF PROPERTY ACT, 1882 – Section 106
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 2 (i)

(i) Joint tenancy and tenancy in common – Incidents – Discussed.

(ii) Tenancy – Succession – Upon death of original tenant, the legal heirs inherit the tenancy as joint tenants – Occupation of one is occupation of all joint tenants – Landlord may implead either of the joint tenants – An eviction suit against one of the joint tenants, who is in actual occupation of the property is maintainable – All joint tenants are bound by the order of Court.

संपत्ति अंतरण अधिनियम, 1882 - धारा 106

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) - धारा 2 (झ)

(i) संयुक्त अभिधृति एवं सामान्यिक अभिधृति - प्रसंगतियां - विवेचित की गईं।

(ii) अभिधृति - उत्तराधिकार - मूल अभिधारी की मृत्यु पर उसके विधिक उत्तराधिकारी अभिधृति को संयुक्त अभिधारियों के रूप में विरासत में प्राप्त करते हैं - एक का आधिपत्य सभी संयुक्त अभिधारियों का आधिपत्य है - भवन स्वामी किसी भी संयुक्त अभिधारी के विरुद्ध वाद ला सकता है - मात्र एक संयुक्त अभिधारी, जो कि संपत्ति के वास्तविक आधिपत्य में है, के विरुद्ध बेदखली का वाद पोषणीय है - सभी संयुक्त अभिधारियों पर न्यायालय का आदेश बंधनकारी है।

Suresh Kumar Kohli v. Rakesh Jain and another

Judgment dated 19.04.2018 passed by the Supreme Court in Civil Appeal No. 3996 of 2018, reported in AIR 2018 SC 2708

Relevant extracts from the judgment:

The issue at hand is what would be the status of the succeeding legal representatives after the death of the statutory tenant. In this regard, it would be worthy to discuss the two capacities, viz., tenancy-in-common and joint tenancy, and the rights that one holds in these two different capacities.

Fundamentally, the concepts of joint tenancy and tenancy-in-common are different and distinct in form and substance. The incidents regarding the co-tenancy and joint tenancy are different: joint tenants have unity of title, unity of commencement of title, unity of interest, unity of equal shares in the joint estate, unity of possession and right of survivorship.

Tenancy-in-common is a different concept. There is unity of possession but no unity of title, i.e. the interests are differently held and each co-tenant has different shares over the estate. Thus, the tenancy rights, being proprietary rights, by applying the principle of inheritance, the shares of heirs are different and ownership of leasehold rights would be confined to the respective shares of each heir and none will have title to the entire leasehold property. Therefore, the estate shall be divided among the co-tenants and each tenant in common has an estate in the whole of single tenancy. Consequently, privity exists between the landlord and the tenant in common in respect of such estate.

X X X

From a perusal of lease deed dated 15.11.1975, we find that the suit premises was let out jointly to late Shri Ishwar Chand Jain and Shri Ramesh Chand Jain, son of late Shri Ishwar Chand Jain. Thus, both of them were joint tenants and upon the death of Shri Ishwar Chand Jain, Respondent No. 1 inherited the tenancy as joint tenant only. Further, in view of a catena of decisions of this Court on the subject as well as the principles laid down in ***H.C. Pandey v. G.C. Paul, AIR 1989 SC 1470,*** we are of the opinion that the High Court erred in holding that the decisions relied upon by learned senior counsel for the appellant are not applicable to the facts of the present case on the premise that in the given case itself the validity and binding nature of the notice given to one of the legal representatives of the deceased tenant under Section 106 of the Transfer of Property Act, 1882 on other legal representatives was determined only on the basis of the fact that they hold the tenancy as joint tenants and notice given to one means notice given to all.

We are of the view that in the light of ***H.C. Pandey*** (supra), the situation is very clear that when original tenant dies, the legal heirs inherit the tenancy as joint tenants and occupation of one of the tenants is occupation of all the joint tenants. It is not necessary for landlord to implead all legal heirs of the deceased tenant, whether they are occupying the property or not. It is sufficient for the landlord to implead either of those persons who are occupying the property, as party. There may be a case where landlord is not aware of all the legal heirs of deceased tenant and impleading only those heirs who are in occupation of the property is sufficient for the purpose of filing of eviction petition. An eviction petition against one of the joint tenant is sufficient against all the joint tenants and all joint tenants are bound by the order of the Rent Controller as joint tenancy is one tenancy and is not a tenancy split into different legal heirs. Thus, the plea of the tenants on this count must fail.

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PART - II A

GUIDELINES REGARDING EXERCISE OF JURISDICTION UNDER SECTIONS 227 & 228 OF CRIMINAL PROCEDURE CODE, 1973

The Apex Court in the case of ***Sajjan Kumar v. Central Bureau of Investigation, 2011 AIR SCW 3730,*** after considering law laid down in ***Union of India v. Prafulla Kumar Samal and another, (1979) 3 SCC 4*** and ***Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135,*** laid down following principles to be borne in mind by the Courts while exercising of jurisdiction under Sections 227 & 228 of Criminal Procedure Code, 1973:

1. The Judge while considering the question of framing the charges under Section 227 of the Criminal Procedure Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out. The test to determine *prima facie* case would depend upon the facts of each case.
2. The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.
3. If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.
4. At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.
5. At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.
6. Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

7. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

[Reiterated the same in ***State v. A. Arun Kumar, (2015) 2 SCC 417,*** and ***Central Bureau of Investigation Hyderabad v. K. Narayana Rao, (2012) 9 SCC 512***]

Note - Following extracts are also relevant and to be kept in mind at the stage of framing of charge:

A. ***Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, AIR 1980 SC 52***

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in ***State of Bihar v. Ramesh Singh, AIR 1977 SC 2018***, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

B. ***Sheoraj Singh Ahlawat v. State of Uttar Pradesh, AIR 2013 SC 52***

"Even in ***Smt. Rumi Dhar v. State of West Bengal & Anr., (2009) 6 SCC 364,*** reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Criminal Procedure Code, were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed :

'...While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law...'. "

C. ***State of M.P. v. S.B. Johari and others, 2000 (2) MPLJ 322***

"It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further, then a charge has to be framed."

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Brevity in judgment writing has not lost its virtue. All long judgments or orders are not great nor brief orders are always bad. What is required of any judicial decision is due application of mind, clarity of reasoning and focused consideration. A slipshod consideration or cryptic order or decision without due reflection on the issues raised in a matter may render such decision unsustainable. Hasty adjudication must be avoided. Each and every matter that comes to the Court must be examined with the seriousness it deserves.

– R.M. Lodha, J.

in Board of Trustees of Martyrs Memorial Trust v. Union of India, (2012) 10 SCC 734, para 22.

PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CRIMINAL LAW (AMENDMENT) ACT, 2018

No. 22 of 2018

[11th August, 2018.]

An Act further to amend the Indian Penal Code, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and commencement. – (1) This Act may be called the Criminal Law (Amendment) Act, 2018.

(2) It shall be deemed to have come into force on the 21st day of April, 2018.

CHAPTER II

AMENDMENTS TO THE INDIAN PENAL CODE

2. Amendment of section 166A. – In the Indian Penal Code (hereafter in this Chapter referred to as the Penal Code), in section 166A, in clause (c), for the words, figures and letters "section 376B, section 376C, section 376D", the words, figures and letters "section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

3. Amendment of section 228A. – In section 228A of the Penal Code, in sub-section (1), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

4. Amendment of section 376. – In section 376 of the Penal Code,—

(a) in sub-section (1), for the words "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine", the words "shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine" shall be substituted;

(b) in sub-section (2), clause (i) shall be omitted;

(c) after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous

imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.".

5. Insertion of new section 376AB. – After section 376A of the Penal Code, the following section shall be inserted, namely:—

"376AB. Punishment for rape on woman under twelve years of age. – Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.".

6. Insertion of new sections 376DA and 376DB. – After section 376D of the Penal Code, the following sections shall be inserted, namely:—

"376DA. Punishment for gang rape on woman under sixteen years of age. – Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376DB. Punishment for gang rape on woman under twelve years of age – Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.".

7. Amendment of section 376E – In section 376E of the Penal Code, for the word, figures and letter "section 376D", the words, figures and letters "section 376AB or section 376D or section 376DA or section 376DB," shall be substituted.

CHAPTER III

AMENDMENTS TO THE INDIAN EVIDENCE ACT, 1872

8. Amendment of section 53A. – In section 53A of the Indian Evidence Act, 1872 (hereafter in this Chapter referred to as the Evidence Act), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

9. Amendment of section 146. – In section 146 of the Evidence Act, in the proviso, for the words, figures and letters" section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

CHAPTER IV

AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE, 1973

10. Amendment of section 26. – In the Code of Criminal Procedure, 1973 (hereafter in this Chapter referred to as the Code of Criminal Procedure), in section 26, in clause (a), in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

11. Amendment of section 154. – In section 154 of the Code of Criminal Procedure, in sub-section (1),—

(i) in the first proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted;

(ii) in the second proviso, in clause (a), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB," shall be substituted.

12. Amendment of section 161. – In section 161 of the Code of Criminal Procedure, in sub-section (3), in the second proviso, for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

13. Amendment of section 164. – In section 164 of the Code of Criminal Procedure, in sub-section (5A), in clause (a), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

14. Amendment of section 173. – In section 173 of the Code of Criminal Procedure,—

(i) in sub-section (1A), for the words "rape of a child may be completed within three months", the words, figures and letters "an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code shall be completed within two months" shall be substituted;

(ii) in sub-section (2), in clause (i), in sub-clause (h), for the word, figures and letters "section 376, 376A, 376B, 376C, 376D", the words, figures and letters "sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted.

15. Amendment of section 197. – In section 197 of the Code of Criminal Procedure, in sub-section (1), in the *Explanation,* for the words, figures and letters "section 376A, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

16. Amendment of section 309. – In section 309 of the Code of Criminal Procedure, in sub-section (1), in the proviso, for the words, figures and letters "section 376A, section 376B, section 376C or section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible,", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA or section 376DB of the Indian Penal Code, the inquiry or trial shall" shall be substituted.

17. Amendment of section 327. – In section 327 of the Code of Criminal Procedure, in sub-section (2), for the words, figures and letters "section 376A, section 376B, section 376C, section 376D", the words, figures and letters "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB" shall be substituted.

18. Amendment of section 357B. – In section 357B of the Code of Criminal Procedure, for the words, figures and letters" under section 326A or section 376D of the Indian Penal Code", the words, figures and letters "under section 326A, section 376AB, section 376D, section 376DA and section 376DB of the Indian Penal Code" shall be substituted.

19. Amendment of section 357C. – In section 357C of the Code of Criminal Procedure, for the figures and letters "376A, 376B, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted.

20. Amendment of section 374. – In section 374 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.".

21. Amendment of section 377. – In section 377 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal.".

22. Amendment of section 438. – In section 438 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.".

23. Amendment of section 439. – In section 439 of the Code of Criminal Procedure,—

(a) in sub-section (1), after the first proviso, the following proviso shall be inserted, namely: —

"Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.";

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.".

24. Amendment of First Schedule.– In the First Schedule to the Code of Criminal Procedure, under the heading "I.— offences under the Indian Penal Code",–

(a) for the entries relating to section 376, the following entries shall be substituted, namely:—

Section	Offence	Punishment	Cognizable or non-congnizable	Bailable or non bailable	By what court triable
1	2	3	4	5	6
"376	Rape	Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life and with fine.	Cognizable	Non-bailable	Court of Session.
	Rape by a police officer or a public servant or member of armed forces or a person being on the management or on the staff of a jail, remand home or other place of custody or women's or children's institution or by a person on the management or on the staff of a hospital, and rape committed by a person in a position of trust or authority towards the person raped or by a near relative of the person raped. Persons committing offence of rape on a woman under sixteen years of age.	Rigorous imprisonment of not less than 10 years but which may extend to imprisonment for life which shall mean the remainder of that person's natural life and with fine. Rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session.

(b) after the entries relating to section 376A, the following entries shall be inserted, namely:—

1	2	3	4	5	6
"376AB	Person committing an offence of rape on a woman under twelve years of age	Rigorous imprisonment of not less than 20 years which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine or with death.	Cognizable	Non-bailable	Court of Session .";

(c) after the entries relating to section 376D, the following entries shall be inserted, namely:—

1	2	3	4	5	6
376DA	Gang rape on a woman under sixteen years of age.	Imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine.	Cognizable	Non-bailable	Court of Session .";
376DB	Gang rape on woman under twelve years of age.	Imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine or with death.	Cognizable	Non-bailable	Court of Session .";

CHAPTER V

AMENDMENT TO THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

25. Amendment of section 42 of Act No.32 of 2012. – In section 42 of the Protection of Children from Sexual Offences Act, 2012, for the figures and letters "376A, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted.

26. Repeal and savings. – (1) The Criminal Law (Amendment) Ordinance, 2018 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Indian Penal Code, the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of those Acts, as amended by this Act.

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THE PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018 No. 16 of 2018

[26th July, 2018.]

The following Act of Parliament received the assent of the President on the 26th July, 2018, and is hereby published for general information:

An Act further to amend the Prevention of Corruption Act, 1988.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. Short title and commencement. – (1) This Act may be called the Prevention of Corruption (Amendment) Act, 2018.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. – In the Prevention of Corruption Act, 1988 (hereinafter referred to as the principal Act), in section 2,—

(i) after clause (a), the following clause shall be inserted, namely:—

'(aa) ''prescribed'' means prescribed by rules made under this Act and the expression ''prescribe'' shall be construed accordingly;';

(ii) after clause (c), the following clause shall be inserted, namely:—

'(d) "undue advantage" means any gratification whatever, other than legal remuneration.

Explanation.— For the purposes of this clause,—

(a) the word "gratification" is not limited to pecuniary gratifications or to gratifications estimable in money;

(b) the expression "legal remuneration" is not restricted to remuneration paid to a public servant, but includes all remuneration which he is permitted by the Government or the organisation, which he serves, to receive.'.

3. Amendment of section 4. – In section 4 of the principal Act, for sub-section (4), the following sub-section shall be substituted, namely:—

"(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years:

Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so:

Provided further that the said period may be extended by such further period, for reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period together with such extended period shall not exceed ordinarily four years in aggregate.''.

4. Substitution of new sections for sections 7, 8, 9 and 10. – For sections 7, 8, 9 and 10 of the principal Act, the following sections shall be substituted, namely:–

"7.Offence relating to public servant being bribed. – Any public servant who,–

(a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or

(b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or

(c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from any person, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1.— For the purpose of this section, the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper.

Illustration.— A public servant, 'S' asks a person, 'P' to give him an amount of five thousand rupees to process his routine ration card application on time. 'S' is guilty of an offence under this section.

Explanation 2.— For the purpose of this section,—

(i) the expressions "obtains" or "accepts" or "attempts to obtain" shall cover cases where a person being a public servant, obtains or "accepts" or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by any other corrupt or illegal means;

(ii) it shall be immaterial whether such person being a public servant obtains or accepts, or attempts to obtain the undue advantage directly or through a third party.

''7A. Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence. – Whoever accepts or obtains or attempts to obtain from another person for himself or for any other person any undue advantage as a motive or reward to induce a public servant, by corrupt or illegal means or by exercise of his personal influence to perform

or to cause performance of a public duty improperly or dishonestly or to forbear or to cause to forbear such public duty by such public servant or by another public servant, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

8. Offence relating to bribing of a public servant. – (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention—

(i) to induce a public servant to perform improperly a public duty; or

(ii) to reward such public servant for the improper performance of public duty;

shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both:

Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage:

Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage:

Provided also that when the offence under this section has been committed by commercial organisation, such commercial organisation shall be punishable with fine.

Illustration.— A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section.

Explanation.— It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the latter.

9. Offence relating to bribing a public servant by a commercial organization. – (1) Where an offence under this Act has been committed by a commercial organisation, such organisation shall be punishable with fine, if any person associated with such commercial organisation gives or promises to give any undue advantage to a public servant intending—

(a) to obtain or retain business for such commercial organisation; or

(b) to obtain or retain an advantage in the conduct of business for such commercial organisation:

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person is said to give or promise to give any undue advantage to a public servant, if he is alleged to have committed the offence under section 8, whether or not such person has been prosecuted for such offence.

(3) For the purposes of section 8 and this section,—

(a) "commercial organisation" means—

(i) a body which is incorporated in India and which carries on a business, whether in India or outside India;

(ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;

(iii) a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or

(iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) "business" includes a trade or profession or providing service;

(c) a person is said to be associated with the commercial organisation, if such person performs services for or on behalf of the commercial organization irrespective of any promise to give or giving of any undue advantage which constitutes an offence under sub-section (1).

Explanation 1.— The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such person is employee or agent or subsidiary of such commercial organisation.

Explanation 2.— Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

Explanation 3.— If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such person is a person who has performed services for or on behalf of the commercial organisation.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under sections 7A, 8 and this section shall be cognizable.

(5) The Central Government shall, in consultation with the concerned stakeholders including departments and with a view to preventing persons associated with commercial organisations from bribing any person, being a public servant, prescribe such guidelines as may be considered necessary which can be put in place for compliance by such organisations.

10. Person in charge of commercial organization to be guilty of offence – Where an offence under section 9 is committed by a commercial organisation, and such offence is proved in the court to have been committed with the consent or connivance of any director, manager, secretary or other officer shall be of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation.— For the purposes of this section, ''director'', in relation to a firm means a partner in the firm.''.

5. Amendment of section 11. – In section 11 of the principal Act,—

(i) in the marginal heading, for the words ''valuable thing'', the words ''undue advantage'' shall be substituted;

(ii) the words ''or agrees to accept'' shall be omitted;

(iii) for the words ''valuable thing'', the words ''undue advantage'' shall be substituted;

(iv) for the words ''official functions'', the words ''official functions or public duty'' shall be substituted.

6. Substitution of new section for section 12. – For section 12 of the principal Act, the following section shall be substituted, namely:—

"12. Punishment for abetment of offences. – Whoever abets any offence punishable under this Act, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years, but which may extend to seven years and shall also be liable to fine.".

7. Amendment of section 13. – In section 13 of the principal Act, for sub-section (1), the following shall be substituted, namely:—

"(1) A public servant is said to commit the offence of criminal misconduct,—

(a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or

(b) if he intentionally enriches himself illicitly during the period of his office.

Explanation 1.— A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

Explanation 2.— The expression ''known sources of income'' means income received from any lawful sources.".

8. Substitution of new section for section 14. – For section 14 of the principal Act, the following section shall be substituted, namely:—

"14. Punishment for habitual offender. – Whoever convicted of an offence under this Act subsequently commits an offence punishable under this Act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to ten years and shall also be liable to fine.".

9. Amendment of section 15. – In section 15 of the principal Act, for the words, brackets and letters "clause (c) or clause (d)", the word, brackets, and letter "clause (a)" shall be substituted.

10. Amendment of section 16. – In section 16 of the principal Act,—

(a) for the words, brackets and figures, "sub-section (2) of section 13 or section 14", the words, figures and brackets "section 7 or section 8 or section 9 or section 10 or section 11 or sub-section (2) of section 13 or section 14 or section 15" shall be substituted;

(b) for the word, brackets and letter "clause (e)", the word, brackets and letter "clause (b)" shall be substituted.

11. Amendment of section 17. – In section 17 of the principal Act, in the second proviso, for the words, brackets, letter and figure "clause (e) of sub-section (1)", the words, brackets, letter and figure "clause (b) of sub-section (1)" shall be substituted.

12. Insertion of new section 17A. – After section 17 of the principal Act, the following section shall be inserted, namely:—

"17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties. – No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to

have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.''.

13. Insertion of new Chapter IVA - After Chapter IV of the principal Act, the following Chapter shall be inserted, namely:—

'CHAPTER IV A

ATTACHMENT AND FORFEITURE OF PROPERTY

18A. Provisions of Criminal Law Amendment Ordinance, 1944 to apply to attachment under this Act – (1) Save as otherwise provided under the Prevention of Money Laundering Act, 2002, the provisions of the Criminal Law Amendment Ordinance, 1944 shall, as far as may be, apply to the attachment, administration of attached property and execution of order of attachment or confiscation of money or property procured by means of an offence under this Act.

(2) For the purposes of this Act, the provisions of the Criminal Law Amendment Ordinance, 1944 shall have effect, subject to the modification that the references to "District Judge" shall be construed as references to "Special Judge".'

14. Amendment of section 19. – In section 19 of the principal Act, in sub-section (1),—

(i) for the words and figures "sections 7, 10, 11, 13 and 15", the words and figures "sections 7, 11, 13 and 15" shall be substituted;

(ii) in clause (a), for the words "who is employed", the words "who is employed, or as the case may be, was at the time of commission of the alleged offence employed" shall be substituted;

(iii) in clause (b), for the words "who is employed", the words "who is employed, or as the case may be, was at the time of commission of the alleged offence employed" shall be substituted;

(iv) after clause (c), the following shall be inserted, namely:—

"Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless—

(i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and

(ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.— For the purposes of sub-section (1), the expression "public servant" includes such person—

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.".

15. Substitution of new section for section 20. – For section 20 of the principal Act, the following section shall be substituted, namely:—

''20. Presumption where public servant accepts any undue advantage – Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11.".

16. Amendment of section 23. – In section 23 of the principal Act,—

(a) in the marginal heading, for the word, figures, brackets and letter "section 13 (1) (c)", the word, figures, brackets and letter "section 13 (1) (a)" shall be substituted;

(b) for the word, brackets and letter "clause (c)", the word, brackets and letter "clause (a)" shall be substituted.

17. Omission of section 24. – Section 24 of the principal Act shall be omitted.

18. Insertion of new section 29A. – After section 29 of the principal Act, the following section shall be inserted, namely:—

"29A. Power to make rules – (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) guidelines which can be put in place by commercial organisation under section 9;".

(b) guidelines for sanction of prosecution under sub-section (1) of section 19;".

(c) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the

session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.".

19. Amendment of Act 15 of 2003. – In the Prevention of Money Laundering Act, 2002, in Part A of the Schedule, for Paragraph 8, the following Paragraph shall be substituted, namely:—

"PARAGRAPH 8
OFFENCES UNDER THE PREVENTION OF CORRUPTION ACT, 1988
(49 OF 1988)

Section Description of offence.

7. Offence relating to public servant being bribed.
7A. Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence.
8. Offence relating to bribing a public servant.
9. Offence relating to bribing a public servant by a commercial organisation.
10. Person in charge of commercial organisation to be guilty of offence.
11. Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant.
12. Punishment for abetment of offences.
13. Criminal misconduct by a public servant.
14. Punishment for habitual offender.".

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Judicial discretion whenever it is required to be exercised has to be in accordance with law and set legal principles.

– D.P. Wadhwa, J.

in M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464, para 73.

THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT ACT, 2018
NO. 27 OF 2018

[17th August, 2018.]

[The following Act of Parliament received the assent of the President on the 17th August, 2018, and is hereby published for general information]

An Act further to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. Short title and commencement – (1) This Act may be called the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Insertion of new section 18A. – After section 18 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the following section shall be inserted, namely:—

"18A. No enquiry or approval required. – (1) For the purposes of this Act,—

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.".

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Judicial officers cannot have two standards; one in the Court and another outside the Court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy .

– K. Jagannatha Shetty, J.

in Daya Shankar v. High Court of Allahabad, (1987) 3 SCC 1, para 11


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