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

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JOTI JOURNAL AUGUST- 2016

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PART-IV

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FROM EDITOR'S DESK

Sanjeev Kalgaonkar

Director Incharge

Respected Judges,

I feel extremely privileged to join as Director Incharge of this esteemed Institution. The profound memories of Induction Training as Trainee Civil Judge in 1994 under the able Directorship of Late Shri B.K. Shrivastava are still afresh. I was overwhelmed with emotions to receive a letter of blessings on the day of "Guru Poornima" from our revered former Director Shri P.V. Namjoshi.

I am fully aware of the legacy of excellence left by my worthy predecessors, namely; Late Shri B.K. Shrivastava, Shri P.V. Namjoshi, Shri A.K. Saxena (Hon'ble Former Judge, High Court of M.P.), Shri P.K. Dubey, Shri Ved Prakash Sharma (Presently, Hon'ble Judge, High Court of M.P.), Shri J.P.Gupta (Presently, Hon'ble Judge, High Court of M.P.), Shri Manohar Mamtani (Presently, Registrar General), Shri C.V. Sirpurkar (Presently, Hon'ble Judge, High Court of M.P.), Shri Shailendra Shukla [Presently, Principal Registrar (Insp. & Vig.)] and Shri Pradeep Kumar Vyas (Presently, Special Judge, Ujjain). I extend my heartfelt gratitude and regards to all of them for guiding and educating the judicial fraternity with their wisdom, knowledge and experience in the field of law. I trust that collective efforts of my associate Shri Kapil Mehta and Staff of the Academy will strengthen me to live up to the expectations.

The Academy is grateful to Hon'ble Shri Justice Rajendra Menon, Acting Chief Justice and Patron of the Academy, Hon'ble Shri Justice S.K. Seth, Judge Incharge, Judicial Education and to Hon'ble Judges of the High Court associated with Judicial Education for their kind support and guidance that paved the way for an early inauguration of the new Guest House of the Academy. The new edifice and modern knowledge imparting tools, to be operational shortly, will certainly inculcate the sense of pride and strengthen the judicial acumen to achieve the desired results.

Meanwhile, Hon'ble Shri Justice Sushil Kumar Gupta, Hon'ble Shri Justice Mool Chand Garg and Hon'ble Shri Justice U.C. Maheshwari have demitted office of the Judge, High Court of M.P.. We wish them a happy, healthy and prosperous life.

Sir Winston Churchill said: ***"I like to learn but hate to be taught"***.

The Academy, in line with the 'Concept Document' of State Judicial Academy, proposes to move from pedagogy to andragogy (participative learning). We wish to make every workshop and colloquium more interactive. We sincerely believe that learning is a two way process. We wish to develop a culture where our participants are both; learners and contributors. The Academy is constantly enriching itself with inputs of our learned participating Judges of District Judiciary. Suggestions for further improvement are always welcome.

We were first to start Judicial Education with the objective of grooming the Judges of the District Judiciary into empathetic, impartial, diligent, upright, erudite, skilled, innovative and dynamic Judges. We will strive towards excellence in Judicial Education and make our Academy premier institution of judicial learning.

Wish you all a spirited and happy Independence Day.

With Sincere Regards.

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"We have come to rely upon a comfortable time-lag of fifty years or a century intervening between the perception that something ought to be done and a serious attempt to do it."

– H.G. Wells

GLIMPSES OF INAUGURAL FUNCTION OF THE GUEST HOUSE BLOCK OF THE NEW BUILDING OF MADHYA PRADESH STATE JUDICIAL ACADEMY HELD ON 15.07.2015

GLIMPSES OF INAUGURAL FUNCTION OF THE GUEST HOUSE BLOCK OF THE NEW BUILDING OF MADHYA PRADESH STATE JUDICIAL ACADEMY HELD ON 15.07.2015

FAREWELL TO HON'BLE SHRI JUSTICE SUSHIL KUMAR GUPTA,

HON'BLE SHRI JUSTICE MOOL CHAND GARG AND

HON'BLE SHRI JUSTICE UMESH CHANDRA MAHESHWARI

Hon'ble Shri Justice Sushil Kumar Gupta demitted office on His Lordship's attaining superannuation. Was born on 12th May, 1954 in District Neemuch. After obtaining degrees of B.Sc., M.A. and LL.B. enrolled as an Advocate on 04.12.1976 and joined the chamber of Senior Advocate Late Shri Ram Chandra Sharma. Practised on civil and criminal side. Joined Madhya Pradesh Judicial Services as Civil Judge Class II on 30th September, 1981. Promoted in Higher Judicial Services as Additional District & Sessions Judge in the year 1993. Was Granted Selection Grade on 07.06.1999 and Super Time Scale on 10.10.2007.

Worked as President, District Consumer Forum, Indore and Principal Judge, Family Court, Rewa. Worked in different capacities at Mandsaur, Ambikapur (Sarguja) and Raisen. Was served as District & Sessions Judge, Barwani and Dhar. Was Commissioner, Departmental Enquiries, Bhopal prior to elevation.

Elevated as an Additional Judge, High Court of Madhya Pradesh on 28.02.2014.

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Hon'ble Shri Justice Mool Chand Garg demitted office on His Lordship's attaining superannuation. Was born on 10th June, 1954. Passed B.Com (Hons.) and LL.B. from Delhi University and Diploma in Cyber Laws. Enrolled as an Advocate with the Bar Council of Delhi on 29th September, 1978. Practised in Civil, Criminal, Constitutional and Labour Sides in Delhi High Court and Subordinate Courts. Attained specialization in the field of Civil as well as Criminal Law. Was taken on the panel of Advocates of the

Government of NCT of Delhi in the year 1985 to represent GNCTD in Delhi High Court and Central Administrative Tribunal and continued to work as such

until his appointment to the Delhi Higher Judicial Service as an Additional District Judge in 1995. Worked in different capacities. Authored a number of articles on various subjects of law, which were published in different Journals.

Elevated as an Additional Judge, High Court of Delhi on 11.04.2008. Transferred to the High Court of Madhya Pradesh and took oath as Additional Judge on 18.04.2011 and as permanent Judge on 17.06.2013.

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Hon'ble Shri Justice Umesh Chandra Maheshwari demitted office on His Lordship's appointment as Up-Lokayukta, Madhya Pradesh on 27.06.2016. Was born on 02.11.1955 at Mhow (Indore). After Obtaining LL.B. degree from Gujrati College, Indore, was enrolled as an Advocate in the year 1977 and started practice as an Advocate in the High Court of M.P., Bench at Indore and its subordinate courts. Practiced in civil, criminal and Revenue branches of Law. Was also associated with social and education activities. Was Honorary Lecturer in R.C. Jall Law College, Mhow since 1.1.1987. Was also President District Court Bar Association, Mhow for the years 1989-91 and was Secretary of High Court Bar Association, Indore for the year 2001-2002. Was also Chairman of Shri Maheshwari Shikshan Mandal, Mhow.

His Lordship was appointed as Permanent Judge of High Court of Madhya Pradesh on 11.10.2004.

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

ROLE OF PRINCIPAL JUDGES IN FAMILY COURTS*

– By **Hon'ble Shri Justice Rajendra Menon**

I am extremely happy to learn that after constitution of Committee for Sensitization on Family Court matters, the Rajasthan Judicial Academy is hosting its First Regional Conference in which Judicial Officers of eight states dealing with Family Court matters are participating with full enthusiasm to share knowledge and skills. One of the topics identified for discussion in this Conference ***"Role of Principal Judges in Family Courts"*** has been allocated to our High Court.

Family is the most cherished unit of the society. It is the foundation on which the civil society is raised. Personal pride, prejudice, greed, intolerance, selfishness, ego and social inequalities sometimes create tensions and dissensions in the unit which reflects adversely on the society at large. For long, it was felt by various jurists, Welfare Organisations and individuals that there should be specialized institutional set up to deal with the issues concerning family disputes.

Emphasis was laid on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs.

The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family, the Court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings and that these Courts should make reasonable efforts and settlement before the commencement of the trial. The Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, the Courts continue to deal with family disputes in the same manner as other civil matters

and the same adversary approach prevails. Hence, a great need was felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

This ultimately paved the way for enacting the Family Courts Act, 1984 which stipulates for establishment of Family Courts manned by persons committed to the need to protect and preserve the institution of marriage and to ensure welfare of children having experience and expertise to promote settlement of disputes by counselling and conciliation.

……

* Address of Hon'ble Shri Justice Rajendra Menon, Acting Chief Justice, High Court of M.P. in the first Regional Conference on "Sensitization of Family Court Matters"

The ‘adversarial system’, is a system where two Advocates represent their parties before a Judge who attempts to determine the truth of case on the basis of evidence produced in the Court. Justice is done when the most effective adversary is able to convince the Judge that his perspective of the case is the correct one. In contrast, an ‘inquisitorial system’ is a legal system wherein the Court is actively involved in investigating the facts of the case.

The adversarial proceedings are not often the best way to resolve family disputes. Too often parents use their children as the battleground and sometimes the ammunition to fight the rights and wrongs of the relationship. Children are often very damaged by this process. Although, the Family Court Judges are partially inquisitorial in cases still they remain the Judge and not the investigator. Family Court Judges do not come off the Bench to visit the families in their homes. They decide the matters on the basis of evidence and the precedents brought before them. So, the verdict of the Family Court may not be just or based on complete understanding of the circumstances prevalent between the parties.

Sometimes, it is seen that despite the decree of divorce, parties reconcile matrimonial relations. It has also been experienced that despite the decree for restitution of conjugal rights, the parties seldom live together and resort to mutual divorce. These patterns would show that the best way to resolve matrimonial disputes is by agreement, whether by counselling, mediation or judicial settlement between the parties.

In the case of ***K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226,*** Their Lordships after granting decree in favour of respondent husband on the ground of cruelty by wife observed the aspects of matrimonial disputes as under:-

> “Before parting we wish to touch upon an issue which needs to be discussed in the interest of the matrimonial disputes. Though in this case we have recorded a finding that by her conduct, the respondent wife has caused mental cruelty to the appellant husband, we may not be understood, however to have said that the fault lies only with the respondent wife. In matrimonial disputes there is hardly any case where one spouse is entirely at fault. But, then, before the disputes assume alarming proportions, someone must make efforts to make parties see reason. In this case, if at the earliest stage, before the respondent wife filed the complaint making indecent allegations against her mother-in-law, she were to be counseled by an independent and sensible elder or if the parties were sent to a mediation centre or they had

> accessed to a pre-litigation clinic, perhaps the bitterness would not have escalated. Things would not have come to such a pass if, at the earliest, somebody had mediated between the two. It is possible that the respondent wife was desperate to save the marriage. Perhaps, in desperation she lost balance and went on filing complaints. It is possible she was misguided. Perhaps, the appellant husband should have forgiven her indiscretion in filing complaints in the larger interest of the matrimony. But the way the respondent wife approached the problem was wrong. It portrays a vindictive mind. She caused extreme mental cruelty to the appellant husband. Now the marriage is beyond repair".

These observations aptly manifest the complexities involved in matrimonial disputes and suggest that such disputes require something more than adversarial justice. The Bench proceeded to issue directions to the effect that Family Court shall make all efforts to settle the matrimonial disputes through mediation. Even if the counsellors submit a failure report, the Family Courts shall with the consent of the parties, refer the matter to the mediation centre. All the mediation centres should set up pre-litigation desks/clinics and make efforts to settle matrimonial disputes at the pre-litigation stage.

'Mediation' is an attempt by a third party called the Mediator, to bring about an agreement on contested issues. Many people when faced with prospects of an impending matrimonial dispute lastly opt for trial. The mere thought of hearing before a Judge is a terrifying ordeal which only adds stress to an already stressful situation. Mediation can be a comforting substitute for the anxiety of the court house. The charged atmosphere of a court room is, in mediation, replaced by a more serene and calming environment.

Mediator often creates unique agreements that deviate from the norms because such agreements are tailor-made by the couple to fit their circumstances and desires. The mediator stands in contrast to the lawyers because lawyers take an adversarial competition approach for their client whereas the mediator's job is to help both the parties to reach to a suitable conclusion.

The Principal Judges must bring various aspects and benefits of the process of mediation to the notice of the parties. Sometimes, parties may feel that their dispute is too complicated to be decided through mediation. The Principal Judge must inform the parties that no case is too complex for mediation. Another concern that the party may have is "what if we are unable to agree on everything"? The Principal Judge should assure the party that it is fairly common to reach an agreement on all but one or two issues, even then the mediation is rarely a

"wasted time". A settlement can be drawn up on the agreed upon issues and then parties may resort to litigation on the remaining issues, then, less time will be spent in court. Therefore, it is the duty of the Principal Judge to suggest that mediation is a smarter choice for both the parties and to explain them that mediating the disputes has many benefits than litigation. Thus, effective implementation of guidelines laid down in ***K. Srinivas Rao*** case would be ensured.

Section 10 of the Family Courts Act provides for procedure generally to be applied by the Family Court. Section 10 (1) of the Act, provides that generally the provisions of the Code of Civil Procedure shall apply to the suits and proceedings before the Family Court. Section 10 (2) provides that generally the provisions of the Code of Criminal Procedure shall apply to the proceedings under Chapter IX of the Code before the Family Court. Special emphasis is given on section 10 (3) which provides that nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down ***its own procedure*** with a view to arrive-

(i) at a settlement in respect of the subject-matter or

(ii) at the truth of the facts alleged by one party and denied by the other.

The observations of Supreme Court in case of ***Lalit Kishore v. Meeru Sharma reported in AIR 2010 SC 1240*** are pertinent to quote:

> "It is difficult to conceive that the Family Court cannot be conferred with jurisdiction to pass an order for medical examination in an appropriate case because when such report is received, that would facilitate the court in giving a positive conclusion on the mental condition of the wife-respondent. It is true that the Hindu Marriage Act or any other law governing the field does not contain any express provision empowering the court to issue direction upon a party in a matrimonial proceeding to compel him to submit herself/ himself to a medical examination. But, in our view, it does not preclude the court from passing such an order. The court is always empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of taking evidence on the ground for which the matrimonial proceeding was started. It is well settled that the primary duty of the court is to see that the truth comes out. Therefore, although the medical examination for a party is not provided in the Act, even then, the court has complete inherent power in an appropriate case under Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit."

In ***Sharda v. Dharmpal, (2003) 4 SCC 493***, a three-Judge Bench decision of Apex Court observed :-

> "In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms."

It goes to show that Family Courts Act permits indulgence by invoking inquisitorial system of judging to arrive at the truth of the matter through laying down its own procedure, within legal framework.

Section 6 of the Family Courts Act provides for Counselling. It is often observed that the parties hesitate to open out before a Counsellor. Factors like economic, social and educational background of the Counsellor plays an important role in this regard. When a party feels that the Counsellor is not matching to their economic, social and educational status, they never open up and share their problems with the Counsellor. The selection of proper Counsellor is also important. Principal Judge, being a person in Authority, the parties look up to him with respect and as guardian to protect their rights. Thus, the Principal Judge of the Family Court, as a Counsellor also, assumes great importance. Most of the matters coming into Family Court may be resolved by active, sympathetic and compassionate counselling of the Judge. The Principal Judge must strive to resolve the dispute. His participation should not be formal. He must endeavour to restore the matrimonial tie between the parties and, if needed, dissolution of stale marriage without delay so that prime youth of the couple may not be wasted.

The matrimonial litigation is a traumatic experience in the lives of parents and their children. Apart that emotional problems, it aids many legal, social and practical complications. It is unfortunate, however, that generally the only way available to the parties to obtain relief from an unhappy and undesirable relationship is by subjecting themselves and, their spouses to the hazards of ordinary Court procedures. The parties should be persuaded to make reasonable efforts for settlement before the commencement of trial. The normal stifling atmosphere associated with Courts should be avoided.

A presiding officer of the Family Court does not merely act as a Judge. He has to bring forth at his command varied experience of life that goes into making the foundation of the family strong enough to weather the occasional storms. He has to act as a wise elder who dispassionately views various aspects of the dispute and has to adopt a holistic and sagacious approach aimed at first affecting a

reconciliation between the warring parties and to bring about a settlement of dispute through judicial pronouncement in a case where the milk has really

gone sour. He should have patience, understanding, perseverance and basic knowledge of human psychology.

It is also expected from the Judges of Family Courts that while adjudicating upon the matters relating to Family Courts, the Judges must bear in mind that only ideal spouses make an ideal family. If the spouses are ideal then there is no need for lawyers or family courts. It is, therefore, a duty of the judges to think in terms of bringing about solutions to the misunderstandings or difference between the spouses.

I would like to place special emphasis on guardianship cases wherein emotions play a significant role. Although Child Custody Guidelines and Parenting Plan enlighten the Family Court Judges to deal with the matters of guardianship still sympathy and compassion are paramount consideration for deciding such cases.

Another aspect, I would like to address is regarding procedures.

Section 13 of the Act provides that:

> "no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner :
> Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae."

But the Principal Judges, as a matter of routine, grant permission for representation by lawyers. Then, the matters are adjourned for non-availability of lawyer due to many reasons including strikes.

The Principal Judges, after granting permission to the parties to be represented by lawyers, if comes to the conclusion that some obstruction is being caused to the proceeding due to non-availability of lawyers or otherwise deliberate misdemeanor, can immediately cancel the permission and obey the mandate of legislature rather than prolonging the agony and waiting period of matrimonial disputes.

At the time of recording evidence, usually a sufferer wife cannot state the real story in the presence of other litigants and legal practitioners in the Court room due to humiliation, fear or as a matter of privacy. In those circumstances, on the request of parties, the Principal Judge should resort to "camera proceeding".

I am aware that recovery of permanent alimony or interim maintenance is troubling most of the Family Court Judges. The distress warrants are to be issued against such respondents who neglect despite “having sufficient means

to maintain" the applicant. It is often observed that poor respondents who do not possess sufficient means to maintain themselves are arrested and send to jail but the wealthy who have sufficient means to manage the things are seldom arrested in execution of distress warrants. The role of Family Court Judge as a vigilante' assumes importance in such a situation.

I am also aware of the fact that lawyers often take share, sometimes a major share, out of the maintenance amount awarded by the Family Court. The destitute and needy applicant is left with meager and insufficient amount. Whether the guidelines laid down by the Apex Court in the case of ***General Manager, Kerala S.R.T.C v. Susamma Thomas, AIR 1994 SC 1631*** for deposit of compensation amount in term deposits may be applied in case of permanent alimony and the zero balance account opened under the scheme of Jandhan Yojana of the Central Government may be utilized for transfer of maintenance amount directly in such account of the applicant? I leave this matter for discussion in the Discussion Session.

I would like to bring to your notice, Section 26 of Protection of Women from Domestic Violence Act, 2005 provides that ***any relief available under sections 18, 19, 20, 21 and 22*** may also be sought in any legal proceeding, before a civil court, ***family court*** or a criminal court, affecting the aggrieved person and the respondent and such relief may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. Thus, the Principal Judge trying a matrimonial dispute may also issue "Protection Orders" under Section 18, "Residence Orders" under Section 19, "Custody Orders" under Section 21 and "Compensation Orders" under Section 22 of Protection of Women from Domestic Violence Act, 2005. Further, "Monetary Reliefs" in terms of Section 20 of the Act may also be granted by the Principal Judge.

Thus, the powers and Jurisdiction vested in Principal Judge are vast. They should not be exercised with apathy to complete paper formality. Empathetical communicative skills and compassionate trustworthy conduct of Family Court Judge is the best way to resolve the disputes.

The participant judges will, I am sure, carry the message from the Conference to their respective States and initiate steps in their own courts to implement the recommendations.

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STATUTORY PRESUMPTION AND REVERSE BURDEN – AN ANALYSIS OF PRESENT SCENARIO

– By **Sanjeev Kalgaonkar**

Director Incharge

PRESUMPTION

The term "presumption" in a comprehensive sense, may be defined, where in absence of actual certainty of the truth or falsehood of a fact or proposition, an inference affirmative or disaffirmative of that truth or falsehood is drawn by a process of probable reasoning from something which is taken to be granted. Presumption literally means taking as true without examination or proof. In other words, presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence.

Under the Evidence Act, all presumptions must come under one or other class of the three classes mentioned in the Act, namely, (i) may presume (rebuttable), (ii) shall presume (rebuttable) and (iii) conclusive presumptions (irrebuttable).

The presumptions falling under category of an expression "may presume" are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling under expression "shall presume" are known as "legal presumptions" or "compulsory presumptions". Presumption of law or artificial presumptions are inferences and the proposition established by law.

PRESUMPTION OF INNOCENCE

The English Common Law case, ***Woolmington v. D.P.P.*** is the ***locus classicus*** on presumption of innocence, in which Lord Chancellor Viscount Sankey entrenched the principle in the following words:

> "One golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal..... .
>
> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

It is recognised as human right and fundamental principle to be applied in criminal trial in India by catena of judgments of the Apex Court. In case of ***Kailash Gour v. State of Assam, AIR 2012 SC 786,*** it was observed:

> "It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away."

Also See: ***Narendra Singh and anr. v. State of M.P., (2004) 10 SCC 699, Ranjitsingh Brahmajeetsingh Sharma v. State of Maharashtra and ors., (2005) 5 SCC 294, State of U.P. v. Naresh and ors., 2011 AIR SCW 187*** and ***Ganesan v. Rama Raghuraman and ors., (2011) 2 SCC 83***.

In ***Noor Aga v. State of Punjab, AIR 2009 SC (Supp) 852,*** it was held that:

> "The presumption of innocence is a human right. Article 6(2) of the European Convention on Human Rights provides : "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". ..... . In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence."

Recently in ***Rajiv Singh v. State of Bihar, Criminal Appeal No. 1708 of 2015*** decided on ***16th December, 2015,*** the Supreme Court reiterated importance of "presumption of innocence" as the fundamental notion of criminal jurisprudence and fundamental human right encompassing the assurance of liberty, dignity and privacy of the individual.

PRESUMPTION OF INNOCENCE – WHETHER INDISPENSIBLE

In case of ***State of West Bengal v. Mir Mohammad Omar and others, (2000) 8 SCC 382,*** it was observed that:

> "The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty".

In ***K.Veeraswamy v. Union of India, (1991) 3 SCC 655*** the Constitution Bench held that:

> ".....a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Art.21 of the Constitution as contended for the appellant. It may be noted that the principle reaffirmed in ***Woolmington case,*** is not a universal rule to be followed in every case. The principle is applied only ***in the absence of statutory provision to the contrary***".

REVERSE BURDEN

Since presumption of innocence is the fundamental element of a trial, the legal or ultimate burden of proof is always on the prosecution to prove the guilt of the accused. The prosecution must, therefore, prove a concurrence between ***mens rea*** and ***actus reus*** beyond reasonable doubt in order to discharge its burden.

The accused may rebut the Court's presumption that a particular exculpating circumstance was absent by raising either a defence or an exception. Commonly referred to as the ***"reverse evidential burden",*** merely requires proof from the accused, which satisfies the standard of 'prudent man' or at least creates reasonable doubt regarding one or more necessary ingredients of the offence. If the accused succeeds in creating reasonable doubt, he will be acquitted because the prosecution has been unable to prove his guilt beyond reasonable doubt. Thus, the legal burden of proving all necessary ingredients of an offence remains on the prosecution from the commencement to the termination of a trial.

"Reverse onus clauses or reverse burdens", constitute an exception to the fundamental rule, replacing the 'golden thread' of criminal law with a presumption of guilt. They tend to replace 'innocent until proven guilty' with 'guilty until proven innocent', making the accused a presumptive offender who is required to prove his innocence.

Reverse burdens dilute the prosecution's legal obligation to the extent that the prosecutor is required to prove only formal requisites, also referred to as the basic or foundational facts. Based on the proof of such foundational facts, the culpability of the accused is presumed and the burden to establish absence of inculpatory facts is then shifted to the accused. The burden upon the accused in such cases, also known as the ***"reverse persuasive burden,"*** is ultimate or final because failure to discharge it will result in the conviction of the accused. Therefore, unlike in a reverse evidential burden, where the accused only has to raise reasonable doubt as to his guilt while the legal burden continues to persist on the prosecution, in a reverse persuasive burden, the role of the prosecution ends once the burden shifts to the accused. Further, reverse persuasive burdens compel the accused to testify as opposed to the reverse evidential burden, which gives the accused the opportunity to displace it by prosecution's evidence or raise any exculpatory defence. Reverse persuasive burdens, however, leave the accused with no choice but to testify to his innocence.

The recommendations of the 47th Report of the Law Commission, 1972 suggest that since offences relating to narcotics, corruption and food adulteration threaten the 'health or material welfare of the community as a whole', special efforts are necessary for their enforcement. The Commission further emphasised that the injury to society, in general, was greater in certain offences against public welfare in comparison to crimes having identifiable victim, such as murder, robbery etc. It was felt, therefore, that to effectively address and redress such crimes, the prosecution should be relieved of proving all the elements beyond doubt. Thereafter, the reverse burden clauses were incorporated in various statutes.

Some statutory provisions employing reverse onus clauses in India are – S.114-A of the Evidence Act, 1872, (Presumption as to rape) and S.113-B (Presumption as to dowry death) (introduced on the recommendations of the 84th and 91st Law Commission Reports, respectively); S.10(7-B) of the Food Adulteration Act, 1954; S. 10-C of the Essential Commodities Act, 1955; Ss.123, 138A and 139 of the Customs Act, 1962; S.39 of the Foreign Exchange Management Act, 1999; Ss. 35, 54 and 66 of the Narcotic Drugs and Psychotropic Substances Act, 1985; S.35-O of the Wealth Tax Act, 1957; S.4(1) of the Prevention of Corruption Act, 1947 and S.20 of the Prevention of Corruption Act, 1988; S.43 and S.44 of M.P. Excise Act, 1915; S.13-A of M.P. Govansh Vadh Pratishedh Adhiniyam, 2004.

CONFLICT BETWEEN "THE PRESUMPTION OF INNOCENCE" AND "REVERSE BURDENS"

In ***Noor Aga v. State of Punjab*** (supra) following statements were quoted with approval:

> "In a recent Article ***"The Presumption of Innocence and Reverse Burdens : A Balancing Duty"*** published in [2007] CLJ (March Part) 142, it has been stated :
>
> > "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

In Glanville Williams, Textbook of Criminal Law (2nd Edn.) page 56, it is stated:

> "Harking back to Woolmington, it will be remembered that Viscount Sankey said that "it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and subject also to any statutory exception". ... Many statutes shift the persuasive burden. It has become a matter of routine for Parliament, in respect of the most trivial offences as well as some serious ones, to enact that the onus of proving a particular fact shall rest on the defendant, so that he can be convicted "unless he proves" it."

Further in case of ***Hiten P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897,*** it was held :

> "Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact."

In case of ***Babu v. State of Kerala, (2010) 9 SCC 189,*** it was observed that:

> "Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact."

Again in ***Noor Aga v. State of Punjab*** (supra), it was observed that:

> "Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself.
>
> Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind."

DOCTRINE OF *RES IPSA LOQUITUR* – REVERSE BURDEN TO EXPLAIN CIRCUMSTANCES

We may find many instances wherein the doctrine of *res-ipsa-loquitur* has been applied in criminal trial to place reverse burden on accused to explain the inculpatory circumstances, failing which he will be presumed guilty.

> See – ***Alimuddin v. King Emperor, 1945 Nagpur Law Journal 300; Raghubir Singh v. State of Punjab, (1974) 4 SCC 560; State of A.P v. R. Jeevaratnam, AIR 2005 S C 4095; State of A.P. v. C. Uma Maheswara Rao and anr., 2004 (4) SCC 399*** and ***B. Nagabhushanam v. State of Karnataka, (2008) 7 SCALE 716***.

Similarly, Sec. 106 of Evidence Act is often pressed into service to place reverse evidential burden on accused to explain the facts specifically in his knowledge.

In ***State of West Bengal v. Mir Mohammad Omar and ors., AIR 2000 SC 2988,*** it was held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.

In case of ***Rajinder Singh v. State of Haryana, AIR 2013 SC 2529,*** the accused failed to explain as to why he was in a hurry to cremate the deceased in the

early morning of 24th January, 1993 while she died in the mid night of 23rd/24th January, 1993 i.e. within few hours. The village of deceased's parents was just 17-18 kms far from the village of the accused but the reason as to why they were not informed about the incident on the same day and why the accused had not waited for them to come is not explained. The accused also failed to explain as to why according to the F.S.L. Report, an Organo Phosphorus Pesticide was found in the vomiting of the deceased. The Supreme Court, placing the burden on accused as per Section 106 of Evidence Act to explain above circumstances held that the Trial Court rightly drew an inference that the accused-appellants were guilty of the offence for which they were charged.

In ***State of W.B. v. Mir Mohammad Omar and others, (2000) 8 SCC 382, Sucha Singh v. State of Punjab, (2001) 4 SCC 375*** and ***Paramsivam*** and ***ors. v. State, AIR 2014 SC 2936,*** placing the burden on the accused to explain the circumstances, it was held that when it is proved to the satisfaction of the Court that deceased was abducted by the accused, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to abductee at least until he was in their custody.

Recently, in case of ***Suresh and Anr. v. State of Haryana, AIR 2015 SC 518,*** recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It was held that the recovery casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused.

PRESUMPTION OF INNOCENCE, RULE AGAINST SELF-INCRIMINATION AND RIGHT TO REMAIN SILENT *VIS-A-VIS* REVERSE BURDEN

In case of ***Manu Sao v. State of Bihar, 2012 AIR SCW 6138,*** the Supreme Court explained the right of the accused to remain silent with reference to inculpatory facts appearing in evidence as under-

> "... The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. .....

> The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

In ***Phula Singh v. State of Himachal Pradesh, AIR 2014 SC 1256,*** balancing the right to remain silent and duty to explain, it was observed that-

> "The accused has a duty to furnish an explanation in his statement under Section 313, Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313, Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law."

In ***Ramnaresh and ors. v. State of Chhattisgarh, AIR 2012 SC 1357,*** the Apex Court held as under:

> "One of the main objects of recording of a statement under Section 313 CrPC is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law." (Also see – ***Munna Kumar Upadhyaya v. State of Andhra Pradesh, AIR 2012 SC 2470***)

In ***State of Karnataka v. Suvarnamma, (2015) 1 SCC 323*** (at page 330), it was observed that:

> "Once the prosecution ***probabilises*** the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused."

However in ***Raj Kumar Singh v. State of Rajasthan, AIR 2013 SC 3150***, the Supreme Court cautioned that:

> "An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself."

In this connection, reference may also be made to the judgments of the Supreme Court in ***Devender Kumar Singla v. Baldev Krishan Singla, 2005 SCC (CRI.) 1185*** and ***Bishnu Prasad Sinha v. State of Assam, (2008) 1 SCC (CRI.) 766*** that the statement of the accused under Section 313 CrPC for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

The present scenario of law, in this regard, may be summarized as under:

1. Admission of guilt or confession in the statement u/s 313 Cr.P.C. cannot be made sole basis for finding the accused guilty but the same can be taken as a piece of evidence as landing credence to the evidence lead by the prosecution.
2. The accused has a right to remain silent or even remain in complete denial but he is under a duty to furnish an explanation as a statement u/s 313 Cr.P.C. regarding incriminating material.
3. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain the inculpatory facts and circumstances appearing in evidence. If the explanation is false, then the court is entitled to draw adverse inference and pass consequential order against the accused in accordance with the law.

4. An adverse inference may be drawn against accused only and only if the incriminating material should establish the guilt and the accused is not able to furnish any explanation for the same.

5. The Court may rely on the portion of statement of accused and find his guilt in consideration of other evidence lead by prosecution. However, such statement should not be considered in isolation.

6. False plea taken against the accused in statement can be taken as vital additional circumstance against him.

We may, now, examine some of the statutory presumptions and interpretation of the Supreme Court on particular reverse burden clause.

SECTION 29 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

> "***Sec. 29. Presumption as to certain offence:-*** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court ***shall presume, that such person has committed*** or abetted or attempted to commit ***the offence,*** as the case may be, ***unless the contrary is proved.***"

Readers are requested to go through the Article – "Standard and extent of burden of proof on the prosecution *vis-a-vis* accused with reference to presumption under Section 29 of the Protection of Children from Sexual Offences Act, 2012" published in JOTI JOURNAL 2012 in Part I of December 2012 issue, authored by Shri Gajendra Singh, Faculty Member.

SECTION 8 (C) OF THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 AS INSERTED BY THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT ACT, 2015

> "Sec. 8. Presumption as to offences:- In a prosecution for an offence under this Chapter, if it is proved that –
>
> (a) xxxxx
>
> (b) xxxx
>
> (c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved."

SECTION 8-A OF THE DOWRY PROHIBITION ACT, 1961

> "Sec. 8-A. Burden of proof in certain cases:-Where any person is prosecuted for taking or abetting the taking of any dowry under Sec.

4, or the demanding of dowry under Sec. 4, the burden of proving that he has not committed an offence under those sections shall be on him."

These provisions are similar in substance with Section 29 of the Protection of Children from Sexual Offences Act, 2012. Therefore, aforementioned Article would provide guidance for application of presumption and effect therof.

SECTIONS 118(A), 138 AND 139 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881

The Supreme Court in ***M.S. Narayana Menon alias Mani v. State of Kerala and anr., (2006) 6 SCC 39*** dealt with legal presumption in favour of holder of cheque and held :

> "Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Presumption drawn under a statute has only an evidentiary value."

Section 138 of Negotiable Instruments Act contains the words "shall be deemed to have committed an offence". It is well settled that offence u/s 138 is created by a legal fiction. (See ***R. Kalyani v. Janak C. Mehta & ors., 2009 (1) SCC 516*** and ***DCM Financial Services Ltd. v. J.N. Sareen, 2008 (8) SCC 1***)

Explaining the legal fiction in ***Hiten P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897,*** it was held :

> "Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact. ….."
>
> The rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

A three Judge Bench of the Supreme Court in ***Rangappa v. Sri Mohan, AIR 2010 SC 1898*** examined the degree of proof required for an accused to discharge his burden in a prosecution under Sec. 138 of Negotiable Instrument Act and held as follows;

> "S.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..... . It is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail."

Thus, Sections 118-A, 138 and 139 of the Negotiable Instruments Act, 1881 make it obligatory on the Court to raise statutory presumption in every case where the factual basis of raising presumption has been established but the accused may rebut the presumption by making his defence reasonably probable.

SECTION 4 (1) OF THE PREVENTION OF CORRUPTION ACT, 1947

In case of ***V. D. Jhingan v. State of Uttar Pradesh, AIR 1966 SC 1762,*** the presumption and scope of reverse burden was explained as under:

> "It is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under S. 4 (1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts, i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt. ..... . That does not mean that if the statute places the burden of proof on an accused person, he is not required to establish his plea; but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated

with the degree and character of proof expected from the prosecution which is required to prove its case.

In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings, the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him."

A three judges bench of the Supreme Court while dealing with this statutory presumptions in ***Trilok Chand Jain v. State of Delhi, AIR 1977 SC 666*** observed as under:

"The presumption however, is not absolute. It is rebuttable. The accused can prove the contrary. The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the shape of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. But the degree and the character of the burden of proof which s.4(1) casts on an accused person to rebut the presumption raised thereunder, cannot be equated with the degree and character of proof which under s.101, Evidence Act rests on the prosecution. While the mere plausibility of an explanation given by the accused in his examination under s. 342, Cr.P.C. may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the fact presumed, improbable. In other words, the accused may rebut the presumption by showing a mere preponderance of probability in his favour; it is not necessary for him to establish his case beyond a reasonable doubt."

SECTION 20 OF THE PREVENTION OF CORRUPTION ACT, 1988

M. Narsinga Rao v. State of Andhra Pradesh, AIR 2001 SC 318 provides the guideline to appreciate the evidence with reference to presumption under section 20 of the Act that when the section deals with legal presumption it is to be understood as in terrorum i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied.

In case of ***T. Shankar Prasad v. State of Andhra Pradesh, AIR 2004 SC 1242,*** it was observed that unless the presumption is disproved or dispelled or rebutted the Court can treat the presumption as tantamounting to proof. Thus, presumption under S.20 is a presumption of law and cast an obligation on Court to operate it in every case brought in. The presumption is a rebuttable presumption and it is rebutted by proof and not by explanation which may seem to be plausible.

However, in case of ***State of Punjab v. Madan Mohan Lal Verma, AIR 2013 S C 3368,*** it was observed that:

> "The burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. (Vide: ***Ram Prakash Arora v. The State of Punjab, AIR 1973 SC 498; State of Kerala and anr. v. C.P. Rao, (2011) 6 SCC 450*** and ***Mukut Bihari and anr. v. State of Rajasthan, (2012) 11 SCC 642***)"

Thus, the presumption provided u/Sec. 4(1) of the Prevention Act, 1947 or u/Section 20 of the Prevention of Corruption Act, 1988 would apply only on proof of foundational facts beyond all reasonable doubts and the accused may displace these statutory presumptions by bringing on record, direct or circumstantial evidence, to establish his defence by mere preponderance of probabilities.

SECTIONS 35 AND 54 OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

Section 35 of NDPS Act, 1985 provides for "presumption of culpable mental state" as under:

> (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state *but it shall be a* ***defence for*** *the accused to* ***prove*** *the fact that he had no such mental state with respect to the act charged as an offence in that prosecution*.
>
> (2) For the purpose of this section, a fact is said to be ***proved*** only when the court believes it to exist ***beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability***.

Section 54 of the N.D.P.S. Act, 1985 provides for presumption for possession of illicit articles as under:

> "In trials under this Act, it may be presumed, unless and ***until the contrary is proved***, that the accused has committed an offence under this Act in respect of –
>
> (a) Any narcotic drug or psychotropic substance or controlled substance;
>
> (b) ……,,"

Explaining the scope and effect of these legal presumption provisions in case of ***Gyan Chand and ors. v. State of Haryana, 2013 CRI. L. J. 4058 (SC),*** it was laid down that:

> "From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.
>
> Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.
>
> Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872."

Explaining the nature and extent of burden cast on the accused under section 35(2) of the Act, in case of ***Abdul Rashid v. State of Gujarat, AIR 2000 SC 821,*** three Judge Bench held as under-

> "The burden of proof cast on the accused under S.35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had

> the knowledge or the required intention, the burden cast on him under S.35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

Thus, even in a case where the statute (S.35 NDPS Act) requires the accused to prove his defence beyond reasonable doubt, the three Judge Bench of the Apex Court had read it down to place "reverse evidential burden" on the accused to be discharged in abovementioned manner.

Later in case of ***Noor Aga v. State of Punjab*** (supra), the notion stands affirmed in following words:

> "Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established.
>
> With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

The present position of law may be summarized as follows:

1. Initial burden to prove the foundational facts beyond all reasonable doubt lies on the prosecution.
2. Sections 35 and 54 of the Act raise presumption with regard to culpable mental state of the accused only in the event circumstances mentioned in the provision are fully satisfied by the prosecution.

3. Once possession of contraband articles is established by the prosecution beyond all reasonable doubt, the burden shifts on the accused that he had no knowledge of the same and the Court shall presume that the accused has committed the offence until contrary is proved by the accused.
4. The burden casts on the accused can be discharged through direct or circumstantial evidence appearing in prosecution case itself or in the defence evidence.
5. The standard of proof required to dispel the burden by the accused is preponderance of probability.

SECTION 13-A OF THE M.P. GOVANSH VADH PRATISHEDH ADHINIYAM, 2014

> "***Burden of proof on accused*** **–** Where any person is prosecuted for an offence under the provisions of this Act, the burden of proof that he had not committed the offence under the provisions of this Act, shall be on him, if the prosecution is in a position to produce the prima facie evidence against him at the first instance."

This provision clearly places reverse persuasive burden on the accused on production of ***prima facie*** evidence by the prosecution. The prosecution is not required to prove the ingredients of alleged offence under the Act beyond all reasonable doubts to shift the burden to prove innocence on the accused.

Kindly go through the position of law hereinafter analysed.

SECTION 304-B OF IPC AND SECTION 113-B OF THE EVIDENCE ACT:

Section 304B of IPC was introduced w.e.f. 19.11.1986 as per Act 43 of 1986. The Law Commission, in its 91st Report dated 10th August, 1983, recommended reform of the law to deal with the situation which led to incorporation of Sections 304 B in IPC, making 'dowry death' an offence and Section 113B in the Evidence Act which provides for raising a presumption as to dowry death in case of an unnatural death within seven years of marriage when it is shown that a woman was subjected to harassment for dowry soon before her death.

Presumption under S.113B of Indian Evidence Act is a presumption of law. On proof of the essential ingredients mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essential ingredients:

(1) The question before the court must be whether the accused has committed the ***dowry death*** of a woman. This means that the presumption can be raised only if the accused is being tried for the offence under S.304B, IPC.
(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

Whether the prosecution is required to prove the ingredients of Sec. 304-B IPC beyond all reasonable doubts or may prove them even by preponderance of probabilities ? And

How this statutory reverse burden may be displaced by the accused?

There is a catena of precedents which held that in order to establish the offence of dowry death under Section 304-B, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death.

In ***Vipin Jaiswal v. State of A.P., AIR 2013 SC 1567*** the requirement of proof of ingredients laid down as follows-

> "In any case, to hold an accused guilty of both the offences under Sections 304B and 498A, IPC, the prosecution is required to prove beyond reasonable doubt that the deceased was subjected to cruelty or harassment by the accused. Similarly, for the Court to draw the presumption under S.113B of the Evidence Act that the appellant had caused dowry death as defined in S.304B, IPC, the prosecution has to prove besides the demand of dowry, harassment or cruelty caused by the accused to the deceased soon before her death. Since the prosecution has not been able to prove beyond reasonable doubt this ingredient of harassment or cruelty, neither of the offences under S.498A and S.304B, IPC has been made out by the prosecution. [Also see – ***Madivallappa V. Marabad v. State of Karnataka, 2013(2) SCALE 665; Devinder v. State of Haryana, (2012) 10 SCC 763; Narayanamurthy v. State of Karnataka, AIR 2008 SC 2377; Raj v. State of Punjab and others, (2000) 5 SCC 207; Sanjiv Kumar v. State of Punjab, (2009) 16 SCC 487*** and ***Bakshish Ram v. State of Punjab, (2013) 4 SCC 131***]

Recently in ***Karan Singh v. State of Haryana, (2014) 5 SCC 73,*** it was held:

> "It has been held times without number that, to establish the offence of dowry death under Section 304-B IPC, the prosecution has to prove beyond reasonable doubt that the husband or his relative has susbjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death."

In ***Rajeev Kumar v. State of Haryana, AIR 2014 SC 227,*** it is observed that:

> "One of the essential ingredients of the offence of dowry death under S.304B, IPC is that the accused must have subjected a woman to cruelty in connection with demand of dowry soon before her death and this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death under S. 113B of the Indian Evidence Act."

In abovementioned judgments the legal effect of the 'deeming' legal fiction provided in section 304-B of IPC read with the statutory presumption mandated by section 113-B of the Evidence Act and use of word 'shown' in section 304-B IPC was not considered at length.

In ***Devinder v. State of Haryana, (2012) 10 SCC 763,*** it is held that the word "deemed" in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death.

However, the following observation in case of ***Kashmir Kaur v. State of Punjab, AIR 2013 SC 1039*** clarifies the notion of reverse burden placed on accused by deeming fiction of Sec. 304-B IPC-

> "Section 304-B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304-B.
>
> Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304-B were not satisfied."

Kind attention of readers is invited to ***Sher Singh @ Partapa v. State of Haryana AIR 2015 SC 980,*** wherein a two Judge Bench of the Supreme Court, while dealing with S. 304-B IPC and S.113-B Evidence Act, ***interalia***, held as follows:

> "The Prosecution can discharge the initial burden to prove the ingredients of S.304B even by preponderance of probabilities. Once the presence of the concomitants are ***established or shown or proved*** by the prosecution, ***even by preponderance of possibility,*** the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence ***dislodging his guilt, beyond reasonable doubt.*** Keeping in perspective that Parliament has employed the amorphous pronoun/noun

"it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed". Regarding the third proposition, there is no scope for doubt since the Courts in India have been interpreting the word "shown" to mean "prove" and the word "deemed" has to mean "presumed" though not expressly declared as 'reading down' and 'reading up'."

It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt.

The other facet is that the husband has indeed a heavy burden cast on his shoulders in that his deemed culpability would have to be displaced and overturned beyond reasonable doubt.

In our opinion, it would not be appropriate to lessen the husband's onus to that of preponderance of probability as that would annihilate the deemed guilt expressed in Section 304B, and such a curial interpretation would defeat and neutralise the intentions and purposes of Parliament."

Thereafter, another two Judge Bench of the Apex Court in ***Ramakant Mishra @ Lalu etc. v. State of U.P., 2015 (3) SCALE 186,*** reaffirmed the view as under:

"Very recently, this Court had the opportunity of interpreting Section 304B of the IPC in Criminal Appeal No.1592 of 2011, titled ***Sher Singh v. State of Haryana, [reported in (2015) 1 SCR 29]*** which was authored by one of us (Vikramajit Sen,J.). Succinctly stated, it had been held therein that the use of word 'shown' instead of 'proved' in Section 304B indicates that the onus cast on the prosecution would stand satisfied on the anvil of a mere preponderance of probability. In other words, 'shown' will have to be read up to mean 'proved' but only to the extent of preponderance of probability. Thereafter, the word 'deemed' used in that Section is to be read down to require an accused to prove his innocence, but beyond reasonable doubt. The 'deemed' culpability of the accused leaving no room for the accused to prove innocence was, accordingly, read down to a strong 'presumption' of his culpability. However, the accused is required to dislodge this presumption by proving his innocence beyond reasonable doubt as distinct from preponderance of possibility."

It is further observed that:

> "The defence has failed to comply with Section 113-B of the Evidence Act. The accused being charged of the commission of a dowry death ought to have entered the witness box themselves."

Another two Judges Bench of the Supreme Court in case of ***Maya Devi and anr. v. State of Haryana, AIR 2016 SC 125*** reiterated the reverse onus notion as under:

> "The key words under Section 113B of the Evidence Act, 1872 are "shall presume" leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case on hand, accused persons failed to ***prove beyond reasonable doubt*** that the deceased died a natural death."

A three Judges Bench of the Supreme Court in case of ***V.K. Mishra & anr. v. State of Uttarakhand, AIR 2015 SC 3043*** relied the dictum of law laid down in case of ***Sher Singh*** (supra).

The present scenario of law may, thus, be summarised as follows:

(1) The composite effect of deeming provision in section 304-B of IPC and legal presumption provided in section 113-B of the Evidence Act is to place "reverse persuasive burden" on the accused.

(2) The deeming legal fiction created by section 304-B of IPC read with the statutory presumption mandated by section 113-B of the Evidence Act and use of word 'shown' in section 304-B IPC have following legal effect:

   (i) The prosecution can discharge the initial burden to prove the ingredients of section 304-B of IPC by preponderance of possibilities.

   (ii) If the prosecution succeeds in establishing the essential ingredients of the offence by evidence, the presumption of innocence of the accused is replaced by assumption of guilt of accused.

   (iii) Once the prosecution succeeds in proving essential ingredients of the offence by preponderance of probabilities, the Court is left with no option but to presume the accused guilty of offence of dowry death unless the presumption is rebutted by proof of innocence beyond reasonable doubt.

   (iv) The accused would be required to produce evidence to prove his innocence beyond reasonable doubt as distinct from mere preponderance of probabilities.

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ADJOURNMENT : A SET BACK TO SPEEDY TRIAL

– By **Kapil Mehta**

OSD

Introduction:

The term 'adjournment' denotes an act of adjourning or the state or period of being adjourned. It means "to put off or defer proceedings to another day, to defer or put off." In other words, it is defined as "the dismissal by some Court, Legislative Assembly, or properly authorized officer, of the business before them, either finally, which is called an adjournment sine die, without delay; or, to meet again at another time appointed, which is called a temporary adjournment".

Factors behind adjournments:

Adjournment is the major cause for delay in disposal of cases by Courts. Reasons or factors behind adjournments may be classified broadly into five heads namely;

(a) intentional i.e. to get benefits from delay
(b) negligent or callous approach
(c) poor time management on the part of the counsel
(d) poor time management and other deficiencies in functioning of the Courts
(e) inevitable i.e. genuine or due to unavoidable circumstances

Discretionary Power:

The decision to grant an adjournment is discretionary. However, discretion can never be exercised arbitrarily but has to be exercised judiciously. While granting adjournments, Courts are required to record sound, convincing and valid reasons and it cannot be granted on mere asking.

Civil matters:

In civil matters, adjournments are governed by Order XVII of the Code of Civil Procedure, 1908 (in short the 'Code'). Order XVII CPC has been amended substantially by Act No. 46 of 1999 w.e.f. 01.07.2002. It confers discretion on the Court to grant time to the parties and adjourn the hearing, at any stage of the suit, for reasons to be recorded in writing, if sufficient cause is shown. Proviso appended to Order XVII Rule 1 applies a rider on such discretion in terms that maximum three adjournments can be granted to a party.

Proviso to Rule 2 of Order XVII fetters the discretion and is reproduced as under:

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary;

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time;
(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.

Thus, under Order XVII of the Code, the Court can grant adjournment only if sufficient cause is shown and that too by recording reason. Once hearing has commenced, recording of evidence must be done on a day to day basis until all the witnesses in attendance have been examined in. However, in exceptional cases, Court may adjourn the hearing beyond the following day.

Proviso (e) to Rule 2 of Order XVII of the Code empowers the Court in such a situation where a witness is present but a party or his pleader is not present or though present but not ready to examine or cross-examine to record the statement of witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross examination of the witness by the party or his pleader not present or not ready. If such provision is properly used in appropriate cases, unnecessary adjournments in recording of evidence may be avoided and witnesses will no longer be required to come to the Courts again and again on account of adjournments.

There is a notion prevalent amongst newly appointed Judges that as per Order XVII of the Code, three adjournments may be taken as of right orally even without showing any reason or reason which may not be sufficient and that assigning reasonable grounds are necessary only when the right of three adjournments have exhausted.

Order XVII has been amended long back in the year 2002 (w.e.f. 01.07.2002). Written application by showing sufficient reason, is required to seek even first adjournment and Courts are supposed to reject the application for adjournment if no sufficient reason is shown or if only oral adjournment is sought.

In the matter of ***Uttam Singh v. State of M.P. and others, 2014 (1) MPHT 503,*** the High Court of Madhya Pradesh has held that Order XVII CPC does not forbid grant of adjournments where the circumstances are beyond the control of the party and there is no restriction on the number of adjournments to be granted. It has further been held that it cannot be said that even if the circumstances are beyond the control of the party after having obtained third adjournment, no further adjournment would be granted. In some extreme cases, it may be necessary to grant adjournments despite the fact that three adjournments have already been granted. It would depend upon the facts of each case, on the basis whereof, the Court would decide to grant or refuse adjournment. In ***Shiv Kotex v. Trigun Auto Plast Pvt. Ltd. and others, (2011) 9 SCC 678,*** the Apex Court has held that cap of three adjournments provided in proviso to Rule 1 of Order XVII although not mandatory but ordinarily should be maintained and it may be relaxed only in suitable case on "justifiable cause" i.e. cause which is not only "sufficient cause" as contemplated in Rule 1 of Order XVII but one which makes request for further adjournments unavoidable and a sort of compelling necessity.

In ***Noor Mohammad v. Jethanand and another, (2013) 3 SCC 202,*** the Supreme Court has expressed its concern over granting repeated adjournments in a non-chalant manner or in a routine fashion. It observed as under:

> "In a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a though is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice-dispensation system cannot be allowed to remotely conceive of casual approach.
>
> In the case at hand, as we perceive, the learned counsel sought adjournment after adjournment in a non-chalant

manner and the same were granted in a routine fashion. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts. All who are involved in the justice-dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redress of the same would be a bright lamp which would gradually become a laser beam. This is the expectation of the collective, and the said expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. Long back, Francis Bacon, in his aphoristic style, had said, "Hope is good breakfast, but it is bad supper." We say no more on this score."

Criminal matters:

Section 309 of the Code of Criminal Procedure, 1973, as has been amended by Criminal Law Amendment Act, 2013 w.e.f. 03.02.2013, reveals in clear terms, the intention of the Legislature in avoiding delay in dispensation of justice on account of adjournments in criminal matters.

Sub-section (1) of section 309 of the Code mandates that in every enquiry or trial, proceedings shall be continued on a day to day basis until all the witnesses in attendance have been examined, unless the Court considers the adjournment beyond the following day to be necessary for reasons to be recorded in writing.

In cases relating to an offence under section 376, 376-A, 376-B, 376-C and 376-D, proviso to sub-section (1) of section 309 provides that the enquiry

or trial shall, as far as possible, be completed within a period of two months from the date of filing chargesheet. Section 309 of the Code also forbids the Courts from granting adjournment to enable the accused person to show cause against the sentence that may be proposed against him and for reasons and circumstances that are within the control of the party. Proviso (c) to fourth proviso of sub-section (2) of section 309 is an important tool in curbing adjournments which provides that where a witness is present in Court but the party or his pleader is not present or though present in Court, is not ready to examine or cross-examine the witness, the Court may, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination.

Explanation to section 309 of the Code enables the Courts to grant adjournment on payment of costs by the prosecution or the accused. Therefore, in suitable cases if adjournment is sought and the Court is of the view that sufficient reason has been shown and adjournment is to be granted, the Court may impose reasonable and sufficient costs on the party seeking adjournment, whether; by the prosecution or by the accused.

The Apex Court in ***Vinod Kumar v. State of Punjab, (2015) 3 SCC 220*** expressed its agony and anguish over the manner in which adjournments are sought and granted in Courts and held as under:

> "If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present.
>
> Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts.

Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.

There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to

> note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

If provisions of Order XVII of the Code of Civil Procedure and section 309 of the Code of Criminal Procedure are complied with in true letter and spirit, it would prove to be a major step towards ensuring speedy trial.

REMEDY – CAN IT BE COMPENSATED BY IMPOSITION OF COSTS?

In civil matters, sections 35, 35-A and 35-B of the Code provide for imposition of costs and compensatory costs in respect of false or vexatious claim or defence and cost for causing delay, respectively whereas in criminal matters, Explanation 2 of section 309 CrPC deals with imposition of costs.

An illusion is widespread amongst considerable number of Judges that while granting adjournments – whether in civil or criminal cases; costs are to be imposed only where no reasonable or sufficient cause is shown and on such cause being shown, no cost needs to be imposed. However, it is absolutely wrong conception because if party seeking adjournment fails to show any reasonable or sufficient cause for adjournment, no adjournment can be granted in such a case. If the Court is satisfied that reasonable or sufficient cause is shown for adjournment, Court may adjourn the case but costs have to be imposed to compensate the other party for the loss incurred on account of such adjournments.

Therefore, while adjourning a case, the Court must impose sufficient and reasonable costs on the party seeking adjournment to compensate the other party keeping in view the financial status of the party, loss in respect of income, travelling, food expenditure, counsel fee etc. sustained by the other party on account of such adjournments by invoking powers conferred under section 35, 35-A and 35-B of CPC.

Section 35-A of CPC is peculiar in the sense that it applies to any suit as well as execution or other proceedings, but has no application in appeal or revision. Therefore, appellate Court or Court exercising revisional power cannot impose cost in exercise of power under section 35-A of the case.

In ***Vinod Seth v. Devinder Bajaj and another, (2010) 8 SCC 1,*** the Apex Court has held:

> "The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.
>
> The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts."

In ***Revajeethu Builders and Developers v. Narayan Swamy &sons and others, (2009) 10 SCC 84***, the Supreme Court has directed that by acceptance for application for amendment under Order VI Rule 17 CPC, if unnecessary delay and inconvenience is caused, the opposite party must be compensated with cost.

In ***Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and others, (2012) 1 SCC 455,*** it has been held :

> "The discretion vested in the courts in the matter of award of costs is subject to two conditions, as is evident from Section 35 of the Code:
>
> (i) The discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for the time being in force [vide sub-section (1)]
>
> (ii) Where the court does not direct that costs shall follow the event, it shall state the reasons in writing [vide sub-section (2)].
>
> The mandate of sub-section (2) of Section 35 of the Code that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the

event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. Prosecution and defence of cases is a time consuming and costly process. A plaintiff/ petitioner/ appellant who is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a defendant/respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.

Section 35A refers to compensatory costs in respect of false or vexatious claims or defenses. The maximum amount that could be levied as compensatory costs for false and vexatious claims used to be Rs. 1,000. In the year 1977, this was amended and increased to Rs. 3,000. At present, the maximum that can be awarded as compensatory costs in regard to false and vexatious claims is Rs. 3,000. Unless the compensatory costs is brought to a realistic level, the present provision authorizing levy of an absurdly small sum by present day standards may, instead of discouraging such litigation, encourage false and vexatious claims. At present Courts have virtually given up awarding any compensatory costs as award of such a small sum of Rs. 3,000 would not make much difference. We are of the view that the ceiling in regard to compensatory costs should be at least Rs. 1,00,000.

We may also note that the description of the costs awardable under Section 35A “as compensatory costs” gives an indication that is restitutive rather than punitive. The costs awarded for false or vexatious claims should be punitive and not merely compensatory. In fact, compensatory costs is something that is contemplated in Section 35B and Section 35 itself. Therefore, the Legislature may consider award of ‘punitive costs’ under Section 35A.

In ***Salem Advocate Bar Assn. (2) v. Union of India, (2005) 6 SCC 344,*** this Court suggested to the High Courts that they should examine the Model Case Flow Management Rules and consider making rules in terms of it, with or without modification so that a step forward is taken to provide to the litigating public

a fair, speedy and inexpensive justice. The relevant rules therein relating to costs are extracted below:

'Re: Trial Courts

8. Costs. – So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event.

Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

Re: Appellate Courts

7. Costs. – Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.'

The costs in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules. We have already referred to the need to revise and streamline the court fee. Equally urgent is the need to revise the advocate's fee provided in the Schedule to the Rules, most of which are outdated and have no correlation with the prevailing rates of fees. In regard to money suits, specific performance suits and other suits where ad valorem court

fee is payable, the Advocate's fee is also usually ad valorem. We are more concerned with the other matters, which constitute the majority of the litigation, where fixed Advocates' fees are prescribed.

There is need to provide for awarding realistic advocates' fee by amending the relevant rules periodically. This Court, of course, in several cases has directed payment of realistic costs. But this Court could do so, either because of the discretion vested under the Supreme Court Rules, 1966 or having regard to Article 142 of the Constitution under which this Court has the power to make such orders as are necessary to do complete justice between the parties.

A serious fallout of not levying actual realistic costs should be noted. A litigant, who starts the litigation, after sometime, being unable to bear the delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realizes that even if he succeeds he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice system. When a civil litigant is denied effective relief in Courts, he tries to take his grievances to 'extra judicial' enforcers (that is goons, musclemen, underworld) for enforcing his claims/ right thereby criminalising the civil society. This has serious repercussions on the institution of democracy.

We therefore, suggest that the Rules be amended to provide for 'actual realistic costs'. The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic'. While ascertainment of actual]is necessary in regard to expenditure incurred (as for example travel expenses of witnesses, cost of obtaining certified copies etc.), in so far as advocates' fee is concerned, the emphasis should be on 'realistic' rather than 'actual'. The courts are not concerned with the number of lawyers engaged or the high rate of day fee paid to them. For the present, the Advocate fee should be a realistic normal single fee.

In ***Narayanrao Raja Raghunath Rao Kher v. State of M.P., 2002 (1) MPLJ 28,*** the High Court held that if the court dismisses

a suit for non-payment of costs which have to be paid as condition precedent to further progress of suit, the dismissal would not be for default but for non-prosecution of the suit. The costs are otherwise made recoverable. Such a dismissal could not be a decree as the cause of action survives. The order for dismissal is not on merits. It is not determined by the rights of parties conclusively. It does not destroy the cause of action. It is not res judicata. Therefore, such an order cannot be treated as decree. It is not an appealable order. Therefore, no appeal lies. It may be revisable."

In ***Ramrameshwari Devi & ors. v. Nirmala Devi & ors., 2011 (4) MPLJ 281*** the Apex Court has directed the Trial Courts for taking certain steps to curb delay by holding:

"Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the party. In appropriate cases the Court may consider order prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings."

It was further held:

"While imposing costs we have to take into consideration pragmatic legalities and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different Courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filling of counter affidavits, miscellaneous charges towards typing, photocopying, Court Fees etc.

The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various Courts."

While imposing costs of Rs. 2 lakh on appellants, the Apex Court observed:

"They have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various Courts."

and expressed:

> "We are not imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation."

Extension of time for payment of costs:

Although payment of costs is a condition precedent, but the Courts may, on sufficient reason being shown, extend the time for payment of costs at later stage invoking power under section 148 of the Code.

In ***Narayanrao (D) through LRs Girish Narayan Rao &others v. State of M.P. & others, 2003 (1) MPHT 90,*** the High Court of Madhya Pradesh considering the phrase "shall be a condition precedent to further prosecution" as used in section 35-B of CPC has held that the payment of costs is a condition precedent to further prosecution of the suit but time for payment of such costs can always be extended by the Courts by resorting to section 148 of the Code exercising its judicial discretion. It has further been held that if costs are offered and the other side refuses to accept it, the bar to further prosecution of the suit would disappear.

So far as the implications of non-payment of costs are concerned, we may refer to ***Manohar Singh v. D.S. Sharma and another, (2010) 1 SCC 53,*** in which considering the effect of non-payment of costs imposed, the Apex Court has held as under:

> "Section 35B provides that if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date, shall be a condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant.
>
> This takes us to the meaning of the words "further prosecution of the suit" and "further prosecution of the defence". If the Legislature intended that the suit should be dismissed in the event of non-payment of costs by plaintiff, or that the defence should be struck off and suit should be decreed in the event of non-payment of costs by the defendant, the Legislature would have said so. On the other hand, Legislature stated in the rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by plaintiff (where the plaintiff was ordered to pay such costs), and a condition

precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party will of course be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law. We therefore reject the contention of the respondents that Section 35-B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by plaintiff.

We may also refer to an incidental issue. When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay.

We may also refer to the provisions of Rule 1 of Order XVII of CPC which deals with grant of time and adjournments.

It is evident from Rule 1(2) proviso (e) of Order XVII that where a witness is present in court but the other side is not ready to cross-examine the witness, the court can dispense with his cross-examination. But where a genuine and bona fide request is made for adjournment, instead of resorting to forfeiture of the right to cross-examine, the court may grant time by levying costs.

> A conspectus of the above provisions clearly demonstrates that under the scheme of CPC, a suit cannot be dismissed for non-payment of costs. Non-payment of costs results in forfeiture of the right to further prosecute the suit or defence as the case may be. Award of costs, is an alternative available to the court, instead of dispensing with the cross- examination and closing the evidence of the witness. If the costs levied for seeking an adjournment to cross-examine a witness are not paid, the appropriate course is to close the cross-examination of the witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party."

Therefore, imposition of costs under section 35, 35-A and 35-B, to a certain extent, may prove to be a useful tool to compensate adjournment of proceeding as well as to curb it.

Non-payment of Process Fee etc.:

There is one more area wherein adjournments are frequently sought and are liberally granted by the Courts, on account of which, progress of cases; whether regular suits, miscellaneous cases or execution proceedings, is adversely and substantially affected i.e. non-compliance of provisions of Order VII Rule 9 and Order IV Rule 1 (1) CPC.

If a party fails to submit plaint in duplicate or fails to pay court fee or postal charges etc. for service of summons to witness(es) for any justifiable reason, Courts may be justified in granting adjournment but where such failure is on account of sheer laziness or negligence, adjournments granted by the Court may be termed as 'unwarranted' and 'unjustified'. Here it is pertinent to note that Order VII Rule 11 (e) and (f) and Order IX Rules 2 and 5 have been inserted/substituted by Act 46 of 1999 and Act 92 of 2002 (both Acts w.e.f 01.07.2002).These amendments are aimed to avoid delay caused by such adjournments.

Order VII Rule 11 (e) provides that where plaint is not filed in duplicate, Court shall reject the same and Order VII Rule 11 (f) also provides for rejection of plaint where the plaintiff fails to comply with the provisions of Rule IX. Thus, where plaint is not filed in duplicate or where plaintiff do not present as many copies of the plaint as there are defendants alongwith requisite fee for service of summons on the defendants, the Court should reject the plaint under Order VII Rule 11 (e) & (f), respectively. However, instead of rejecting as aforesaid, Court may grant time, if reasonable or sufficient cause for such failure, is shown.

Similarly, Order IX Rule 2 CPC empowers the Court to dismiss the suit where on the day fixed for the defendant to appear and answer, it is found that

summons has not been served upon the defendant in consequence of failure of the plaintiff to pay the Court fee or postal charges if any, chargeable for such service, or failure to present copies of the plaint as required under Rule 9 of Order VII of CPC.

Rule 5 of Order IX CPC in similar tune provides that where, after a summon has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of seven days from the date of return made to the Court by the serving Officer, to apply for issuance of fresh summons, the Court shall pass an order that suit be dismissed against such defendant. However, Court shall not make such an order if the plaintiff satisfies the Court that he has failed using his best endeavours to discover the residence of the defendant, who has not been served or such defendants is avoiding service of process or there is any other sufficient cause for extending the time.

Therefore, by exercising powers conferred under Order VII Rule 11 (e) & (f) and Order IX Rules 2 & 5 of the Code, in suitable cases, the Courts may expedite the trial of cases and avoid undue delay.

Execution Proceedings:

In execution proceedings, although provisions under Order VII Rule 11 (e) & (f) and Order IX Rules 2 & 5 of the Code is not applicable but if decree holder/applicant does not pay requisite process fee for issuance of summons or warrants against judgment debtor, executing Court is not helpless in dismissing the execution proceedings by invoking inherent power under section 151 CPC. In this regard it is pertinent to mention the case of ***Khoobchand Jain and anr. v. Kashi Prasad and ors., AIR 1986 MP 66*** wherein it has been held that there is a specific provision for dismissal of suit for non-payment of costs etc. while in Order IX, there is no analogous provision in Order XXI of the CPC. Consequently, the dismissal of execution application for non-payment of process fee or for failure to comply with any direction of the Court, will be in exercise of inherent powers.

If parties are not interested in prosecution of civil suit or other proceedings, instead of granting unnecessary adjournments, provision under Order IX of CPC may be invoked in dismissing such proceedings. For execution proceedings, though Order IX of the Code is not applicable, yet provisions under Order XXI Rules 105 and 106 may be resorted to deal with the absence of parties.

Interlocutory applications & Adjournments:

Filing of interlocutory applications under the provisions of CPC, CrPC and other statutes is a regular feature which cannot be avoided but undue and unnecessary delays can be countered if Courts are more careful and strict while granting

adjournments for filing reply and putting forth arguments in respect of such applications.

There are certain matters which are only between the Court and one of the parties and opposite party has nothing to do with it. In such cases, there is no need to file reply by the opposite party. Therefore, fixing date for filing reply or granting adjournments for filing reply is wholly unwarranted in such situations. If Trial Courts find that interlocutory applications are falsely and vexatiously filed with ulterior motive of obstructing progress of the case, they must deal with such applications cautiously and stringently and must dispose of the applications expeditiously by imposing heavy and exemplary costs.

The Apex Court referring to its earlier decisions in ***Shiv Kotex*** (supra) and ***Noor Mohammad*** (supra), in its latest pronouncement in ***Gayathri v. M. Girish, SLP (C No. …… of 2016)/CC No. 14061 of 2006*** decided on ***27.07.2016*** has cautioned the Trial Courts to be vigilant in the matter of granting adjournment. While considering the maladroit efforts of a litigant to indulge in abuse of the process of law by successfully endeavouring very hard to master the art of adjournment by filing interlocutory applications (in all 22 IAs) one after the other and act of the Trial Court in granting adjournments after adjournments by hoping that imposition of costs would compensate adjournment without understanding the designs in the mind of the defendant-plaintiff behind seeking adjournment, it has held thus:

> "In the case at hand, it can indubitably be stated that the defendant petitioner has acted in a manner to cause colossal insult to justice and to the concept of speedy disposal of civil litigation. We are constrained to say though virus of seeking adjournment has to be controlled, the sayings of Gita "Awake! Arise! Oh, Parth" is apt here to be stated for guidance of Trial Courts."

Conclusion:

It is experienced that now-a-days, voluntary litigation i.e. matters arising out of civil dispute and relating to tortious liability, is decreasing considerably because of inordinate delay in disposal of cases by Courts. Therefore, expeditious trial is the need of the day to encourage voluntary litigation. Similarly, in criminal matters also, there is delay in disposal of cases. In these cases also right to speedy trial has been recognized as fundamental right enshrined under Article 21 of the Constitution by the Apex Court. (***Hussainara Khatoon and others v. Home Secretary, State of Bihar, AIR 1979 SC 1369***). The constitutional guarantee of speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial; to minimize concern accompanying public accusation and to limit the possibilities that long delays will impair the ability of an accused to defend himself. Justice Krishna Iyer while dealing with the bail petition in ***Babu Singh v. State of U.P., AIR 1978 SC 527***remarked:

> "our justice system even in grave cases, suffers from slow motion syndrome which is lethal to fair trial, whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condemningly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

As we have seen, adjournment is one of the main factors for delay in trial and disposal of cases. Therefore, there is need to develop effective and efficient strategy on the part of Courts to deal with this issue. Trial Courts are required to expedite trial by applying provisions of Order XVII CPC and section 309 CrPC in true letter and spirit for avoiding undue, unwarranted and unnecessary adjournments during trial and early stages as well or in dealing with interlocutory applications.

If adjournments are sought unnecessarily just to create hindrance in the progress of the case or without any just or sufficient reason, Courts must adopt strict approach and no adjournments must be granted in such a situation. It ought to be granted only where it becomes inevitable to continue with the proceedings or for reasons which are beyond the control of the party seeking adjournment, after imposing proper costs.

Deliberate Adjournment may amount to misconduct: A note of caution

All the members of Madhya Pradesh Judicial Services are governed by the Madhya Pradesh Civil Services (Conduct) Rules, 1965. Rule 3-A has been inserted vide GAD Notification No. C-5-1-96-3-one dated 25.05.2000 which runs as under:

> 3-A. Promptness and courteous behavior.- No Government servant shall,-
>
> (a) x x x;
>
> (b) adopt dilatory tactics in his/her official dealings with the public or otherwise and shall make deliberate delay in disposing of the work assigned to him;
>
> (c) x x x;
>
> (d) x x x.

Rule 3-A (b) of Rules, 1965 mandates that Government servant must not adopt delaying tactics and there must be no deliberate or willful delay on their part in disposal of his/her works.

If adjournments are granted deliberately by Judges in violation of Order XVII CPC or section 309 CrPC, as the case may be, it may amount to violation of Rule 3-A (b) of Rules, 1965 and thus, may ultimately amount to misconduct and making them liable for suitable departmental action.

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PART-II

NOTES ON IMPORTANT JUDGMENTS

181. ADVOCATES ACT, 1961 – Sections 7, 36 and 49

CONSTITUTION OF INDIA – Articles 19 (1) (g) and 21

Protest call by Bar Association – Disregard to the protest, effect of – Held, Bar Association can neither threaten the Advocates nor take any action against them who want to appear before the Court by disregarding the protest call given by the Bar Association on the given day – Further held, the action taken by the Bar Association to expel the petitioner Advocate as he took exception to the decision of the Bar Association to abstain from the Court is *non est* in the eye of law for all purposes. [*Ex-Capt. Harish Uppal v. Union of India and others, (2003) 2 SCC 45* relied on].

Banwari Lal Yadav v. High Court Bar Association

Order dated 06.01.2016 passed by the High Court of M.P. in Writ Petition No. 9951 of 2015, reported in 2016 (2) MPLJ 39 (DB)

Relevant extracts from the Order:

This petition takes exception to the decision of the Bar Association dated 12.5.2015 taken pursuant to show-cause notice dated 30.4.2015 in the backdrop of defiance of the petitioner to abide by the resolution passed by the Bar Association to abstain from the Court. The law on this subject is no more ***res integra***. The Constitution Bench of the Supreme Court in ***Ex-Capt.Harish Uppal Vs. Union of India and others, (2003) 2 SCC 45*** has expounded that the Bar Association cannot threaten the Advocates nor take any action against them who want to appear before the Court by disregarding the protest call given by the Bar Association on the given day. Paragraph 35 of the reported decision reads thus :

> "35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out a Court premises banners and/or placards, wearing black or white or any colour arm bands, peaceful protest marches outside and away from Court premises, going on dharnas or relay fasts etc. It is held that lawyers holding Vakalats on behalf of their clients cannot not attend Courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that

> no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, Courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. It is being clarified that it will be for the Court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that Courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all Courts to go on with matters on their boards even in the absence of lawyers. In other words, Courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a Vakalat of a client, abstains from attending Court due to a strike call, he shall be personally liable to pay costs which shall be addition to damages which he might have to pay his client for loss suffered by him."

In view of the settled legal position, the impugned action taken by the Bar Association to expel the petitioner is ***non est*** in the eyes of law and must be treated as such for all purposes.

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182. ARBITRATION AND CONCILIATION ACT, 1996 – Part 1, Sections 2 (2) and 34

Application for setting aside foreign awards, maintainability of and Part 1 of the Act, applicability of – Clause mentioned in arbitration agreement, which was entered into between the parties in England, revealing intention of the parties with regard to applicability of English Law to arbitration agreement and not to limiting it to conduct of arbitration – Held, once governing law to arbitration is English one, Part 1 of the Act is excluded by necessary implications – Further held, application under section 34 of the Act for setting aside foreign awards, therefore, would not be maintainable.

Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.

Judgment dated 28.01.2016 passed by the Supreme Court in Civil Appeal No. 7019 of 2005, reported in AIR 2016 SC 1285

Relevant extracts from the Judgment:

The bare necessary facts of the case are that an agreement dated 22.04.1993 was executed between the appellant and the respondent with relation to supply of equipment, and modernization and up-gradation of the production facilities of the appellant at Korba in the state of Chhattisgarh. Certain disputes arose between the parties and the same were referred to arbitration. The arbitration proceedings were held in England and the arbitral tribunal made two awards in favour of the respondent dated 10.11.2002 and 12.11.2002. The appellant filed applications, under Section 34 of the Arbitration Act before the District Judge, Bilaspur, which were dismissed. Aggrieved, the appellant filed appeals before the High Court of Chhattisgarh. The High Court dismissed the appeals.

A close perusal of the terms between the parties would clearly show that the first part of Article 22 is on the law governing the contract and in the second part the parties intended to lay down the law applicable to the arbitration agreement, viz., the proper law of the agreement of arbitration. It is unnecessary that after already agreeing on the procedural law governing the arbitration in Article 17.1, the parties intended to state the same again in a separate clause within the same contract in Article 22. Therefore, the intention of the parties to apply English Law to the arbitration agreement also and not limit it to the conduct of the arbitration is fairly clear from Article 22.

Sumitomo Heavy Industries Limited v. ONGC Limited and others, AIR 1998 SC 825 is of no avail to the appellant. In ***Sumitomo*** (supra), there was no specific choice on the law of arbitration agreement and this court held that in absence of such choice, the law of arbitration agreement would be determined by the substantive law of the contract. That is not the case in this agreement.

It is clear that the law applicable to arbitration agreement in the present case is English Law. Once it is found that the law governing the arbitration agreement is English Law, Part I of the Indian Arbitration Act stands impliedly excluded. This has been a long settled position and the latest judgment in ***Union of India v. Reliance Industries Limited and others, 2015 (10) SCALE 149*** reaffirms the same. In the words of R.F. Nariman J.,

> "20. The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from paragraph 32 of Bhatia International itself-that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration

as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule.".

We are hence unable to be persuaded by the persuasive argument advanced by learned Senior Counsel appearing for the appellant that the arbitration agreement is to be governed by the Indian Law.

Accordingly, we find no error in the view taken by the High Court that the applications filed by the appellant under Section 34 of the Indian Act are not maintainable against the two foreign awards dated 10.11.2002 and 12.11.2002 between the appellant and the respondent.

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183. CIVIL PROCEDURE CODE, 1908 – Section 11

LIMITATION ACT, 1963 – Article 65

(i) ***Res Judicata*** **– Same cause of actions.**

Former suit for possession of entire property based on a settlement deed – Subsequent suit for partition claiming plaintiff's share in property based on her birth right – As both suits are not based on the same cause of action, ***res judicata*** **is not attracted – Claim to entire property not the same as claim to share therein by partition.**

(ii) Adverse possession – Co-owner – Ouster of non-possessing co-owner by another co-owner in possession – Principles explained through precedents.

Nagabhushanammal (Dead) by L.Rs. v. C. Chandikeswaralingam

Judgment dated 26.02.2016 passed by the Supreme Court in Civil Appeal No. 1858 of 2016, reported in (2016) 4 SCC 434

Relevant extracts from the judgment:

This court in ***Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri, (1971) 1 SCC 597*** held that possession of one co-owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

A three judge bench of this court in ***P. Lakshmi Reddy v. R.Lakshmi Reddy, AIR 1957 SC 314*** while examining the necessary conditions for applicability of doctrine of ouster to the shares of coowners, held as follows:

"Now, the ordinary classical requirement of adverse possession is that it should be ***nec vi nec clam nec precario***. (See ***Secretary of State for India v. Debendra Lal Khan [(1933) LR 61 IA 78, 82])***. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See ***Radhamoni Debi v. Collector of Khulna [(1900) LR 27 IA 136, 140]***). But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See ***Cores v. Appuhamy [(1912) AC 230)]***. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other."

This Court in ***Vidya Devi v. Prem Prakash, (1995) 4 SCC 496*** held that:

"'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

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***184. CIVIL PROCEDURE CODE, 1908 – Section 35-A, Order 6 Rule 15 and Order 18 Rule 4**

Filing of false/misleading affidavit – Exemplary costs, imposition of – Instances of filing false affidavit have alarmingly increased – It is an unhealthy trend that should be strongly discouraged well before the false affidavit gets to be treated as a routine and normal affair – Imposition of exemplary costs, held justified in such cases.

Sciemed Overseas Inc. v. BOC India Limited and others

Judgment dated 11.01.2016 passed by the Supreme Court in SLP (C) No. 29125 of 2008, reported in (2016) 3 SCC 70

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***185. CIVIL PROCEDURE CODE, 1908 – Sections 148 and 151**

Extension of time under section 148 of the Code, permissibility of – Refusal to enlarge any period fixed or granted by the Court for doing any act prescribed or allowed by the Court without considering the sequence of dates, facts and explanation offered by applicant for delay is not proper.

Further held, although in terms of section 148 of the Code, Court cannot exercise its discretion to extend the time beyond 30 days in total, yet if the act could not be performed within 30 days for the reasons beyond the control of the parties, the time beyond maximum 30 days can be extended under section 151 of the Code.

Nashik Municipal Corporation v. M/s R.M. Bhandari and another

Judgment dated 26.02.2016 passed by the Supreme Court in Civil Appeal No. 1856 of 2016, reported in AIR 2016 SC 1090

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***186. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10**

In a suit for specific performance on the basis of agreement to sell executed by Defendant No. 2 in favour Defendant No. 1, petitioner claiming that the suit property belongs to her father and the father of Respondent No. 2, therefore, she had interest in the suit property – Application under O.1 R.10 CPC was rejected – Held, plaintiff is *dominus litus* of the litigation – He cannot be insisted either by any of the parties to the suit or by the court unless there is any cause of action in the suit against such person – Petitioner is neither a necessary nor a proper party – No relief is claimed against petitioner – Thus, trial court has not committed any error in dismissing the application to implead the petitioner.

Vinti Solanki v. Anil Kumar

Order dated 28.10.2013 passed by the High Court of M.P. in W.P. No. 18465 of 2013, reported in ILR (2015) MP 2568

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***187. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**

Amendment of pleadings cannot be permitted after starting the process of recording evidence in the matter – No such amendment can be allowed which was apparently in the knowledge of the applicant on the date of filing of his pleadings.

Radha Bai (Smt.) v. Shankar Lal Kachhi

Order dated 11.10.2013 passed by the High Court of M.P. in W.P. No. 13693 of 2013, reported in ILR (2015) MP 2352

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188. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

Rejection of plaint – Power of Court, exercise of – Is a drastic power to terminate a civil action at the threshold – It is only if the averments in the plaint *ex facie* do not disclose cause of action or on a reading thereof, the suit appears to be barred under any law, the plaint can be rejected – The stand of the defendant in the written statement or in the application for rejection of plaint is wholly immaterial – In all other situations, the claims have to be adjudicated in the course of the trial.

P.V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy and another v. P. Neeradha Reddy and others

Judgment dated 13.02.2015 passed by the Supreme Court in Civil Appeal No. 5254 of 2006, reported in 2016 (1) MPLJ 585 (SC)

Relevant extracts from the Judgment:

Rejection of the plaint under Order VII, Rule 11 of the Civil Procedure Code is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII, Rule 11 therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the state of exercise of power under Order VII, Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

In the present case, reading the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex facie discloses that the suit is barred by limitation or is barred under any other provision of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the

stage of consideration of the application under Order VII, Rule 11 the stand of the defendants in the written statement would be altogether irrelevant.

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189. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 6A

Counter claim, maintainability of – The cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence i.e. before the defendant has filed a written statement.

Held, in the case in hand, though counter claim was filed after 2½ years of framing of issues, yet cause of action had accrued even prior to filing of suit and since plaintiff's evidence is yet to be recorded, no prejudice would be caused to him if counter claim is adjudicated upon alongwith his suit – Therefore, counter claim is maintainable.

Vijay Prakash Jarath v. Tej Prakash Jarath

Judgment dated 01.03.2016 passed by the Supreme Court in Civil Appeal No. 2308 of 2016, reported in 2016 AIR SCW 1304

Relevant extracts from the Judgment:

A perusal of Sub-clause (1) of Section 6A of Order VIII, leaves no room for any doubt, that the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement. The instant determination of ours is supported by the conclusions drawn in ***Bollepanda P. Poonacha & Anr v. K.M. Madapa, AIR 2008 SC 2003*** wherein this Court observed as under:

> "The provision of Order 8 Rule 6-A must be considered having regard to the aforementioned provisions. A right to file counterclaim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. The respondent in his application for amendment of written statement categorically raised the plea that the appellants had tresspassed on the lands in question in the summer of 1998. Cause of action for filing the counterclaim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of ***Ryaz Ahmed*** (supra) is based on the decision of this Court in ***Baldev Singh v. Manohar Singh, (2006) 6 SCC 498]***."

It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the

respondent-plaintiff filed the suit (out of which these petitions/appeals have arisen). It is therefore apparent that the appellants before this Court were well within their right to file the counter-claim.

It is quite apparent from the factual position noticed hereinabove, that after the issues were framed on 18.10.1993, the counter claim was filed by the appellants before this Court (i.e. by defendant Nos. 3 and 4 before the trial court) almost two and a half years after the framing of the issues. Having given our thoughtful consideration to the provisions relating to the filing of counter claim, we are satisfied, that there was no justification whatsoever for the High Court to have declined, the appellant before this Court from filing his counter claim on 17.06.1996, specially because, it is not a matter of dispute, that the cause of action, on the basis of which the counter claim was filed by defendant Nos.3 and 4, accrued before their written statement was filed on 11.11.1992. In the present case, the respondent-plaintiff's evidence was still being recorded by the trial court, when the counter-claim was filed. It has also not been shown to us, that any prejudice would be caused to the respondent-plaintiff before the trial court, if the counter-claim was to be adjudicated upon, along with the main suit. We are of the view, that no serious injustice or irreparable loss (as expressed in paragraph 15 of Bollepanda P. Pooncha's case), would be suffered by the respondent-plaintiff in this case.

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***190. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 10**

The Court closed the right of defendant to file written statement under O.8 R. 10 CPC still the plaintiff may be directed to lead evidence to prove the facts so as to settle the factual controversy and defendant may be granted opportunity to cross-examine the witness.

Tukaram v. Fulsingh & ors.

Order dated 06.04.2015 passed by the High Court of M.P. in W.P. No. 13975 of 2013, reported in ILR (2015) MP 2422

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191. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 2

Non-substitution of LR – Suit or appeal, abatement of – When there are more plaintiffs than one, and one of them dies, suit or appeal will not abate if right to sue survives upon the surviving plaintiffs/appellants.

Government of Andhra Pradesh Thr. Principal Secretary and others v. Pratap Karan and others

Judgment dated 09.10.2015 passed by the Supreme Court in Civil Appeal No. 2963 of 2013, reported in AIR 2016 SC 1717

Relevant extracts from the Judgment:

In the case of ***Amba Bai and others v. Gopal and others, (2001) 5 SCC 570,*** this Court was considering the case where a suit for specific performance by one plaintiff against the defendant was finally allowed in appeal and the suit was decreed. During the pendency of Second Appeal by the defendant in the High Court, the plaintiff died and his legal representatives were brought on record. Subsequently, the defendant also died, but this fact was not brought to the notice of the Court and the appeal was dismissed. In those facts this Court considering the provision of Order 22 Rule 3 of the Code held that:

> "in a case where the plaintiff or the defendant dies and the right to sue does not survive, and consequently the Second Appeal had abated and the decree attained finality inasmuch as there cannot be merger of the judgment or decree passed in Second Appeal with that passed in the First Appeal."

The said decision therefore, in our considered opinion will not apply in the present case. In the instant case, there are more plaintiffs than one and one of them died and the right to sue survives upon the surviving plaintiffs. In the said circumstances Order 22 Rule 2 of the Code will come into operation and the appeal will not abate.

In the instant case, the plaintiffs joined together and filed the suit for rectification of the revenue record by incorporating their names as the owners and possessors in respect of the suit land on the ground inter alia that after the death of their predecessor-in-title, who was admittedly the Pattadar and Khatadar, the plaintiffs succeeded the estate as sharers being the sons of Khatadar. Indisputably, therefore, all the plaintiffs had equal shares in the suit property left by their predecessors. Hence, in the event of death of any of the plaintiffs, the estate is fully and substantially represented by the other sharers as owners of the suit property. We are, therefore, of the view that by reason of non-substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High Court, entire appeal shall not stand abated. Remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated. We, therefore, do not find any reason to agree with the submission made by the learned counsel appearing for the appellants.

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***192. CIVIL PROCEDURE CODE, 1908 – Order 26 Rule 9**

Issuance of commission to ascertain actual possession – No party can be permitted to use the process of the court as an agency to collect the evidence for such party – If some ambiguity is pointed out by either of the parties after recording the evidence of both parties, the trial court may consider such an application to clarify the same.

Ramavtar & ors. v. Shivbhajan & anr.

Order dated 10.09.2013 passed by the High Court of M.P. in W.P. No. 14563 of 2013, reported in ILR (2015) MP 2560

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193. CONSTITUTION OF INDIA – Article 20 (2)

CRIMINAL PROCEDURE CODE, 1973 – Section 300 (1)

Whether protection under Article 20 (2) of the Constitution of India and Section 300 (1) Cr.P.C. against double jeopardy is relatable to one particular offence or to all the offences which arise out of the same act/incident?

Petitioner was prosecuted for offences punishable u/s 279 and 337 IPC – He was convicted and sentenced on admission of guilt – Later on, impugned order dated 19.12.2013 directing re-opening of the same criminal case alleging a graver offence punishable u/s 304-A IPC was passed.

Held, Sections 279 and 337 IPC on the one hand and section 304-A IPC on the other hand are distinct in their basic constitution, basic ingredients, definitions and the punishments they attract – Thus, the distinction between the two classes of offence is so vividly pronounced that even if they arise out of one single transaction or act, they can attract separate and distinct prosecution and punishment – The accused very well be prosecuted for a graver offence punishable u/s 304-A of IPC despite having been earlier prosecuted and punished for a lesser offence u/s 337 r/w/s 279 IPC, notwithstanding the graver offence arising out of the same incident/act which gave rise to the less grave offence for which prosecution and conviction stands concluded – Protection of double jeopardy would not be available to accused.

Nadimuddin v. State of M.P.

Order dated 18.09.2015 passed by the High Court of M.P. in M.Cr.C. No. 7642 of 2015, reported in 2016 CriLJ 1408

Relevant extracts from the Order:

Legal question involved herein is whether the protection under Article 20(2) of Constitution of India and Section 300 Cr.P.C. against 'double jeopardy' is relatable to the one particular offence or to all the offences which arise out of the same act/ incident ?

Section 300 of Cr.P.C is more elaborate and explanatory than Article 20 (2) of Constitution of India. Sub Sections (2) and (3) of Section 300 of Cr.P.C. empowers the State to frame charge and prosecute a person for a different offence notwithstanding the same person having been tried and convicted of a different offence arising out of the same incident/act/transaction.

The plea of 'autrefois convict' or 'autrefois acquit' avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.... The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter.

This principle found recognition in Section 26 of the General Clauses Act, 1897:

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,"

and also in Section 403(1) of the Criminal Procedure Code, 1898:

> "A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237." ...

These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. ..

It may be pointed out that the words "prosecution" and "punishment" have no fixed connotation and they are susceptible of both a wider and a narrower meaning; but in Article 20(2) both these words have been used with reference to an "offence" and the word "offence" has to be taken in the sense in which it is used in the General Clauses Act as meaning "an act or omission made punishable by any law for the time being in force". It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes. ...

In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred.

What is the meaning of the expression used in Article 20(2) “for the same offence”? What is prohibited under Article 20(2) is that the second prosecution and conviction must be for the same offence. If the offences are distinct, there is no question of the rule as to double jeopardy being applicable.

It is thus clear that the same facts may give rise to different prosecutions and punishment and in such an event the protection afforded by Article 20(2) is not available. It is settled law that a person can be prosecuted and punished more than once even on substantially same facts provided the ingredients of both the offences are totally different and they did not form the same offence.

Consequently, Section 279 and 337 IPC on the one hand and Section 304A IPC on the other are distinct in their basic constitution, basic ingredients, definitions and the punishments they attract. Thus, the distinction between the two classes of offence is so vividly pronounced that even if they arise out of one single transaction or act, they can attract separate and distinct prosecution and punishment.

Coming to the type of cases for which the petitioner had been earlier convicted and the graver offence for which impugned prosecution is taking place, it is seen that initial prosecution is related to offences punishable u/S 337 and 279 of IPC. Section 279 of IPC relates to endangering human life by rash and negligent driving on public way and invites maximum punishment of six months of imprisonment or with fine which may extend to Rs.1,000/- or with both. Whereas Section 337 of IPC relates to causing hurt to any person by doing rash and negligent act as to endanger human life or personal safety of others. This offence attracts maximum punishment of six months and or fine to the extent of Rs. 500/-. 15. It is thus evident that the applicant can very well be prosecuted for a graver offence punishable u/S 304A of IPC, despite having been earlier prosecuted and punished for a lesser offence punishable u/S 337 read with Section 279 of IPC, notwithstanding the said graver offence arising out of the same incident/act which gave rise to the less grave offence for which prosecution and conviction stands concluded.

[Referred - ***Corpn. of Calcutta v. Mulchand Agarwala, AIR 1956 SC 110; State of M.P. v. Veereshwar Rao Agnihotri, AIR 1957 SC 592; Thomas Dana v. State of Punjab, AIR 1959 SC 375; State v. Navjot Sandhu, (2005) 11 SCC 600; Jitendra Panchal v. Narcotics Control Bureau, (2009) 3 SCC 57 and Union of India v. Purushottam, (2015) 3 SCC 779***].

***194. CONSTITUTION OF INDIA – Article 136**

Adverse remarks/observations made by the High Court against appellant District Judge – Held, even if a wrong order is passed by a Judge, should not be visited with adverse remarks against him.

Mihir Ranjan Parida v. Menja Naik and others

Judgment dated 18.04.2016 passed by the Supreme Court in Civil Appeal No. 4080 of 2016, reported in AIR 2016 SCW 2033

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***195. CONTRACT ACT, 1872 – Section 176**

Pledge – First charge – Sugar mill taking bank loan from Multi States Co-operative Society – Sugar stock was pledged in favour of the society granting the loan – The stock was sold in auction pursuant to recovery certificate issued against mill for payment to sugarcane growers – Provident Fund dues of mill employees also outstanding – High Court ordered disbursement of sale proceeds first towards Provident Fund dues and towards payment to sugar cane growers – It was held that pawnee-bank has to be given precedence over other dues.

Relied – ***Central Bank of India v. Siriguppa Sugar & Chemicals Ltd., AIR 2007 SC 2804*** **as under:**

Thus, going by the principles governing the matter propounded by this Court, there cannot be any doubt that the rights of the appellant Bank over the pawned sugar had precedence over the claims of the Cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant Bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant Bank. In view of the fact that the goods were validly pawned to the appellant Bank, the rights of the appellant Bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods.

Sahyadri Co-operative Credit Society Ltd. v. State of Maharashtra and others

Judgment dated 28.03.2016 passed by the Supreme Court in Civil Appeal No. 1840 of 2013, reported in AIR 2016 SCW 1580

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***196. COPYRIGHT ACT, 1957 – Sections 63 and 64**

(i) Accused found in possession of duplicate spark plugs and same were seized by Police Officer – Plea of accused that said Police Officer being complainant was not competent to conduct investigation, is not maintainable in absence of any bias or prejudice by Police Officer against the accused.

(ii) Spark plugs not covered under provision of Copyright Act – Offence of copyright infringement not made out.

Kamal Kishor v. State of M.P.

Order dated 14.10.2015 passed by the High Court of M.P. in M.Cr.C. No. 3850 of 2012, reported in 2016 CriLJ 1640

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***197. COURT FEES ACT, 1870 – Section 7 (iv) (c), (v)**

Consequential relief – Consequential relief means such relief which would flow directly from the main relief – The valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief.

In a suit for declaration that the suit property is Joint Hindu Family Property and further declaration that if any alienation has taken place, the same may be declared as not binding – It was held that unless the suit property is declared to be Joint Hindu Family Property, relief in the second part of the relief clause cannot be granted, which in substance is not a relief in sequence but in consequence, which makes the petitioner/plaintiff liable for the court fees as per Section 7 (iv) (c) of the Act.

Sudha Jaiswal (Smt.) v. Sunil Jaiswal

Judgment dated 05.09.2014 passed by the High Court of M.P. in W.P. No. 7094 of 2014, reported in ILR (2015) MP 2371

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***198. COURT FEES ACT, 1872 – Section 35**

Notification of State Government as amended on 14.02.2011 – No procedure of inquiry is provided for in the notification – So the trial court has discretion to enquire into the matter according to its own way and decide the same in judicious manner – Court is not bound to call report of any authority, if on the basis of evidence adduced by the parties the matter can be decided.

Kamlesh & ors. v. Tara Devi & ors.

Order dated 24.10.2013 passed by the High Court of M.P. in W.P. No. 18251 of 2013, reported in ILR (2015) MP 2565

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199. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Right to maintenance, entitlement of.

(i) Levelling of false allegations regarding leading adulterous life is sufficient ground for wife to live separately and is entitled to maintenance.

(ii) Child born out of artificial insemination, legitimacy of – Such a child is a legitimate child and although non-applicant is not the biological father, still he is liable for maintenance of the child as he willfully consented for artificial insemination which implies a promise to support the child.

Manoj Kapadia (Dr.) v. Smt. Manisha Kapadia and another

Order dated 27.07.2015 passed by the High Court of M.P. in Criminal Revision No. 1074 of 2008, reported in ILR 2015 MP 2239

Relevant extracts from the Order:

The question whether the respondent No.01 was having justification for separate living from the applicant? It is manifestly clear that while filing the reply of main application of the respondents the applicant specifically raised allegations against the chastity of the respondent No.01 particularly in paragraphs 3, 4 and 5 of his reply.

Learned Family Court after appreciation of the evidence produced by both the parties in Para 16 to 20 lucidly discussed the evidence on the strength of mentioning case law and in Para-19 came to the conclusion that when the husband has leveled charges against his wife regarding leading adulterous life, but, failed to prove in these circumstances as a result these false allegations are sufficient reason for wife to live separately. In such premises when learned Family Court come to this conclusion that the respondent No.01 is having every right to live separately from the applicant is based on evidence led by the parties and does not requires any interference.

While dealing with the claim of minor respondent No.02 the Test Tube Baby the parties lead the evidence regarding this fact that the respondent No.02 is born as the result of artificial insemination. Because, this fact was not pleaded by the respondent No.01 in her application, hence, there was no occasion for the applicant to rebute it or to raise any objection regarding the birth of respondent No.02 as Test Tube Baby.

Learned Family Court exonerated liability of maintenance by the applicant towards the respondent No.02. It is pertinent to mention here that the respondents were not adopted any legal recourse against the denial of maintenance amount for the respondent No.02.

Learned counsel for the respondents submitted that regarding birth of respondent No.02 Anunay, as Test Tube Baby, all relevant record which were 5 Cr.R. No.1074 of 2008 made available to the respondent No.01 by the Hospital,

were produced during the trial but, learned Family Court did not satisfied with available material brought on the record, hence, maintenance was not granted to the respondent No.02. It is also submitted that since the applicant was not physically capable of getting blessed by child therefore with the mutual consent of couple, Test Tube Baby the respondent No.02 Anunay was born.

The applicant, first time raised this issue in this revision memo with the allegations that the respondent No.01 maintained illegal relationship with another person and the respondent No.02 was born in 2002 through artificial insemination but, without his consent. In this sequence it is made clear on the strength of admissions of the applicant as well as the respondent No.01 that they are related with medical profession.

This fact is not disputed that a child who is born as the result of artificial insemination is legitimate child. A husband who permitted his wife to be artificially inseminated is entitled to the paternity rights of a natural father as well as also liable to fulfill his responsibilities towards Test Tube Baby. While the statute imposes liability on the father, the purpose of the statute with reference to that subject is to insure and facilitate the enforcement of that obligation, where necessary.

Though, the husband is not biological "father" of the Test Tube Baby, but the same time the child is not illegitimate child, because the husband is liable for the child's support because he willfully consented for artificial insemination which, implied a promise to support. The question of the liability of the husband for support of a child created through artificial insemination is one of first impression. A child conceived through artificial insemination is not illegitimate but, condition precedent is that the husband willfully consented for adopting this artificial technic of insemination for happiness of the couple who, are not naturally capable for having blessed with child.

Before parting with the case, it is clarified that the rights of maintenance of the respondent No.02 Anunay against the applicant cannot be considered in this revision which is filed by the applicant, not by the respondents. In these facts and circumstances, the respondents are having liberty to take necessary steps for determination of maintenance rights of respondent No.02 against the applicant.

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200. CRIMINAL PROCEDURE CODE, 1973 – Section 195(1)(b)(ii)

Forged and fabricated surety bond furnished in the court – Forgery of document was committed before the document was produced in court – Held, bar contained in section 195 (1)(b)(ii) of Cr.P.C. is not applicable.

Bacchan Singh v. State of M.P.

Order dated 28.08.2015 passed by the High Court of M.P. in Criminal Revision No. 706 of 2013, reported in 2016 CriLJ 1920

Extracts from the order:

The main contention raised by learned counsel for the petitioner is that the furnishing of forged surety bond in the Court comes within the purview of judicial proceedings, therefore, furnishing of the forged and fabricated surety in the Court by preparing forged documents is an offence before the Court and cognizance of the offence can be taken only on the complaint of the concerning Court and under Section 340 of the Code complaint can only be filed by that Court.

It is undisputed that if forgery has been committed while the document was in the custody of a Court, then prosecution can be launched only with a complaint made by that Court. Again, if forgery was committed with a document which has not been produced in a court, then the prosecution would lie at the instance of any person.

It would be a strained thinking that any offence involving forgery of a document if committed far outside the purlieus of the Court and long before its production in the Court, could also be treated as one affecting administration of justice merely because that document later reached the court records. It must therefore be held that the bar contained in Section 195(1)(b)(ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a Court.

The Hon'ble Apex Court in the case of ***Iqbal Singh Marwah and another v. Meenakshi Marwah and another, AIR 2005 SC 2119*** has observed as under :-

> "Section 195 (1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in custodia legis."

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201. CRIMINAL PROCEDURE CODE, 1973 – Sections 216 and 301

(i) Addition or alteration of charge – Power of Court, exercise of – Court can change or alter the charge if there is defect or something is left out – It must be founded on the material available on record during the course of trial or on the basis of the complaint or the FIR or accompanying documents – Further held, it can be done at any stage before pronouncement of judgment – It is also obligatory on the part of the Court to ensure that no prejudice is caused to the accused and he is allowed to have a fair trial.

(ii) Application for alteration or addition of charge, *locus* therefor – Informer may file an application for addition or alteration of charge – It is not required that it must be filed by the Public Prosecutor.

(iii) Conduction of session trial – Role of Public Prosecutor, significance of – He alone has to conduct the trial – The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well – If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not conceal it and it is his duty to winch it to the fore and make it available to the accused.

Anant Prakash Sinha alias Anant Sinha v. State of Haryana and another

Judgment dated 04.03.2016 passed by the Supreme Court in Criminal Appeal No. 131 of 2016, reported in 2016 AIR SCW 1197

Relevant extracts from the Judgment:

The court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.

In addition to what we have stated hereinabove, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial. It has been held in ***Amar Singh v. State of Haryana, (1974) 3 SCC 81*** that the accused must always be made aware of the case against them so as to enable him to understand the defence that he can lead. An accused can be convicted for an offence which is minor than the one he has been charged with, unless the accused satisfies the court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. While so stating, we may reproduce the following two passages from ***Bhimanna v. State of Karnataka, (2012) 9 SCC 650***:-

> "25. Further, the defect must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed,

or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the charges has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

26. This Court in ***Sanichar Sahni v. State of Bihar, (2009) 7 SCC 198***, while considering the issue placed reliance upon various judgments of this Court particularly on ***Topandas v. State of Bombay, AIR 1956 SC 33, Willie (William) Slaney v. State of M.P., AIR 1956 SC 116, Fakhruddin v. State of M.P., AIR 1967 SC 1326, State of A.P. v. Thakkidiram Reddy, (1998) 6 SCC 554, Ramji Singh v. State of Bihar, (2001) 9 SCC 528 and Gurpreet Singh v. State of Punjab, (2005) 12 SCC 615*** and came to the following conclusion: (Sanichar Sahni case (supra), SCC p. 204, para 27)

"27. Therefore... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."

A similar view has been reiterated in ***Abdul Sayeed v. State of M.P., (2010) 10 SCC 259***.

We have reproduced the aforesaid passages by abundant caution so that while adding or altering a charge under Section 216 CrPC, the trial court must keep both the aforestated principles in view. The test of prejudice, as has been stated in the aforesaid judgment, has to be borne in mind.

Submission of senior counsel for the appellant is that the learned Magistrate could not have entertained the application preferred by the informant, for such an application is incompetent because it has to be filed by the public prosecutor. In this regard, he has laid stress on the decision in ***Shiv Kumar v. Hukam Chand and another, (1999) 7 SCC 467***. In the said case, the grievance of the appellant

was that counsel engaged by him was not allowed by the High Court to conduct the prosecution in spite of obtaining a consent from the concerned Public Prosecutor. The trial court had passed an order to the extent that the advocate engaged by the informant shall conduct the case under the supervision, guidance and control of the Public Prosecutor. He had further directed that the Public Prosecutor shall retain with himself the control over the proceedings. The said order was challenged before the High Court and the learned single Judge allowing the revision had directed that the lawyer appointed by the complainant or private person shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed and the Public Prosecutor in-charge of the case shall conduct the prosecution. This Court referred to Sections 301, 302(2), 225 CrPC and various other provisions and came to hold as follows:-

> "13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.
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> It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private

counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

Being of this view, this Court upheld the order passed by the High Court. The said decision is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge under Section 406 IPC as there were allegations against the husband about the criminal breach of trust as far as her stridhan is concerned. It was, in a way, bringing to the notice of the learned Magistrate about the defect in framing of the charge. The court could have done it suo motu. In such a situation, we do not find any fault on the part of learned Magistrate in entertaining the said application. It may be stated that the learned Magistrate has referred to the materials and recorded his prima facie satisfaction. There is no error in the said prima facie view. We also do not perceive any error in the revisional order by which it has set aside the charge framed against the mother-in-law.

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202. CRIMINAL PROCEDURE CODE, 1973 – Section 228

Validity of order framing charges u/s 498-A and 306 IPC in the alternative section 302 of IPC was challenged – The victim/deceased alleged to have informed her brother that her in-laws are threatening her and are not giving food – She died next day – It was held, harassment appears to be soon before her death – *Prima facie* case of harassment of deceased by demanding dowry and prompting her to commit suicide was made out – The order of framing of charge held to be proper – Meticulous examination of 'call details' of the deceased and her brother not necessary at the stage of framing of charge.

Rajesh Singh and others v. State of Madhya Pradesh and others

Order dated 30.09.2015 passed by the High Court of M.P. in Criminal Revision No. 50 of 2013, reported in 2016 CriLJ 1815

Relevant extracts from the Order:

The present case there is matrimonial dispute and there was demand of money. Because of which the deceased Puja was harassed by her in-laws and for that only she died taking extreme steps to end her life. There has been intention and positive acts by the petitioners which promoted the deceased to commit suicide. To constitute offence under Section 306 of IPC the prosecution has to establish that (i) a person has committed suicide (ii) that such suicide

was abated by the accused. In other words, the offence under Section 306 of IPC would stand only if there is abatement for commission of crime. The incident took place at the matrimonial home of the deceased.

The deceased was living at her in-laws house at Gwalior. She informed her brother Upendra Singh on 18.2.2012 by her cell phone that her in-laws are threatening her and are not giving food and on 19.2.2012 she died. That means the harassment was soon before her death.

On behalf of the petitioners, it is strenuously argued that no call details have been seized. Therefore, it cannot be substantiated that her brother Upendra has actually received the call from the deceased.

In this regard, it would be sufficient to mention here that meticulous examination of evidence is not necessary at the time of framing of charge, only prima facie case is to be seen, whether the case is beyond reasonable doubt is not to be seen at this stage. If the Court comes to the conclusion that the commission of offence is probable consequence, at the stage of framing of charge, probative value of material on record cannot be gone into. It is not necessary for the prosecution to establish beyond all reasonable doubt that accusation which they are bringing against the accused person bound to be brought home against him.

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***203. CRIMINAL PROCEDURE CODE, 1973 – Section 319**

Summoning of additional accused – Prosecution of offence under section 409 of IPC against accused persons for embezzlement of amount from official account for MNREGA Scheme was lodged – During trial the complainant deposed that amounts used to be withdrawn jointly by the appellant and Block Development Officer – Held, the fact that police did not choose to send up the Block Development Officer/suspect appellant for trial, does not affect the power of Trial Court under section 319 CrPC to summon such a person on account of evidence recorded during trial.

Hardei v. State of U.P.

Judgment dated 30.03.2016 passed by the Supreme Court in Criminal Appeal No. 186 of 2016, reported in AIR 2016 SCW 1615

Relevant extracts from the Judgment:

The learned counsel for the appellant has relied heavily upon the fact that the appellant was not named as an accused in the FIR nor any charge-sheet was submitted against her after completion of investigation. He further submitted that the amount has been embezzled mainly by accused Rahul Yadav and Omkar Singh and therefore, the defence of the appellant that she was illiterate lady who does not know even to sign much less reading or writing should have been accepted by the Magistrate and the High Court. It was pointed out that in the

FIR lodged by co-accused Muneshwar Singh against Rahul Yadav, the defence of the appellant was clearly spelt out.

Learned counsel for the State of U.P., on the other hand supported the summoning order of Chief Judicial Magistrate as well as the order under appeal by the High Court. According to him, there is no denial of the fact that along with Muneshwar Singh, this appellant was the co-signatory and only with their signatures money could be withdrawn from the MNREGA account; therefore, in such a situation the statement emerging from the deposition of the complainant/informant R.D. Sharma, P.W.1 that amounts used to be withdrawn jointly by the appellant and the Muneshwar Singh, the Block Development Officer and hence they are also answerable for the embezzlement of the concerned amount could not have been ignored at the present stage in anticipation of defence of the appellant that she is illiterate and cannot sign her name and that she was duped or cheated by co-accused Rahul Yadav.

It is well accepted in criminal jurisprudence that F.I.R. may not contain all the details of the occurrence or even the names of all the accused. It is not expected to be an encyclopedia even of facts already known. There are varieties of crimes and by their very nature, details of some crimes can be unfolded only by a detailed and expert investigation. This is more true in crimes involving conspiracy, economic offences or cases not founded on eye witness accounts. The fact that Police chose not to send up a suspect to face trial does not affect power of the trial court under Section 319 of the Cr.P.C. to summon such a person on account of evidence recorded during trial.

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204. CRIMINAL PROCEDURE CODE, 1973 – Section 321

(i) Withdrawal from prosecution – Duty of Public Prosecutor – Law explained.

Is an executive function of Public Prosecutor and is to be exercised exclusively by him by applying his mind to the facts of the case independently without being subjected to any outside influence.

(ii) Withdrawal from prosecution – Duty of Court – Law explained.

Is supervisory and not adjudicatory function – The Court is required to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the course of justice for illegitimate purpose.

(iii) Permission to withdraw from prosecution, consideration therefor – The Court has to consider relevant circumstances so as to find out:

(a) whether the withdrawal from prosecution would advance the cause of justice?

(b) whether the case is likely to end in an acquittal?

(c) whether continuance of the case would only cause severe harassment to the accused?

(d) whether withdrawal is likely to resolve the dispute and bring about harmony between the parties?

(e) whether the grounds for withdrawal are valid?

(f) whether the implication is bonafide or is collusive?

(iv) Withdrawal from prosecution – *Locus standi* therefor – The proposition that State is the *dominus litis* in criminal cases is not an absolute one – Any member of the society has *locus standi* to intiate a prosecution as also to resist withdrawal of such prosecution, if initiated.

Pushpa Dharwal (Ku.) and others v. State of M.P. and another

Order dated 15.05.2015 passed by the High Court of M.P. in M.Cr.C. No. 17218 of 2013, reported in ILR 2015 MP 2260

Relevant extracts from the Order:

In understanding and applying the provisions of Section 321 of the Code two main features thereof have to be kept in mind. The initiative is that of the Public Prosecutor. And the trial Court has to do is to give its consent. But, the paramount consideration must always be the interest of administration of justice.

The principles justifying the regulating withdrawal from prosecution have been considered by the Supreme Court in a series of decisions. In case of ***Rajendra Kumar Jain v. State, AIR 1980 SC 1510***, the Apex Court culled out the principles applicable for invocation of sec. 321 of the Code as under:-

(i) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.

(ii) The withdrawal from the prosecution is an executive function of the Public Prosecutor.

(iii) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to some one else.

(iv) The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

(v) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, political purposes.

(vi) The Public Prosecutor is an officer of the Court and responsible to the Court.

(vii) The Court performs a supervisory function in granting its consent to the withdrawal.

(viii) The Court's duty is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

(ix) It shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of Criminal Justice against possible abuse or misuse by the Executive by resort to the provisions of s. 361 Criminal Procedure Code. The independence of the judiciary requires that once the case has traveled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case.

In case of ***Rahul Agarwal v. Rakesh, (2005) 2 SCC 377,*** the Apex Court after consideration of a number of its earlier decisions, laid down the law as under:

> "... the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal. The discretion under Section 321 Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished."

As to the role of the Public Prosecutor, it is specially laid down in case of ***Sheonandan Paswan v State, AIR 1983 SC 194,*** which is a leading case on the subject that the Public Prosecutor must apply his mind to the facts of the case independently without being subjected to any outside influence.

The Apex Court in catena of cases held that the power must be exercised by the public prosecutor and by no one else.

That the withdrawal from the prosecution is an executive function of the public prosecutor and that the ultimate decision to withdraw is his.

Public prosecutor actually conducting prosecution can apply for withdrawal otherwise not – ***State v Surjit, AIR 1967 SC 1214***.

Public Prosecutor cannot act merely as a "Post Box". The withdrawal application must be "reflective of a free and uninfluenced application of mind"

The power of public prosecutor to withdraw from prosecution is wide but should not be used as a "rubber stamp" – ***Rajendra Kumar Jain v. State, AIR 1980 SC 1510.***

The decision to withdrawal must be of the public prosecutor, not of other authorities, even of those where displeasure may affect his continuance in office. In taking a decision for withdrawal the public prosecutor has to apply independent mind and exercise his discretion because he acts as a limb of the judicative process and not as an extension of the executive – ***Subhash Chander v. State, AIR 1980 SC 423***.

That the Government may suggest to the public prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. Receiving communication or instruction from the Government by the public prosecutor before filing application for withdrawal does not make the application illegal and he cannot be said to be under extraneous influence.

The Government may have ordered, directed or asked a public prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind and act in a way so that the public interest may be served. ***Abdul Karim v State, (2000) 8 SCC 710***.

In case of ***Rajendra Kumar Jain*** (supra) the Apex Court also mandate that the bureaucrat should be careful not to use peremptory language when addressing the public prosecutor, such as 'he is directed' or 'he is instructed', since it may give rise to an impression that he is coercing the public prosecutor to move in the matter.

The Public Prosecutor has to make out some ground for withdrawal from prosecution like want of sufficient evidence, case not well founded, object of administration of justice would not be advanced, etc. - ***State v. Chandrika, AIR 1977 SC 903***.

Application for withdrawal may be made by public prosecutor for reasons other than judicial prospects of prosecution.

Public prosecutor can, with the consent of the court, withdraw from prosecution a session's tribal case at committal stage – ***State v Ram Naresh, AIR 1957 SC 389***.

Application for withdrawal can be made at any time ranging between the court taking cognizance till such time the court actually pronounces the judgment. Even where reliable evidence has been adduced to prove the charges, the public prosecutor can seek consent of the court to withdraw the prosecution – ***Md. Mumtaz v. Nandini, AIR 1987 SC 863***.

Where complainant has filed the case and conducting the prosecution, the public prosecutor cannot file application for withdrawal – ***Surjit case*** (supra).

Hence it is crystal clear that the purpose of sec. 321 of the Code it is the opinion of the public prosecutor alone which is material and the ground on which he seeks permission of the court for withdrawal of the prosecution alone has to be examined.

FUNCTIONS OF THE COURT

The independence of the judiciary requires that once the case has traveled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case. The court has to be satisfied that the executive function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the course of justice for illegitimate purpose. The consent of the court under sec. 321 of the Code as a condition for withdrawal is imposed as a check on the exercise of that power.

The court while granting or refusing consent under the section performs supervisory and not adjudicatory function. The exercise of the power to accord or withdraw consent by the court is discretionary. Of course, it has to exercise the discretion judicially. The court should satisfy itself that application for withdrawal is a bona fide and supported by reasons of State or public policy. The court should satisfy itself that the executive function of the public prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. ***Ram Naresh case*** (supra). All that, the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. Discretion under sec.321 of the Code should not be exercised to stifle the prosecution. Consent will be given only if public justice in the larger sense is promoted rather than subverted by such withdrawal.

The court is required to consider relevant circumstances so as to find out:

(i) whether the withdrawal of prosecution would advance the cause of justice;
(ii) whether the case is likely to end in an acquittal;
(iii) whether continuance of the case would only cause severe harassment to the accused;
(iv) whether withdrawal is likely to resolve the dispute and bring about harmony between the parties;
(v) whether the grounds of withdrawal are valid; and

(vi) whether the implication is bona fide or is collusive.

Whether consent should or should not be granted for withdrawal is a question to be decided by the Magistrate in a judicial manner.

The prayer for withdrawal from prosecution should not be refused merely on the ground that the case is at advance stage.

Chances of a likely failure is not per se a valid ground to withdraw from prosecution.

Magistrate can permit withdrawal for the reasons that the charges were not grave; the cases were pending for a very long time; and the other accused in the same case were acquitted.

It is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal.

That not merely inadequacy of evidence, but other relevant grounds such as to further the broad ends of public justice, economic and political; public order and peace are valid grounds for withdrawal.

Offences exclusively triable by Court of Sessions, committing Magistrate is competent to give consent for withdrawal – ***Rajendra Kumar Jain*** (supra).

The proposition that State is the dominos litis in criminal cases is not an absolute one. The society for its orderly and peaceful development is interested in the punishment of the offender and if the offence is against the society and not merely an individual wrong, any member of the society must have locus standi to initiate a prosecution as also to resist withdrawal of such prosecution if initiated – ***Union Carbide v Union of India, (1991) 4 SCC 584.*** The complainant or any other person has locus standi to oppose withdrawal of a case involving offences of criminal breach of trust, cheating, forgery, etc. In case of corruption and criminal breach of trust any member of the society has locus standi to resist withdrawal.

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205. CRIMINAL PROCEDURE CODE, 1973 – Section 397

Order to take cognizance of private complaint passed in exercise of Revisional jurisdiction – Such an order is in nature of putting impediment in judicial discretion to be exercised by Magistrate – Matter remanded to Magistrate to make further inquiry into complaint.

Bahadur Singh v. Ramcharan

Order dated 16.11.2015 passed by the High Court of M.P. in M.Cr.C. No. 5041 of 2015, reported in 2016 CriLJ 1723

Relevant extracts from the Order:

This Court in the case of ***Rajaram Gupta v. Dharamchand, 1983 Cri LJ 612*** held as under:

> "While deciding a revision petition, some of the well settled principles have always to be kept in mind. For example, an order not to be lightly set-aside unless it has entailed miscarriage of justice or where two views are possible, merely the fact that the revising Court takes other view, then the one taken by the Lower Court. The bare possibility of an additional offence or some alleged offence being made out would not in itself justify further inquiry. A further inquiry ought not to be ordered also where it would prove futile. The order discharging an accused should not be interfered with, unless it is perverse or on the face of record in-correct or foolish perfectory or glaringly un-reasonable or has been made without recording reasons for discharging the accused."

In ***Rajaram Gupta's case*** (supra) this Court further held that :

> "The only order that could be made by the revising Court under this Section is for a 'further inquiry'. No direction, therefore, in the nature of putting any impediment in the judicial discretion to be exercised by the lower Court has to be made. (See: ***Banchhanidhi Maharashtra v. Shrinibass Paikroy, AIR 1967 Orrisa 62***). Any direction or instruction indicating the manner in which further inquiry is to be made and particularly whether to frame a particular charge can also not be given."

In the present case learned Second ASJ, while allowing the revision, directed the Magistrate that there is prima facie evidence available against the petitioner, therefore, take the cognizance for the offence and proceed further. I am of the view that such direction is in the nature of putting impediment in the judicial descrition to be exercised by the Magistrate. Therefore, such part of the impugned order is set-aside and the matter is send back to Magistrate to make further inquiry into the complaint and proceed further.

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206. CRIMINAL PROCEDURE CODE, 1973 – Section 482

ADVERSE REMARKS – NATURAL JUSTICE

Trial court passed adverse remarks at the stage of examination of accused against investigating officers – Prior opportunity of hearing not provided to investigating officers – Amounts to violation of natural justice – Adverse remarks can be passed at the time of pronouncement of judgment.

Trial court directed authority to conduct departmental enquiry against the erring officer – Trial court has no jurisdiction to issue such direction.

Kamal David and others v. State of Madhya Pradesh

Order dated 26.08.2015 passed by the High Court of M.P. in M.Cr.C. No. 20084 of 2014, reported in 2016 CriLJ 1740

Relevant extracts from the Order:

No doubt, the criminal Courts have full powers and authority to pass adverse remarks against the investigating officer and witnesses and also has power for issuing directions to the concerned authority to take necessary actions in accordance with the law. But while doing so, they are required to follow the established procedure. This established procedure is that the Presiding Judge should pass first the judgment or order, as the case may be, pointing out the material lapses and lacunas committed and left by the investigating officer in the course of investigation, on account of which the case has ended in acquittal. Otherwise, the case would have been resulted into the conviction of the accused. As stated earlier, the learned trial Judge has passed the directions and the adverse remarks vide the impugned order at a time when the judgment in the case is yet to be passed. Thus, the learned trial Judge has passed the impugned order in gross violation of the established procedure, which deserves to be disapproved by this Court, and the procedure adopted by the learned Judge is liable to be quashed.

To satisfy myself whether the petitioners were given any opportunity of hearing before passing the observations and the adverse remarks against him? I have meticulously gone through the record, which reflects that the petitioners were not afforded any opportunity of hearing before passing of the said remarks. Thus, learned counsel appearing for the petitioners has rightly stated across the Bar that while passing impugned order, principles of natural justice have not been followed.

The Supreme Court in the case of ***State of Uttar Pradesh v. Mohammad Naiem, AIR 1964 SC 703*** has clearly held that:

> "It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks, and (c) whether it is necessary for the decision of the case, as an integral part thereof to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature and should not normally depart from sobriety, moderation and reserve."

The same view was reiterated in the cases of ***Niranjan Patnaik v. Sashibhusan Kar, AIR 1986 SC 819 and S.K. Viswambaran v. E. Koyakunju, AIR 1987 SC 1436***.

As stated in para-15 that the learned trial Judge has not granted an opportunity of hearing to the petitioners before passing the observations and the adverse remarks against them. Hence, in view of the ratio law laid down in the aforesaid decisions, the adverse remarks are liable to be expunged.

As per the contents of 32(3) the learned trial Judge has directed the initiation of departmental enquiry against the petitioners. This Court, in the case of ***K.P. Singh Kushwaha v. State of M.P., 2005 (2) MPLJ 276*** has held that the trial Court has no jurisdiction to direct the authority for initiation of departmental enquiry and to punish them. At most the learned trial Judge after passing the adverse remarks may have directed the authorities concerned to take necessary action in accordance with law. Thus, the learned trial Judge has exceeded his power by directing the authority concerned to hold the departmental enquiry against the petitioners. Hence, remarks made in para 32(3) are liable to be quashed.

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207. EVIDENCE ACT, 1872 – Section 3

Corroboration of testimony of witness, necessity of – Corroboration is necessary of the testimony of the witness who is neither wholly reliable nor wholly unreliable.

Surendra Kumar v. State of M.P.

Judgment dated 26.02.2015 passed by the High Court of M.P. in Criminal Appeal No. 752 of 1996, reported in ILR (2015) MP 1541

Relevant extracts from the Judgment:

As far back as in the year 1957, the Hon'ble Supreme Court in the case of ***Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614***, has laid down the principle to say that based on the nature of evidence given by a person, the same can be categorized into three; namely witnesses who are wholly reliable, witnesses who are wholly unreliable and lastly neither wholly reliable nor wholly unreliable. As far as the first two categories of witnesses are concerned, the Hon'ble Supreme Court says that there is no difficulty in accepting or rejecting the statement of such witnesses. If the statement of witnesses is wholly reliable, it can be accepted but if the statement of witnesses is wholly unreliable, it can be rejected but the problem arises when the statement of witnesses falls in the third category i.e. partly reliable and partly unreliable. It is said that the statement of this category of witness can be accepted only if any corroborative evidence is available. The matter is again considered by the Supreme Court in the case of ***Vithal Pundalik Zendge v. State of Maharashtra AIR 2009 SC 1110*** and in para 8, the matter has been so dealt with by the Supreme Court in the following manner :-

"8. In ***Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614*** this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under:

'11. ... Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.'

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208. EVIDENCE ACT, 1872 – Section 11

INDIAN PENAL CODE, 1860 – Sections 302 and 324

(i) Plea of alibi, tenability and proof of – It is a rule of evidence recognized under section 11 of the Evidence Act – Such a plea is required to be established only after prosecution has proved its case against the accused.

(ii) Offence under sections 302 and 324 of IPC, proof of – There was previous enmity related to irrigation of fields between both the parties leading to initiation of proceedings under section

107/151 CrPC against them – Accused and other members of party assaulted rival party after altercation between them in Court – Eye witnesses narrated and assigned specific role of the accused in the incident – Fatal injuries sustained by deceased and injuries caused to eye witnesses were duly corroborated by medical evidence – Oral testimony of injured eye witnesses found to be credible – Confirming conviction of accused under sections 302 and 324 IPC, reversal of order of acquittal by the High Court, held proper.

Darshan Singh v. State of Punjab

Judgment dated 06.01.2016 passed by the Supreme Court in Criminal Appeal No. 2099 of 2008, reported in (2016) 3 SCC 37

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***209. EVIDENCE ACT, 1872 – Section 101**

Title, proof of – Document/receipt showing payment of tax etc. cannot be treated as document of title and does not confer any title.

Rajjo Bai & ors v. Chhotelal & ors.

Order dated 03.03.2015 passed by the High Court of M.P in Second Appeal No. 1195 of 2005, reported in 2015 (IV) MPJR SN 2

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210. EVIDENCE ACT, 1872 – Sections 154 and 145

CRIMINAL PROCEDURE CODE, 1973 – Sections 161 and 162

(i) Testimony of hostile witness, credibility and appreciation of – When a witness is cross-examined and contradicted with the leave of the Court by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether – It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of its testimony.

(ii) Cross-examination of a witness by the party calling him, object of – The only purpose of cross-examination is not only to discredit him but it is also done in the hope that the witness might revert to what he had stated previously – If the departure from the prior statement is not deliberate, but is due to false memory or a like nature, there is every possibility of the witness veering round to his former statement.

(iii) Statement under section 161 CrPC, manner and use of.

The Court cannot *suo motu* make use of statement to police not proved and ask questions with reference to them which are inconsistent with the testimony of witness in Court – Such a

statement cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross examination and also during cross-examination of the I.O.

In order to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those part of it which are to be used for the purpose of contradicting him, before the writing can be used – While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross examination – The attention of the witness is drawn to that part and this must reflect in his cross examination by reproducing it – If the witness admits the part intended to contradict him, it stands proved and there is no need of further proof of contradiction and it will be read while appreciating the evidence – If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition.

Krishan Chander v. State of Delhi

Judgment dated 06.01.2016 passed by the Supreme Court in Criminal Appeal No. 14 of 2016, reported in (2016) 3 SCC 108

Relevant extracts from the Judgment:

The learned Additional Solicitor General (ASJ) has submitted that the High Court has rightly re-appreciated the evidence of the complainant-Jai Bhagwan and other prosecution witnesses and concurred with the findings recorded on the charges. Further it was submitted by him that the trial court while appreciating the evidence of the complainant Jai Bhagwan relied upon the decision of this Court in the case of ***Sat Paul v. Delhi Administration, AIR 1976 SC 294,*** paragraphs 41 and 51 of which decision in recording the finding on the charges against the appellant, are extracted hereunder:

> "41. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty

memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic altitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

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51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

We are unable to agree with the above contentions urged by the learned ASG that the complainant-Jai Bhagwan turned hostile witness in the case before the trial court, however, the statement of evidence of Anoop Kumar Verma (PW-6) and inspector-Sunder Dev (PW-12) was sufficient to support the case of the prosecution with regard to acceptance of bribe amount by the appellant from Jai Bhagwan (PW-2). This Court is of the view that whenever a prosecution witness turns hostile his testimony cannot be discarded altogether. In this regard, reliance is placed by the ASG on the decision of this court in the case of ***Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233***. The relevant para 12 of the aforesaid case reads thus:

"12. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-

examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. In ***Bhagwan Singh v. State of Haryana Bhagwati, (1976) 1 SCC 389 J.,*** speaking for this Court observed as follows:

"The prosecution could have even avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

However, in the instant case, from the material on record, it is amply clear that the complainant-Jai Bhagwan turned hostile on two important aspects namely, demand and acceptance of bribe by the appellant which is sine qua non for constituting the alleged offence under Sections 7 and 13(1)(d) read with 13(2) of the PC Act convicting the appellant and sentencing him for the period and fine as mentioned above.

As far as the evidence of Panch witness – Anoop Kumar Verma (PW-6) is concerned, in his examination-in-chief, he stated thus:

"...Thereafter, the complainant and the accused walked for 15-20 steps and had some talk with the complainant and the complainant took out those GC notes from his pocket and gave in the right hand of accused which he kept in the left pocket of his shirt..."

The Investigation Officer (PW-10) in his evidence, has not at all spoken of the contents of the statement of the complainant-Jai Bhagwan (PW-2), recorded by him under Section 161 of the Cr.P.C. Further, PW-2 in the light of the answers elicited from him in the cross-examination by Public Prosecutor, with regard to the contents of 161 statement which relevant portions are marked in his cross-examination and the said statements were denied by him, the prosecution was required to prove the said statements of the PW-2 through the Investigating Officer to show the fact that PW-2 Jai Bhagwan in his evidence has given contrary statements to the Investigation Officer at the time of investigation and, therefore, his evidence in examination-in-chief has no evidentiary value. The same could have been used by the prosecution after it had strictly complied with Section 145 of the Indian Evidence Act, 1872. Therefore, the I.O. should have spoken to the above statements of PW2 in his evidence to prove that he has contradicted

in his earlier Section 161 statements in his evidence and, therefore, his evidence cannot be discarded to prove the prosecution case.

It becomes amply clear from the perusal of the evidence of PW-10, I.O. in the case that the same has not been done by the prosecution. Thus, the statements of PW-2 marked from Section 161 of Cr.P.C. in his cross-examination cannot be said to be proved in the case to place reliance upon his evidence to record the findings on the charge. The position of law in this regard is well settled by this Court in the case of ***V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588.*** The relevant paras are extracted hereinbelow:

> "Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the reexamination of the witness if necessary.
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> The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by 25 eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.
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> Section 145 of the Evidence Act reads as under:
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> > '145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but,

if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.'

Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction."

Thus, the contradiction of evidence of the complainant-Jai Bhagwan (PW-2) does not prove the factum of demand of bribe by the appellant from the complainant-Jai Bhagwan as the statement recorded under Section 161 of Cr.P.C. put to him in his cross-examination was not proved by B.S. Yadav (PW-10) by speaking to those statements in his evidence and therefore, the evidence of PW-2 is not contradicted and proved his Section 161 statement in the case.

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211. INDIAN PENAL CODE, 1860 – Section 197

Sanction for prosecution, necessity of – Law explained.

Petitioner alleged that respondents have misappropriated the public money while implementing the schemes in the course of their official duties – Held, since the alleged acts of misappropriation against the respondents are inseparable from their official duties, sanction under section 197 is necessary.

Tridev Jan Kalyan Samiti v. U.K. Subuddhi & anr.

Order dated 18.08.2015 passed by the High Court of M.P. in M.Cr.C. No. 4330 of 2015, reported in ILR (2015) MP 2516 (DB)

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***212. INDIAN PENAL CODE, 1860 – Section 300**

EVIDENCE ACT, 1872 – Section 3

(i) Evidence of eyewitness was challenged on the ground that he is only chance witness – He has been consistent in his version and fully supported prosecution story – Then fact that he has signed panchanama on the suggestion of Darogaji and father of the deceased asked him whose names should be written in panchnama are immaterial – These inconsistencies should be seen in the context of preparing panchnama and shall not be attributed otherwise to disbelieve his evidence.

(ii) Discrepancy in medical and ocular evidence – Doctor in his examination-in-chief categorically stated that incident could have occurred at 8.00 a.m. which corroborated the case of informant – There was no reason to disbelieve this fact and to hold that the incident occurred between 2.00 to 4.00 a.m. merely basing on a vague statement made by Doctor in cross-examination – Further, merely for the reason that no blunt injuries were present on deceased, whole evidence of eyewitness cannot be discarded as primacy has to be given to the ocular evidence particularly in case of minor discrepancies. *Darbara Singh v. State of Punjab, AIR 2013 SC 840* relied on.

(iii) Non-examination of injured witness – Trial Court has appreciated the fact that though the prosecution has made an attempt to produce Ganga Singh, they failed to do so as he was kidnapped at the relevant period – This stands proved by registration of two FIRs which establish the fact that Ganga Singh was threatened and kidnapped, thefore, non-examination of injured witness, Ganga Singh could not be fatal to the case of prosecution – Thus no adverse inference can be drawn against the prosecution for non-examination of injured witness.

Sadhu Saran Singh v. State of U.P. and others

Judgment dated 26.02.2016 passed by the Supreme Court in Criminal Appeal No. 1467 of 2005, reported in 2016 CriLJ 1908 (SC)

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213. INDIAN PENAL CODE, 1860 – Sections 300 and 302
EVIDENCE ACT, 1872 – Section 106
CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Murder, circumstantial evidence, appreciation of – Facts within knowledge of accused – Burden of proof – Absence of explanation, effect of – Son allegedly killed his father – Dead body was found lying in a pool of blood inside the house as also stone smeared with blood – Accused and his father were in house at the time of incident – Blood stained clothes of the accused were recovered at his instance and he failed to offer any explanation with regard to homicidal death of his father – Holding conviction and sentence to be proper, it was further held that inmates of house cannot get away from criminal liability by simply keeping mum on supposed premise that burden to establish the case lies entirely on prosecution.

(ii) Delay in FIR – Delay between time of offence and registration of FIR, if satisfactorily explained by the prosecution, is not fatal in itself – Keeping in view the circumstance of the case, it was further held that though there was delay in lodging FIR, but it was properly explained.

Gajanan Dashrath Kharate v. State of Maharashtra

Judgment dated 26.02.2016 passed by the Supreme Court in Criminal Appeal No. 2057 of 2010, reported in 2016 AIR SCW 1255

Relevant extracts from the Judgment:

As seen from the evidence adduced by the prosecution, deceased-Dashrath, his wife-Mankarnabai and their son accused Gajanan were residing together. PW-1-Nagorao Kharate whose house was adjacent to the house of Dashrath and was also closely related to him had deposed that the appellant was addicted to bad habits of liquor and gambling and appellant used to demand money frequently from his father and quarrelled with his father. In his evidence, PW-1-Nagorao Kharate stated that on 07.04.2002 at about 5.00 p.m. accused-Gajanan demanded money from his father and when his father refused to give money to the appellant, the appellant abused his father and thereafter left the house. PW-1 further stated that appellant-accused returned home at about 8.30 p.m., he again started abusing his father and also assaulted him and Dashrath was wailing till about 10.00 p.m. The testimony of PW-2-Ratnaprabha-wife of PW-1 is to the same effect which amply corroborates the version of PW-1. 8. PW-1-Nagorao Kharate stated that he and his wife PW-2-Ratnaprabha and grand-

daughter have witnessed the occurrence but due to fear of the appellant they did not intervene in the occurrence on the night of 07.04.2002. On the next day, they were informed by PW-4-Madhukar Kharate that deceased Dashrath was lying dead in a pool of blood. PW-1 in his evidence stated that on 08.04.2002 at about 7.00-7.30 a.m. he learnt about death of his cousin through PW-4-Madhukar Kharate and when he went to the house of Dashrath, he saw him dead lying in a pool of blood. Assailing trustworthiness of PW-1, it was submitted that PW-1 came to know about the death of Dashrath only from PW-4- Madhukar Kharate and PW-1 could not have witnessed the occurrence. Evidence of PWs 1 and 2 is assailed contending that had they witnessed the occurrence, they would have certainly tried to intervene in the quarrel to pacify the appellant and the deceased and the conduct of PWs 1 and 2 in not trying to intervene is unnatural and the courts below ought to have disbelieved their version.

On the night of 07.04.2002 after witnessing the incident, PWs 1 and 2 retired to bed. PWs 1 and 2 did not try to intervene in the quarrel between the appellant and the deceased as they assumed that it was a routine and usual quarrel between father and son. On the next day morning, when they were in their house, they came to know about the death of Dashrath-deceased through PW-4-Madhukar Kharate. At the time of incident, as the appellant was in a drunken state, as noted by the courts below, PW-1 did not try to intervene in their dispute. Further PWs 1 and 2 are persons of advance age. Trial court noticed that PW-1-Nagorao Kharate was of 71 years and PW-2-Ratnaprabha was of 65 years and therefore it was quite natural on their part to keep themselves away from the appellant; more so, when the appellant was in a drunken state. Credibility of PWs 1 and 2 cannot be doubted on the ground that they did not try to intervene in the incident.

On behalf of the appellant, it was submitted that delay in registration of first information report creates serious doubts about the prosecution case and the prosecution has not satisfactorily explained the delay. PW-1-Nagorao Kharate lodged the complaint at Boregaon Manju Police Station on 08.04.2002 at about 5.00 p.m. In his evidence, PW-1-Nagorao Kharate stated that Boregaon Manju Police Station is about eight miles from their village and that they had to go to Boregaon Manju Police Station via Akola. PW-1 further stated that he went to Akola at 3.00 p.m. and from Akola he went to Boregaon Manju Police Station at about 5.00 p.m., as no vehicle was available at that time. PW-1 further stated that it takes two to three hours by walk to reach Boregaon Manju Police Station from his village. Delay in setting the law into motion by lodging of complaint and registration of first information report is normally viewed by courts with suspicion because there is possibility of concoction and embellishment of the occurrence. So it becomes necessary for the prosecution to satisfactorily explain the delay. The object of insisting upon a prompt lodging of the report is to obtain early information not only regarding the assailants but also about the part played by the accused, the nature of the incident and the names of witnesses. In the case

at hand, prosecution has satisfactorily explained the delay in lodging the complaint. When the prosecution has explained the delay in lodging the complaint, prosecution case cannot be doubted on the small delay between the time of occurrence and in registration of first information report.

Apart from the oral evidence, case of prosecution is also strengthened by recovery of blood stained clothes of the appellant. During chemical analysis, it was found that the shirt of the appellant contained 'B' Group blood which is the blood group of deceased-Dashrath. The appellant has not offered any explanation as to presence of 'B' Group blood in his clothes, which is yet another incriminating circumstance against the appellant.

As seen from the evidence, appellant-Gajanan and his father-Dashrath and mother-Mankarnabai were living together. On 07.04.2002, mother of the appellant-accused had gone to another village-Dahigaon. Prosecution has proved presence of the appellant at his home on the night of 07.04.2002. Therefore, the appellant is duty bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of occurrence, when accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

In ***Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681,*** it was held as under:-

> "22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In ***Nika Ram v. State of H.P., (1972) 2 SCC 80*** it was observed that the fact that the accused alone was with his wife in the house when she was murdered
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> there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent

explanation by him, point to his guilt. In ***Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106*** the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In ***State of U.P. v. Dr. Ravindra Prakash Mittal, (1992) 3 SCC 300*** the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of ***T.N. v. Rajendran, (1999) 8 SCC 679*** the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

Same view was reiterated by this Court in ***State of Rajasthan v. Parthu, (2007) 12 SCC 754***.

Upon appreciation of oral evidence and the circumstance of the recovery of blood stained clothes of the accused and the conduct of the accused in not offering any explanation for the homicidal death of his father, by concurrent findings, the trial court and the High Court rightly convicted the appellant-accused under Section 302 IPC and we do not find any reason to interfere with the impugned judgment. Paras 6 to 15

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

Murder and culpable homicide not amounting to murder, distinction between.

Facts of the case:

When the deceased 'H' alongwith eye witness 'K' were going to eat betel, accused persons came from the front side and accused 'B' pelted country bomb at them and inflicted blow of sword on 'H' and other co-accused persons assaulted 'H' with sword, gupti and kankur and they also attacked eye witness 'K' with their weapons – Deceased 'H' was soiled in blood and was moaning and on being taken to hospital, was declared dead – Injuries No. 1 to 4 found on the body of deceased were incised wounds and 3rd and 4th of them were inflicted on the right knee joint and head respectively –

Dr. 'A' who conducted autopsy opined that the injuries found on the body of deceased were sufficient to cause death and cause of death was excessive hemorrhage from injury No. 3 which was on the knee – Held, case falling within thirdly of section 300 of the Code and not under section 304 Part I.

State of Madhya Pradesh v. Goloo Raikwar and another

Judgment dated 02.03.2016 passed by the Supreme Court in Criminal Appeal No. 185 of 2016, reported in 2016 (1) Crimes 264 (SC)

Relevant extracts from the Judgment:

When the deceased along with PW1 Kallu Choudhary were going to eat betels respondents/accused came from the front side and second respondent Bhura pelted country bomb at them and inflicted blow of sword on Hari and the other accused assaulted Hari with sword, Gupti and Kankur and they also attacked PW1 Kallu Choudhary with weapons. Hari was soiled in blood and was moaning and on being taken to hospital, was declared dead. Injuries no.1 to 4 found on the body of Hari were incised wounds and 3rd and 4th of them were inflicted on the right knee joint and head respectively. Dr. Ashok Kumar Jain who conducted the autopsy has stated that the injuries found on the body were sufficient to cause death. It was pointed out that the cause of death was excessive haemorrhage from injury no.3 which was on the knee.

In ***State of Andhra Pradesh v. Rayavarapu Punnayya and Anr., (1976) 4 SCC 382,*** this Court had to deal with a similar situation. In that case, the accused 5 in number beat the victim with sticks on the legs and arms of the deceased and when hospitalized the deceased succumbed to his injuries. The medical officer who conducted the autopsy opined that the cause of death was shock and haemorrhage resulting from multiple injuries and said injuries were cumulatively sufficient to cause death in the ordinary course of nature. Question arose whether in such a case when no significant injury had been inflicted on a vital part of the body, and the weapons used were sticks and the accused could not be said to have the intention of causing death, the offence would be 'murder' or merely 'culpable homicide not amounting to murder'. This Court answered the question in these terms:

> "..... . All these acts of the accused were preplanned and intentional, which, considered objectively in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of clause thirdly of Section 300. The expression "bodily injury" in clause thirdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under clause thirdly of Section 300. All the conditions which are a prerequisite for the applicability of this clause have been established and the offence committed by the accused, in the instant case was 'murder'."

In the present case, the fact that the accused hurled country made bombs, has been established. The incised injuries caused to Hari were intentional and were sufficient to cause death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within thirdly of Section 300.

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215. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 106

Circumstantial evidence – Appellant was alone in the house with the deceased – Deceased was alive when the appellant entered the house otherwise, he would have immediately came out of the house, if the deceased was already dead – Presence of sperm on petticoat and vaginal swab clearly shows that there was cohabitation soon before the death – In view of section 106 of the Evidence Act, it shall be presumed that appellant killed the deceased.

Chandramani Tripathi v. State of M.P.

Judgment dated 21.09.2015 passed by the High Court of M.P. in Criminal Appeal No. 563 of 2010, reported in ILR (2015) MP 2764 (DB)

Relevant extracts from the Judgment:

If Shyamwati was already dead when the appellant entered in the house, then he would have immediately come out of the house and there was no possibility that his wife could append a lock on the only exit door of the house of Shyamwati from outside, hence it is also a circumstance proved against the appellant that he had illicit relations with deceased Shyamwati and when he entered in the house, Shyamwati was alive.

As discussed above, it is proved by the witnesses that in the morning when Sarpanch Gajendra Singh directed the appellant to come out, he came out by opening the door and started running towards his house. There was nobody except the appellant in the house and Shyamwati was found dead. It is also discussed above that death of deceased was homicidal in nature and, therefore, in view of Section 106 of the Evidence Act, it shall be presumed that appellant was the person who killed deceased Shyamwati. In this connection, judgment passed by Hon'ble the Apex Court in ***Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681*** may be referred. Though it is a matter relating to other inmates of the house if dead body of the wife is found in the house, but on same analogy when it is established that there was nobody except the appellant alongwith deceased Shyamwati for entire night in a closed house of two rooms and deceased Shyamwati was found killed, when the appellant left the house of deceased Shyamwati, then on same analogy, it was for the appellant to explain as to how deceased Shyamwati had died, hence in the light of the judgment passed by the Apex Court in ***Trimukh Maroti Kirkan*** (supra), a presumption shall be drawn against the appellant that he killed deceased Shyamwati unless he would have explained the position as to how deceased Shyamwati was killed. The appellant did not take any specific plea in his statement under Section 313 of the CrPC. He simply denied all the allegations made against him. He did not give any explanation as to how Shyamwati has died.

At this stage, if all the circumstances, which are proved against the appellant, are considered together that death of deceased Shyamwati was

homicidal in nature, soon before her death cohabitation was done with her, her husband was not residing with her, the appellant had illicit relationship with her, the

appellant entered in the house when Shyamwati was alive and when he came out of the house, she was found dead, he was the only person who remained in the house for the entire night whereas there was only one door in the house, which was surrounded by various witnesses for the entire night, then the only conclusion will be drawn that the appellant had killed the deceased Shyamwati.

Learned counsel for the appellant has submitted that if the appellant had illicit relations with deceased Shyamwati and he went inside the house then there was no reason for him to kill the deceased Shyamwati. However, if there was nobody in the house, who could kill deceased Shyamwati and it is for the appellant to explain as to how deceased Shyamwati has died and no explanation is given by the appellant then the submission made by the learned counsel for the appellant cannot be accepted. If Shyamwati had expired during the act of cohabitation or any other reason or the appellant wanted to get the advantage of any exception of Section 300 of the IPC then it was for him to give explanation. The death of deceased is homicidal and it is established that the appellant was the person who killed her. He did not give any explanation about the circumstances in which she died and, therefore, it cannot be said that the case of the appellant falls in the purview of culpable homicide not amounting to murder. It is a case of murder. The appellant killed deceased Shyamwati by throttling. So far as motive is concerned, it is settled view of the Apex Court that it is not required for the prosecution to prove the motive, if other circumstances are proved beyond doubt and chain of circumstantial evidence is complete then if motive is not proved then it makes no difference. The Apex Court has taken such a view from very beginning and such view has been expressed in various cases. It would be appropriate to refer the judgment passed by the Apex Court in the case of ***Gurucharan Singh v. State of Punjab, AIR 1956 SC 460*** in which it is mentioned that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.

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216. INDIAN PENAL CODE, 1860 – Section 306

Abetment to commit suicide – Allegation of illicit relationship between the accused-lady and the deceased – It was alleged that she had pressurized deceased to return the money invested in medical shop run by the deceased which caused severe mental stress to deceased driving him to commit suicide – Held, commission of suicide by the deceased was sheer exercise in escapism for which accused cannot be held to be legally liable.

Smt. Mamta Rai v. State of M.P.

Order dated 01.10.2015 passed by the High Court of M.P. in Criminal Revision No. 1688 of 2015, reported in 2016 CriLJ 1887

Relevant extracts from the Order:

In the case at hand, it has been established prima facie that the applicant/ accused had live-in relationship with the deceased and had financed his medical shop. She was demanding back the money invested by her in the medical shop which caused severe mental stress to the deceased, as a result of which, he committed suicide by hanging. However, it is clear that the applicant had no intention of instigating or goading deceased to commit suicide, for the simple reason that with the suicide of deceased, her chances of recovering money invested in the shop, practically vanished. She could not conceivably foreseen that a demand for money as also her relationship with the deceased would lead to suicide by deceased.

The deceased was a young businessman. His relationship with his wife was strained. He had a daughter from his wife. On the other hand, applicant Mamta is a widow with two young children to raise. She had invested money in the medical shop run by the deceased. The nature of the financial relationship between the two is not clear from the statements of the witnesses. The police has not collected any document which would through light upon the nature of financial arrangement between the deceased and the applicant. In these circumstances, the applicant was perfectly justified in demanding her money back, from the deceased. In the situation the deceased found himself in, he had several options before him. One of them was to have faced any legal action that could potentially have been instituted by the applicant; however, he was ultrasensitive to the situation and chose to end his life. In aforesaid circumstances, commission of suicide by the deceased was sheer exercise in escapism on the part of the deceased, for which the applicant cannot be held to be legally liable because by no stretch of imagination, can it be said that the applicant has succeeded in creating such a situation for the deceased that he was left with no option but to commit suicide. The applicant had not reason to conceive the nexus between her demand for money from the deceased, which she had advanced and even her illicit relationship with the deceased and the result thereof, which eventually ensued.

Thus, there is no sufficient ground to proceed against the applicant Mamta Rai under Section 306 of the I.P.C. and the charge framed against her is not sustainable in the eyes of the law. As such, she is entitled to be discharged in respect of aforesaid offence.

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217. INDIAN PENAL CODE, 1860 – Section 326

CRIMINAL PROCEDURE CODE, 1973 – Section 354

Sentencing – It is the duty of the Court to ensure justice to both the parties – Undue leniency in awarding sentence needs to be avoided.

State of M.P. v. Udaibhan

Judgment dated 01.03.2016 passed by the Supreme Court in Criminal Appeal No. 182 of 2016, reported in 2016 AIR SCW 1150

Relevant extracts from the Judgment:

The High Court in our considered opinion failed to keep under focus various relevant factors for a proper decision on the quantum of sentence which should have been imposed even for the altered conviction under Section 326 or Section 326/34 of the IPC. The prosecution case which has been accepted as true disclosed that the complainant Kriparam was called to Panchayat Bhawan where the accused persons were already present with weapons. Rajaram was having farsa whereas Hakim was armed with an iron rod and Udaibhan with lathi. As soon as the complainant arrived he was threatened and assaulted by all the three with their respective weapons. Rajaram caused a farsa injury on the head, Hakim caused an injury with iron bar on the eyebrow near the right eye. Udaibhan gave more than one lathi blows. When complainant's brother Prabhu came for his rescue then he was also assaulted with lathi blows by Udaibhan.

The High Court did not even note down the six injuries on the complainant which included a grievous injury on the temporal part, a reddish blue mark on the upper side of right eye, another injury having blue mark on the forehead and another wound on the eyebrow on the right eye. There was hardly any mitigating circumstance to take such a lenient view as has been done by the High Court. The law on the principles governing proper sentencing has been elaborated by this Court in large number of cases. It is the duty of the Court awarding sentence to ensure justice to both the parties and therefore undue leniency in awarding sentence needs to be avoided because it does not have the necessary effect of being a deterrent for the accused and does not re-assure the society that the offender has been properly dealt with. It is not a very healthy situation to leave the injured and complainant side thoroughly dissatisfied with a very lenient punishment to the accused. In the present case the order of punishment imposed by the High Court suffers from the vice of being over-lenient even in absence of any mitigating circumstance.

In such a situation, the interest of justice requires interference with the punishment imposed by the High Court. The ends of justice would be satisfied by imposing on all the three accused persons a sentence of rigorous imprisonment for three years in place of period already undergone, for the offence under Section 326 as well as Section 326/34 of the IPC. The other sentence which has been maintained by the High Court is left intact. However, it is clarified that sentence of imprisonment for different offences against the respondents shall run concurrently. The impugned judgment and order are modified accordingly.

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***218. INDIAN PENAL CODE, 1860 – Section 364-A**

Abduction for ransom – Appellants have threatened to cause death or hurt to abductee in order to extort ransom – Abductee was kept in detention and threatened in order to extort ransom and he communicated that demand for ransom – Prosecution has proved ingredients of section 364-A IPC – Abductee duly identified the appellants in identification parade – Incriminating articles recovered at the instance of the appellants – Held, trial court has not committed any error in convicting and sentencing the appellants.

Balinder Kumar & ors. v. State of M.P.

Judgment dated 05.01.2015 passed by the High Court of M.P. in Criminal Appeal No. 138 of 2008, reported in ILR (2015) MP 2752 (DB)

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219. INDIAN PENAL CODE, 1860 – Section 376-E

CRIMINAL PROCEDURE CODE, 1973 – Section 211 (7)

EVIDENCE ACT, 1872 – CHILD WITNESS

(i) Procedure for enhanced punishment for the accused previously convicted – Explained.

(ii) Appreciation of evidence – Child witness – Need of assessment of intellectual capacity of the child – Testimony of child witness – Credibility.

In Reference received from learned First Additional Sessions Judge, Ashta, Sehore (M.P.) v. Ramesh

Judgment dated 04.03.2016 passed by the High Court of M.P. in Criminal Reference No. 4 of 2015 (DB) (unreported judgment)

Relevant extracts from the judgment:

Section 376-E of IPC brings within its ambit enhanced punishment for the accused person previously convicted. The points requires for proving Section 376-E of IPC are:

(i) the accused person has been previously convicted of an offence punishable under Section 376 or Section 376-A or Section 376-D of IPC.

(ii) the accused person is subsequently, convicted of an offence punishable under any of the said sections.

Sub Section (7) of Section 211 of the Code lays down how previous conviction is to be set out. This Sub-section (7) provides for enhanced punishment which reads as under:-

> "(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove

such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the facts date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed."

Where it is intended to prove a previous conviction for the purpose of enhancing the punishment, it should be entered in the charge and the accused should be called on to plead thereto; mere exhibiting certified copy of the judgment of previous case certainly is insufficient to prove a previous conviction.

Therefore it is crystal clear that where it is intended to prove a previous conviction for the purpose of enhancing the punishment, learned Trial Court was also bound to be entered in the charge and accused Ramesh should be called upon to plead thereto.

It is evident from the perusal of charge form that the particulars of date, time, place, etc. of previous conviction of accused Ramesh does not mention in charge reproduced earlier. It is crystal clear that during trial of this case at relevant stage, as provided by Sub-section (7) of Section 211 of the Code accused Ramesh was not specifically charged with an offence under Section 376 E IPC.

Learned trial Court was duty bound to satisfy itself that accused Ramesh has completely understood the accusation that was against him and completely realizing the consequences that follow. But there is no indication from the materials on record that it was brought to the notice of accused Ramesh that he had freedom to defend himself, as charge under Section 376 E IPC was not leveled against him. Again, there was nothing to show that accused Ramesh understood the consequences of non-framing of charge. On top of it, there was nothing to show that the facts on record reflected all the ingredients constituting the offence, punishment under Section 376 E IPC.

It was incumbent upon learned trial Court to ask for the prosecution to produce evidence against the accused to prove his previous conviction. Where the previous conviction admitted by the accused, even then as per cardinal principles of natural justice, the prosecution was also bound to prove with all certainty that accused Ramesh was the person previously convicted, because the prosecution intended to enhance his punishment on basis of his previous conviction, that too for capital punishment of death sentence.

In the light of above mentioned legal position the prosecution was bound to produce evidence to prove with all certainty that accused Ramesh was the person who was convicted previously. Examination of accused Ramesh was also mandatory for the purpose of enabling him to extend any circumstances apparent in the prosecution evidence against him. Next step was to call upon accused Ramesh to enter on his defence and adduce any evidence he may have in support thereof. The probable defence of accused Ramesh may be that he is not the previously convicted person. After hearing final arguments of learned counsel for the parties, then learned trial Court was authorized to pass judgment, certainty not before it, of conviction as per provisions of Section 235 of the Code. But, learned trial Court

adopted almost different procedural course and after holding accused Ramesh guilty directly passed order of punishment of capital sentence.

Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but, it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. Nevertheless his/her evidence cannot be rejected if he is found reliable. His/her evidence must be evaluated more carefully and with greater circumspection.

The Court is also aware that children are most untrustworthy class of witnesses and some of the reasons are when of a tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by home of reward and by desire of notoriety.

But, same time the court should not start with a presumption of untrustworthiness of the evidence of a child witness. A child witness is not an incompetent witness by reason of his age. Age of a child is no important factor, his degree of intelligence, maturity and knowledge matter. Lack of intellect or intelligence is mainly responsible for incompetency of a witness. The credibility of the evidence has to be judged on the touchstone of the intrinsic worth of the evidence. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.

The court should not convict an accused on a serious charge relying on the evidence of a child witness unless he is materially corroborated. Substantial corroboration of the evidence of child witness is necessary. Corroboration about the factum of crime and connection of the accused with the crime is necessary. The rule of corroboration of the testimony of a child witness is not a rule of practice, but, it is rather a rule of prudence.

The evidence of a child witness can be the basis of conviction. The court shall take precaution only that the witness is reliable and his demeanor is like any other competent witness and that there is no likelihood of being tutored – ***Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341***.

The decision on the question, whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as

his understanding of the obligation of an oath. The court has to satisfy that the child has capacity to understand and give rational answers.

It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of witness may be seriously affected so much so, that in some cases it may be necessary to reject the evidence altogether – ***Rameshwar Singh v State of Rajasthan, AIR 1952 SC 54***.

The intellectual capacity of a child to understand questions and to give rational answers thereto is the sole test of testimonial competency.

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220. INDIAN PENAL CODE, 1860 – Section 379

(i) Theft, ingredients of – Prosecution is required to prove:

(a) that accused removed moveable property;

(b) that he removed such property out of the possession of another without his consent; and

(c) that he did so with a dishonest intention.

(ii) Theft of standing crop, proof of:

(a) complainant must prove that he has sown and raised crop on the land recorded in his name;

(b) there must be failure on part of the accused to show that he has any genuine counter-claim or possession over the land or that he grew the crop;

(c) it must be proved that the accused cut and removed the crop.

(iii) Theft – Absence of *animus furandi*, effect of – Absence of *animus furandi* and presence of circumstances indicating taking of moveable property in assertion of bonafide claim of right on account of existence of dispute of civil nature between the parties with regard to demarcation and physical possession, may amount to civil injury but not theft.

Gurudayal v. Indal and others

Order dated 15.05.2015 passed by the High Court of M.P. in M.Cr.C. No. 18938 of 2014, reported in ILR 2015 MP 2254

Relevant extracts from the Order:

To prove the charge of theft against the accused punishable under Section 379 of IPC, the prosecution must prove:-

(1) that he removed movable property.

(2) that the removed from out of the possession of another without his consent and,

(3) that he did so with a dishonest intention.

Cutting and removing stealthily standing crop from another's land would constitute offence under sec. 379 IPC- ***Malhu Yadav v State of Bihar, (2002) 5 SCC 724***.

If the complainant satisfactorily proved that he has sown and raised the crop on his land recorded in his name and on the other hand the accused failed to show that he has any genuine counterclaim or physical possession of the land or that he grew the crop and cutting and removal of the crop by the accused is proved, then he can be convicted.

The Apex Court in case of ***Ram Ekbal v Jaldhari Pandey, AIR 1972 SC 949*** held where the question of possession of land and crop on the date of occurrence, is open to doubt, the accused cannot be convicted for theft of crop.

Animus furandi; the dishonest intention to cause wrongful gain to oneself or wrongful loss to another. Where there is absence of animus furandi and the circumstances indicate that the taking of movable property is in the assertion of a bona fide claim of right, the act, though may amount to a civil injury, does not fall within the mischief of the offence of theft.

Mens rea is necessary for an offence of theft. The ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. For example, where the taking of movable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft – ***Chandi Kumar v Abanidhar AIR 1965 SC 585.***

Where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. In view of the bona fide dispute over land, harvesting the standing crop has been held not an offence of theft.

Now the position of law is clear that where there is bona fide counter-claim of the accused or where he succeeds in showing his possession or growing the crop, the dispute would have been a genuine civil dispute.

In a case of theft of crops where the dispute centers round the question of possession, it is a civil dispute; hence, no case of theft under Section 379 of IPC is made out.

Please see case of ***Ram Ekbal (supra), State v. Vishwanath, AIR 1979 SC 1825 CrLJ 1193, Chandi Kumar (supra); Abbarao v. Lakshminarayan, AIR 1962 SC 586, K.N. Mehra v. State, AIR 1957 SC 369, Suvvari Sanyasi v. Bodde Palli, AIR 1962 SC 586***.

While learned Appellate Court examined this question whether complainant succeed to prove that the Soyabean crop which were cutting and removing stealthily from the field was of possession of the complainant only? found that complainant failed to prove it and given the benefit of doubt to the respondents and acquitted them after marshalling the evidence filed by both the parties.

As per documentary evidence Ex.P-1 and P-2 this fact is proved that survey No.110 area 8.195 hectare belongs to Kiran Kumar, son of Gurudayal. But, this fact alone is not sufficient to convict the respondents for the offence punishable

under Section 379 of the IPC. As per above discussed legal position this burden is also upon the complainant to prove this fact beyond doubt that the respondents cutting and removing stealthily Soyabean crop which was standing on the field of the possession of Kiran Kumar and Gurudayal.

As per Demarcation Report Ex.P-2 this fact is clear that complainant party encroached land area of 0.03 acre of survey No.14/1 which belongs to ownership of respondents and situated along with the land of the complainant and the respondents also encroached land area 0.35 acre of survey No.14/4 which belongs to ownership of Kiran Kumar son of complainant Gurudayal. On perusal of this Demarcation Report Ex. P-3, it is crystal clear that there is existence of dispute between the parties with regard to the demarcation and actual possession of the land. This dispute would have been a genuine civil dispute.

During cross-examination Gurudayal (PW-1) frankly admitted this fact that at the time of cutting and removing stealthily the crop of Soyabean he was not present on the spot, but his wife was present, who informed, apprised him regarding this thief, therefore, learned Appellate Court rightly pointed out that Gurudayal (PW/1) is a hearsay witness.

Jhelai (PW-2) and other witnesses Chandrakalabai (PW-3) and Pooja (PW-5) were not able to specify the number of tractor, which is not of much importance, but these witnesses also admitted these facts in some or other way that there is no specific demarcation between these adjoining situated lands and both the parties claiming their ownership on the piece of land of each other.

In such premises learned Appellate Court did not commit any error and the acquittal of the respondents by the learned Appellate Court is not based on unwarranted assumption or erroneous appreciation of evidence by ignoring valuable incredible evidence, resulting in serious and substantial miscarriage of justice. The failure of the prosecution is also rightly pointed out by the learned Appellate Court which is completely creating doubtful situation. Hence, leave to appeal against the judgment of acquittal dated 14.10.2014 cannot be granted in light of above discussed legal positions.

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***221. INDIAN PENAL CODE, 1860 – Section 395**

Appellant/accused convicted u/s 395, 397 and 504 IPC – Sessions Court convicted the accused for the offence u/s 395 IPC – Trial Court inflicted rigorous imprisonment of only one year alongwith fine of Rs. 100/- – High Court affirmed the conviction and enhanced the sentence to five years of rigorous imprisonment alongwith the fine imposed by the trial court – Considering the value of the alleged loot including cash and mobile was only Rs. 16,550/- and the appellant only of 22 years of age at the time of occurrence, held, High Court erred in enhancing the sentence to five years.

Pareshbhai Annabhai Sonvane v. State of Gujarat & ors.

Judgment dated 18.03.2016 passed by the Supreme Court in Criminal Appeal No. 209 of 2016, reported in 2016 (2) Crimes 6 (SC)

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***222. INDIAN PENAL CODE, 1860 – Sections 420, 461 and 147**

Dispute regarding lease of dairy farm – Respondent/accused stopped paying lease rent and also refused to handle the cattle heads – After notice for payment of lease rent and return of cattle heads respondent/accused informed that he has handed over all the cattle heads to another respondent/ accused – Held, it is purely a dispute of civil nature, so the jurisdiction vested in a criminal Court cannot be invoked to settle a dispute which is purely of civil nature.

Subodh Kumar v. Smt. Alpana Gupta & anr.

Order dated 19.11.2014 passed by the High Court of M.P. in M.Cr.C. No. 5863 of 2008, reported in ILR (2015) MP 2494

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223. INDIAN PENAL CODE, 1860 – Sections 467, 468, 420 r/w/s 511

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Filing of private complaint – Abuse of process of Court, when may amount to? Explained.

A signed cheque was handed over by the complainant to the accused and subsequently a report regarding loss of cheque and abuse of the lost cheque by the accused was lodged – There were no allegations that signature were forged – There was also no explanation on the part of the complainant as to why he signed the blank cheques – Held, prosecution story is inherently improbable – Further held, the report was lodged with an ulterior motive to pre-empt filing of a case under section 138 of the Act of 1881 or for fabricating a defense therein – Following *State of Haryana and ors. v. Ch. Bhajan Lal and ors., AIR 1992 SC 604*, it was also held that continuation of proceedings in the case would clearly tantamount to abuse of process of Court.

Gurpreet Singh v. State of M.P. and others

Order dated 16.12.2015 passed by the High Court of M.P. in Misc. Criminal Case No. 4089 of 2010, reported in 2016 (1) JLJ 356

Relevant extracts from the Order:

A perusal of written report dated 11.02.2006 filed by the complainant Gurmeet Singh in P.S. Bandol reveals that the cheque book which he allegedly lost, belonged to Amarpatan Branch of Allahabad Bank and not to Dungeriya, Chhapara Branch of Central Bank of India; whereas, the cheque in respect of

which the offence is alleged to have been committed was drawn on Dungeriya, Chhapara Branch of Central Bank of India. Thus, at the inception, it was not the case of the complainant that he lost a cheque belonging to Central Bank of India.

The complainant is a businessman and runs a petrol pump. The Banks repeatedly advise their account-holders not to sign and store blank cheques, yet the complainant alleges that he had signed three of the six blank cheques and he had lost them. There is no explanation as to why he signed blank cheques without any rhyme or reason. Thus, this part of the prosecution story is inherently improbable.

Apart from aforesaid, it may be seen that it is not the case of the prosecution that the applicant/ accused had forged the signature of the complainant on the cheque. The only allegation is that the accused misused the cheque signed by the complainant, which had accidentally fallen into his hands, by filling in the date, the amount, and the name of the drawee in his own hand writing in order to cheat the complainant and draw the amount from the bank account of the complainant/respondent no.2. There is no requirement of law that aforesaid particulars in a cheque must be filled in by the drawer who has signed it. It is sufficient for drawer to sign the cheque. He may leave the particulars to be filled in by any other person including the drawee. As such, it cannot be said that a forgery has been committed simply because particulars in the cheque have been filled in by the drawee, whereas the cheque has been signed by the drawer.

In the instant case, it is apparent that a signed cheque was handed over by the complainant to his cousin the accused and thereafter, a report regarding loss of cheque and abuse of the lost cheque by the accused were lodged with an ulterior motive to pre-empt filing of a case under Section 138 of the Negotiable Instruments Act by the accused or for fabricating a defence therein. As such, the continuation of proceedings in this case before the trial Court would clearly tantamount to abuse of process of Court. As such, the proceedings cannot be allowed to continue. Consequently, the First Information Report and the proceedings arising; therefore, are liable to be quashed.

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224. INDIAN PENAL CODE, 1860 – Section 498-A

Meaning of the word 'relative' – Relatives of husband of complainant wife having blood relation with husband can be treated as relatives of her husband.

Smt. Meena Sharma and others v. State of Madhya Pradesh and another

Order dated 23.09.2015 passed by the High Court of M.P. in M.Cr.C. No. 6700 of 2014, reported in 2016 CriLJ 1386

Relevant extracts from the Order:

In Section 498-A IPC, "Relative" has not been defined but in the Ramanath Aiyyar's advanced edition the word "relative" means any person related by blood, marriage or adoption.

The blood relations be divided into two categories:-

1. Relations of Paternal side.
2. Relations of Maternal side.

1. Relations of Paternal side:-

(i) Father's father – Grandfather
(ii) Father's mother – Grandmother
(iii) Father's brother – Uncle
(iv) Father's sister – Cousin
(v) Children of uncle – Cousin
(vi) Wife of uncle – Aunt
(vii) Children of aunt – Cousin
(viii) Husband of aunt – Uncle

2. Relations of Maternal side:-

(i) Mother's father – Maternal Grandfather
(ii) Mother's mother – Maternal Grandmother
(iii) Mother's brother – Maternal Uncle
(iv) Mother's sister – Aunt
(v) Children of maternal uncle – Cousin
(vi) Wife of maternal uncle – Maternal Aunt

Keeping in view the above, it is crystal clear that the relatives of the husband of the complainant Sushma Sharma having blood relation with husband Jitendra can be treated as relatives of her husband. In the facts and circumstances of the case, it is apparent that there is prima facie sufficient evidence available against the petitioners to proceed under section 498-A of IPC.

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***225. LAND ACQUISITION ACT, 1894 – Sections 23 and 25**

Compensation, award of – Under amended section 25 of the Act, compensation of higher amount than that of claim can be awarded – Further held, it is the duty of the Court to award just and fair compensation taking into consideration the true market value and other relevant factors, irrespective of the claim made by the owner.

Ashok Kumar and anr. etc. v. State of Haryana

Order dated 18.02.2016 passed by the Supreme Court in Civil Appeal No. 2714 of 2012, reported in AIR 2016 SC 1210

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***226. LIMITATION ACT, 1963 – Section 5**

Condonation of delay – Appellant not impleaded as a party either in succession case or at appellate stage – Appellant got knowledge on 24.03.2013 when order was placed for compliance – Sufficient cause being shown extending the delay – Delay of 1047 days condoned.

Regional Commissioner v. Bhuria Bai & ors.

Order dated 13.08.2014 passed by the High Court of M.P. in Civil Revision No. 466 of 2013, reported in ILR (2015) MP 2777

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227. LIMITATION ACT, 1963 – Articles 64 and 65

Adverse possession – Acquisition of title, ingredients & proof of – A person who claims adverse possession should show:

(a) on what date he came into possession;

(b) what was the nature of his possession;

(c) whether the factum of possession was known to the other party;

(d) how long his possession has continued;

(e) his possession was open and undisturbed;

(f) his *animus possidendi* to hold as owner in exclusion to the actual owner *Animus possidendi* is one of the ingredients of adverse possession and unless the person possessing the land has the requisite animus, the period for prescription does not commence and where possession can be referred to a lawful title, it will not be considered to be adverse.

Bangalore Development Authority v. N. Jayamma

Judgment dated 10.03.2016 passed by the Supreme Court in Civil Appeal No. 2238 of 2016, reported in 2016 AIR SC 1294

Relevant extracts from the Judgment:

In the first blush, argument of the learned counsel for the respondent, viz., there is a finding of fact that respondent and her predecessors-in-title have been in continuous possession and enjoyment of the suit property for more than 12 years and, therefore, the respondent has perfected her title by adverse possession, appears to be attractive. It may appear to be a finding of fact simplicitor. However, an in depth analysis of the issue would manifest that the matter cannot be brushed aside with such a simplisitic overtone. In fact, the detailed discussion that follows would amply demonstrates that the manner in

which the issue has been approached by the courts below is itself erroneous and legally unsustainable. For this, we are not even required to discuss various nuances of the issue as the judgment of this Court in ***M. Venkatesh & Ors. v. Commissioner, Bangalore Development Authority, AIR 2016 SC (Civ) 605*** has done this exercise whereby same issue has been directly and squarely dealt with which arose in almost similar circumstances. Therefore, it would be apt to discuss the facts of that case as well as law laid down therein which would provide answers to many arguments raised by the parties before us.

In ***M. Venkatesh*** (supra) as well, land was acquired by the State Government of Karnataka and given at the disposal of the BDA. Preliminary Notification was issued on July 17, 1984 and final Notification dated November 28, 1986 was published on December 25, 1986. Determination of amount of compensation payable to the landowners having been approved by the competent authority on August 21, 1986, the BDA claimed that possession of the land was taken over from the landowners and handed over to the engineering section of the BDA by drawing a possession Mahazar on November 06, 1987. A Notification under Section 16(2) of the Act was also published in the Karnataka Gazette dated July 04, 1991 which, according to the BDA, signified that the land in question stood vested with the BDA free from all encumbrances whatsoever. Here also, after taking of the aforesaid steps by the BDA, the original land owners of the acquired land sold the said land to different persons after carving out the sites/plots. When the actual possession was sought to be taken, the said subsequent purchasers (like the respondent in the instant appeal) filed writ petitions in the High Court. Their writ petitions, along with the writ petition of the respondent herein and some others, were the subject matter of the judgment of the Division Bench of the High Court in ***John B. James & ors. v. Bangalore Development Authority & anr., 2001 AIR Kant HCR 110***. Like the respondent herein, the individuals/ subsequent purchasers in the case of ***M. Venkatesh*** (supra) were also relegated to the civil court giving them permission to file the suit if they were claiming adverse possession. Five such suits were the subject matter of the judgment in ***M. Venkatesh*** (supra). The trial court had, in fact, clubbed these suits which were decided together and decreed. The issues framed in those suits were almost the same to the ones framed in the civil suit filed by the respondent herein, as is clear from the issues which were settled by the trial court in those cases:

> "(1) Whether the Plaintiffs prove that, they have acquired and perfected their alleged title to the suit schedule properties by virtue of the alleged law on adverse possession, as claimed?
>
> (2) Whether the Plaintiffs prove their alleged lawful possession and enjoyment of the suit schedule properties, as on the date of the suit?
>
> (3) Whether the Plaintiffs further prove the alleged illegal interferences and obstructions by the defendant?
>
> (4) Whether the defendant proves that, the suit schedule properties is duly acquired by the defendant, in accordance with law and as such,

the same have stood vested with the defendant, free from all the encumbrances?

(5) Whether the Plaintiffs are entitled to the suit relief of declaration and injunction, against the defendant?

(6) What Order or Decree?"

In that case also the trial court had recorded the findings that those plaintiffs were in lawful possession on the date of the suit, such possession was for more than 12 years and, thus, the plaintiffs had perfected their title to the schedule properties by way of adverse possession. The BDA filed appeals against the decree passed by the trial court. Four appeals were allowed wherein the High Court held that the trial court was wrong in recording the finding that those four plaintiffs had established their possession. It was noticed that the plaintiffs in those appeals were claiming settled possession of vacant piece of land, which was clearly impermissible. The High Court found that there was no dispute that all the structures on the suit properties, relevant to those suits, had been demolished and that the land was a vacant piece of land all along and at all material times, including on the date of filing the suit as well as on the date of judgment. These four plaintiffs had filed appeals which were dismissed by this Court in ***M. Venkatesh*** (supra) approving the view taken by the High Court in the said four appeals. Insofar as decision in those four cases is concerned, it may not be very relevant as in the instant case it is not the vacant land with which we are concerned. However, what is relevant for us is the discussion in the fifth appeal which was filed by the BDA in the High Court wherein the High Court had affirmed the decree passed in favour of the plaintiff. The High Court noticed that in the said case the plaintiffs were running a saw mill which was in operation long prior to the filing of the suit and which continued to be in existence even on the date of the suit as well as on the date of the judgment of the High Court. Keeping in view the aforesaid position, the High Court relied upon its Division Bench judgment in ***John B. James's case*** (supra) and held that the plaintiff therein was entitled to protection against attempted eviction by the BDA. On this basis, decree passed by the trial court was affirmed. This judgment of the High Court was also appealed against, which also became the subject matter of discussion in ***M. Venkatesh*** (supra). Pertinently, this Court allowed the appeal of the BDA and set aside the aforesaid judgment of the High Court and reversed the decree passed by the trial court, thereby holding that even in this case the plaintiff was not entitled to any protection.

Following reasons can be culled out in taking the aforesaid view by this Court:

(a) The plaintiff therein had purchased the property from the original owners in terms of sale deed dated August 22, 1980, which was long after the issuance of the preliminary notification published in July 1984. Such a sale was clearly void and

non est in the eyes of law, opined the Court. In arriving at this conclusion, it referred to earlier decisions of this Court in ***U.P. Jal Nigam v. Kalra Properties Pvt. Ltd., (1996) 3 SCC 124; Ajay Kishan Singhal v. Union of India, (1996) 10 SCC 721 ; Mahavir & Anr. v. Rural Institute, Amravati & Anr., (1995) 5 SCC 335 ; Gian Chand v. Gopala & Ors., (1995) 5 SCC 528; Meera Sahni v. Lieutenant Governor of Delhi & Ors., (2008) 9 SCC 177; and Tika Ram v. State of Uttar Pradesh, (2009) 10 SCC 689***.

(b) As on the date of suit, the plaintiffs had not completed 12 years in possession of the suit property so as to entitle them to claim adverse possession against the BDA, the true owner. This finding was given on the basis that the plaintiffs could count the period of the so-called adverse possession only from the date they purchased the property and the period for which the original vendor held the property, or for that matter the date of Mahazar, could not be counted.

(c) The Court also rejected the argument of the plaintiffs that possession of the land was never taken. In this behalf, the Court took the view that one of the settled mode of taking possession is by drawing a panchnama, which part had been done to perfection according to the evidence led by the BDA. For this, the Court referred to the judgments in ***Tamil Nadu Housing Board v. A. Viswam (D) by LRs., (1996) 2 SCC 634 and Larsen & Toubro Ltd. v. State of Gujarat & Ors., (1998) 4 SCC 387***.

(d) Most pertinently, the Court also held that the plaintiffs could not claim adverse possession as, on the facts of that case, it could not be said that possession of the plaintiffs was peaceful, open, continuous and non-hostile. On this aspect, the Court took note of essentials of adverse possession, which are required to be proved, from the judgment in the case of ***Karnataka Board of Wakf v. Government of India, (2004) 10 SCC 779*** and some other judgments. Discussion in this behalf is contained in paras 15 to 18, which read as under:

> "15. Coming then to the question whether the plaintiffs-respondents could claim adverse possession, we need to hardly mention the well known and oft quoted maxim nec vi, nec clam, nec precario meaning thereby that adverse possession is proved only when possession is peaceful, open, continuous and hostile. The essentials of adverse possession were succinctly summed-up by this Court in ***Karnataka Board of Wakf v. Govt. of India, (2004) 10 SCC 779*** in the following words:
>
> > "11.In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it.

> Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. [See ***S.M. Karim v. Bibi Sakina, AIR 1964 SC 1254, Parsinni v. Sukhi, (1993) 4 SCC 375 and D.N. Venkatarayappa v. State of Karnataka, (1997) 7 SCC 567***]. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [***Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma, (1996) 8 SCC 128***]."

16. Reference may also be made to the decision of this Court in ***Saroop Singh v. Banto, (2005) 8 SCC 330,*** where this Court emphasised the importance of animus possidendi and observed:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. [See ***Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376***].
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> 30. "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has the

requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. [See ***Mohd. Mohd. Ali v. Jagadish Kalita, (2004) 1 SCC 371, SCC para 21.***]"

17. Also noteworthy is the decision of this Court in ***Mohan Lal v. Mirza Abdul Gaffar, (1996) 1 SCC 639,*** where this Court held that claim of title to the property and adverse possession are in terms contradictory. This Court observed:

"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

18. To the same effect is the decision of this Court in ***Annasaheb Bapusaheb Patil v. Balwant, (1995) 2 SCC 543,*** where this Court elaborated the significance of a claim to title viz-a-viz the claim to adverse possession over the same property. The Court said:

"15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

19. After taking note of the principle of law relating to adverse possession in the aforesaid manner, this Court commented about the erroneous approach of the High Court in the following manner:

> "19. The Courts below have not seen the plaintiff-respondent's claim from the above perspectives. The High Court has, in particular, remained oblivious of the principle enunciated in the decisions to which we have referred herein above. All that the High Court has found in favour of the plaintiffs is that their possession is established. That, however, does not conclude the controversy. The question is not just whether the plaintiffs were in possession, but whether they had by being in adverse possession for the statutory period of 12 years perfected their title. That question has neither been adverted to nor answered in the judgment impugned in this appeal. Such being the case the High Court, in our opinion, erred in dismissing the appeal filed by the appellant-BDA. The fact that the plaintiffs had not and could not possibly establish their adverse possession over the suit property should have resulted in dismissal of the suit for an unauthorised occupant had no right to claim relief that would perpetuate his illegal and unauthorised occupation of property that stood vested in the BDA."

In addition to the discussion contained in ***M. Venkatesh case noted above, we may also add what was held in P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors., (2007) 6 SCC 59***:

> "5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (See ***Downing v. Bird; Arkansas Commemorative Commission v. City of Little Rock; Monnot v. Murphy; and City of Rock Springs v. Sturm***)."

In ***Rama Shankar & Anr. v. Om Prakash Likhdhari & Ors., (2013) 6 ADJ 119,*** the Allahabad High Court has observed as under:

> "21. The principle of adverse possession and its consequences wherever attracted has been recognized in the statute dealing with limitation. The first codified statute dealing with limitation came to be enacted in 1840. The Act 14 of 1840 in fact was an enactment applicable in England but it was extended to the territory of Indian continent which was under the reign of East India Company, by an authority of Privy Council in the ***East India Company v. Oditchurn Paul, 1849*** (Cases in the Privy Council on Appeal from the East Indies) 43.
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> xx xx xx

> 23. The law of Prescription prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is acquired or extinguished. A prescription, by which a right is acquired, is called an 'acquisitive prescription'. A prescription by which a right is extinguished is called 'extinctive prescription'. The distinction between the two is not of much practical importance or substance. The extinction of right of one party is often the mode of acquiring it by another. The right extinguished is virtually transferred to the person who claims it by prescription. Prescription implies with the thing prescribed for is the property of another and that it is enjoyed adversely to that other. In this respect it must be distinguished from acquisition by mere occupation as in the case of res nullius. The acquisition in such cases does not depend upon occupation for any particular length of time."

The aforesaid analysis of the judgment in ***M. Venkatesh*** (supra) amply shows that it is squarely and directly applicable to the facts and circumstances of the present case. In the first instance, it shows that reliance of the respondent herein on the judgment of ***John B. James*** (supra) is of no avail. It would further demonstrate that the findings of the court below that only paper possession was taken and actual possession was not taken also becomes meaningless as the manner of taking possession in the instant case was also identical. In addition, it is pertinent that the respondent herein, in para 10 of the plaint, had herself admitted that the officials of the BDA had come to the suit property on April 24, 2001 and demolished the existing structure. This act of the BDA would amply demonstrate that there was no unhindered, peaceful and continuous possession of the suit land.

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***228. MOTOR VEHICLES ACT, 1988 – Section 147**

Driver of offending vehicle was having license to drive light motor vehicle whereas he was driving a transport vehicle – Insurance Company is not liable but in the interest of justice, Insurance Company may be directed to pay compensation to the claimants as they are third party – The Insurance Company shall be entitled to recover the same compensation from the driver and owner.

Shameena Bano (Smt.) & ors. v. Ram Naresh Patel & ors.

Judgment dated 11.08.2015 passed by the High Court of M.P. in M.A. No. 2808 of 2010, reported in ILR (2015) MP 2469

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***229. MOTOR VEHICLES ACT, 1988 – Section 147**

Liability of Insurance Company – If the cover note *prima facie* appears to be genuine – It was properly stamped by seal of company – Held, vehicle was insured by the Insurance Company at the time of accident.

Vimla (Smt.) & anr. v. Sheikh Jabbar

Judgment dated 26.11.2014 passed by the High Court of M.P. in M.A. No. 1670 of 2007, reported in ILR (2015) MP 2739

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***230. MOTOR VEHICLES ACT, 1988 – Section 163**

EVIDENCE ACT, 1872 – Section 59

Motor Accidents Claims Tribunal although held that damage was caused to pair of bullocks and the bullock cart, but rejected the claim petition holding that appellant has failed to prove that he was owner of the same – Held, provisions of Evidence Act do not apply with full force – Certificate issued by the Gram Panchayat conveys that the property (i.e. pair of bullock and bullock cart) belonged to the injured appellant – Hence, appeal was accepted and respondent was directed to pay compensation of ` 33,000/- towards loss of property.

Gaurishankar v. Speciality Electromars & ors.

Judgment dated 20.11.2014 passed by the High Court of M.P. in M.A. No. 2364 of 2005, reported in ILR (2015) MP 2735

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***231. MOTOR VEHICLES ACT, 1988 – Section 163**

Notional income – Uneducated and unskilled person – Held, sum of Rs. 100/- per day calculated on the basis of the decision rendered by the Supreme Court in case of *Laxmi Devi v. Mohammad Tabbar and another, 2008 ACJ 1488 (SC)* is proper.

Kishanlal & ors. v. Hemraj Jaiswal & ors.

Judgment dated 03.07.2014 passed by the High Court of M.P. in M.A. No. 1544 of 2013, reported in ILR (2015) MP 2467

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232. MUSLIM LAW:

Gift – Registered gift deed in respect of undivided divisible property in possession of tenant, validity of and how it can be effected – Such a gift is valid – Further held, while gift of immovable property is not complete unless the doner parts with the possession and donee enters into possession – But if the property is in occupation of tenant, gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation – Also held,

gift of property which is being capable of division is irregular but can be perfected and rendered valid by subsequent partition or delivery.

Khursida Begum (D) by LRs and others v. Komammad Farooq (D) LRs and another

Order dated 01.02.2016 passed by the Supreme Court in Civil Appeal No. 2845 of 2006, reported in 2016 RN 171 (SC)

Relevant extracts from the Order:

Validity of gift deed dated 24th February, 1976 executed by late Hazi Azimuddin in favour of the plaintiff Rafiuddin is the sole question for consideration. The courts below have held the same to be a gift of undivided share of property which was capable of division and thus invalid under Muslim Law being hiba-bil-musha. It has also been held that gift was of no effect as possession was not delivered to the donee. Factually, the gift was held to be genuinely executed.

The trial Court dismissed the suit. It was held that no family arrangement had taken place as claimed by the defendants. Hazi Azimuddin alone was receiving the rent from the tenants till his death as shown by the rent receipts and other documents which were proved on record. Gift deed dated 24th February, 1976 was duly executed. Hazi Azimuddin himself had gone to the office of the Sub Registrar. The case of the defendants that he was not in a fit state of health was not accepted. However, gift of undivided property was not valid as the plaintiff was never given actual or symbolic possession of one-third share of property and that the gift was hiba-bilmusha. The High Court dismissed the appeal.

Learned counsel for the appellants submitted that once the gift was held to have been duly proved in favour of the appellant who was minor, transfer of possession was not required to be proved. Further, the property being in possession of the tenant, execution of gift deed by itself amounted to transfer of constructive possession. It was further submitted that the gift could not have been declared invalid on the ground that it related to undivided share of divisible property which was not the plea in the written statement. There was no absolute bar to such gift. Even if there is such a bar in certain situations, there are exceptions to the rule which apply. One of the exceptions is that property is freehold property in a large commercial town which is clearly applicable to the present case. The courts below thus erred in holding the gift to be illegal on that ground.

Learned counsel for the parties have referred to the principles of Mohammedan Law as compiled in "Mulla Principles of Mohammedan Law, 20th Edition by Lexis Nexis, paras 152 and 160 which are :

> ***"152. Delivery of possession of immovable property (1) Where donor is in possession*** – A gift of immovable property of which the donor is in actual possession is not complete, unless

the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.

(2) Where property is in the occupation of tenants – A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee, or by delivery of the title deed or by mutation in the Revenue Register or the landlord's sherista. But if the husband reserves to himself the right to receive rents during his lifetime and also undertakes to pay Municipal dues, a mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete.

(3) Where donor and donee both reside in the property – No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The principle for the determination of questions of this nature was thus stated by West, J. in a Bombay case.

"When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession without any physical departure or formal entry. 160. Gift of mushaa where property divisible. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated.

Exceptions – A gift of an undivided share (mushaa), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases – (1) where the gift is made by one co-heir to another. (2) where the gift is of a share in a zamindari or taluka (3) where the gift is of a share in freehold property in a large commercial town. (4) where the gift is of shares in a land company."

A perusal of the above shows that while gift of immovable property is not complete unless the donor parts with the possession and donee enters into possession but if the property is in occupation of tenants, gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation. It is further clear that gift of property which is capable of division is irregular but can be perfected and rendered valid by subsequent partition or delivery. Exceptions to the rule are : where the gift is made by one co-heir to the other; where the gift is of share in a zemindari or taluka; where gift is of a share in freehold property in a large commercial town, and where gift is of share in a land company.

The courts below appear to have quoted "Mohammedan Law" by B.R. Verma, Law Publishers (India) Pvt. Ltd, 13th Edition which is by and large to same effect as Mulla's book on the subject.

The courts below have held the gift to be invalid on the ground that it was gift of undivided property which is capable of division and was not covered by any of the exceptions to the rule that gift of such property is irregular. It is submitted by learned counsel for the appellant that the property is freehold property in the city of Jaipur, which is a large commercial town. This has been wrongly ignored by the courts below on the ground that there was no pleading or proof to that effect. Description of property mentioned in plaint and in the gift deed itself shows that it is commercial property in the city of Jaipur which is the capital of the State of Rajasthan and is, thus, a large commercial town. Requirement of possession is also met when right to collect rent has been assigned to the plaintiff under the gift deed itself, genuineness of which stands proved.

We find force in the submission. The gift had no infirmity under the Muslim Law either on the ground that the possession was not delivered or on the ground that the gift was hit by Hiba-bil-Musha. The gift was by father to his minor son. Property is under tenancy. The gift is by a registered deed. Right to collect rent stands transferred to donee. The property is located in the city of Jaipur which is mentioned in Para 2 of the plaint as well as in the gift deed. The courts below are not justified in not giving effect to the gift which has been held to be genuine.

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233. N.D.P.S. ACT, 1985 – Section 8 r/w/s 21/22

Whether syrups Cosome and Codex fall within the definition of "manufactured drug" or "psychotropic substance" made punishable under the Act?

Held, a preparations containing not more than 100 milligrams of drug codeine phosphate per dosage unit and with concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice, is exempted from the application of section 21 of the Act – So the syrups Cosome and

Codex or Phensedyle cough syrup would not fall under definition "manufactured drug" or "psychotropic substance" of Section 8 r/w/s 21/22 of the Act.

Shiv Kumar Gupta v. The State of Madhya Pradesh

Order dated 16.09.2015 passed by the High Court of M.P. in Criminal Revision No. 200 of 2015 (Unreported Judgment)

Relevant extracts from the Order:

The question that arises for consideration before this Court is whether any of the above drugs or substances fall within the definition of "manufactured drug" or "psychotropic substance" made punishable under the Act?

Section 21 of the Act provides for punishment for contravention in relation to manufactured drugs and preparations. The term "Manufactured Drug" has been defined in section 2 (xi) of the Act. It inter alia means a narcotic substance or preparation which the Central Government may by notification in official gazette, declare to be a manufactured drug.

In exercise of powers conferred by sub-clause (b) of clause (xi) of section 2 of the Act, the Central Government had issued Notification No. S.O.826 (E), dated 14th November, 1985, which declares certain narcotics substances to be manufactured drugs. The Entry No.35 of the Notification reads as follows:

> 'Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice."

From the perusal of the aforesaid entry in the notification, it is clear that a preparations containing not more than 100 milligrams of drug codeine phosphate per dosage unit and with concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice, is exempted from the application of section 21 of the Act.

Now the Court shall consider as to what was the concentration of Codeine Phosphate in undivided preparations? At the outset let it be mentioned that there is no report of any Forensic Science Laboratory on record. However, in the case of ***Amrik Singh v. State of Punjab, 1996 Cri.L.J. 3329,*** the Punjab and Haryana High Court was faced with similar situation. In that case, cough syrup Phensedyle was seized from the possession of the accused in 125 m.l. bottles. Each bottle contained codeine phosphate in proportion of 9.5 m.gs. per 5 m.ls. The sample was sent to Forensic Science Laboratory and as per the report of

FSL the concentration of Codeine Phosphate in undivided preparations came to 1.9%. In the instant case, syrup Codex and Cosome contained Codeine Phosphate in proportion of 10 m.gs. per 5 m.ls., which would surely be less than 2.5% in concentration in undivided preparations.

Likewise, in the case of ***Deep Kumar v. State of Punjab, 1997 Cri.L.J. 3104,*** on similar grounds, the Punjab & Haryana High Court held that Phensedyle cough syrup was not a manufactured drug, as defined under the Act.

It is not disputed that both cough syrups namely Codex and Cosome (LCD) are established in therapeutic practice for treatment of cough.

The argument that such syrups are being widely used by the drug addicts as substitutes for narcotic drugs and psychotropic substances by itself, is not sufficient to prosecute the applicant. In this regard, this Court adopts with approval the observations made in paragraph No. 20 of the judgment rendered in the case of ***Rajeev Kumar v. State of Punjab and others reported in 1998 Cri.L.J. 1460,*** which read as follows:

> "It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all kinds of intoxicating substances. It may be stated that all penal statutes ought to be construed strictly, that is to say, that the Court must say that the thing charged as an offence is within the plain meaning of the words used and must not strain the words so as to bring it within the mischief of the statute. Maxwell on Interpretation of Statutes, 12th Edition at page 239 says, the strict construction of penal statutes seems to manifest itself in four ways in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

In aforesaid view of the matter, even if all allegations contained in the charge sheet and the documents filed therewith are taken at their face value and taken to be true, no offence under section 8 read with section 21 of the NDPS Act is made out against the applicant.

It is not disputed that the applicant is carrying on business as retail druggist under the name and style of Shiv Medical Store. If the petitioner has contravened any provision of the Drugs and Cosmetics Act, 1940, or the Rules framed thereunder, Drugs Inspector appointed under the that act shall be free to initiate requisite action against the petitioner in accordance with the provisions of that Act.

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234. NATIONAL SECURITY ACT, 1980 – Section 5-A

Section 5-A of the Act, applicability of – Section 5-A of National Security Act, 1980 will have application if the detaining authority is able to demonstrate that even one ground is valid for issuing the order of detention.

Mangal Singh @ Mangu v. State of M.P. & ors.

Judgment dated 14.09.2015 passed by the High Court of M.P. in Writ Petition No. 13987 of 2015, reported in ILR (2015) MP 3157 (FB)

Relevant extracts from the Judgment:

Section 5-A of National Security Act, 1980 will be applicable if the detaining authority is able to demonstrate that even one ground is valid for issuing the order of detention. The fact that other grounds are invalid, will have no effect on the validity of the detention order. It was also held that detention order if it is saved by section 5-A of National Security Act, 1980 cannot be set aside due to non-mentioning of material facts like acquittal or detention of detenue. It is not required to plead specifically all the grounds of detention as it is a matter of legal presumption under section 5-A and it is not needed to restate in Counter Affidavit to be filed by the detaining authority.

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235. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Debt or other liability – The cheque in question was given for security against the mobilization advance, so the entire mobilization amount cannot be recovered by premature lodging of the cheques before the concerned bank – Held, the amount of such cheques cannot be considered as debt or other liability.

Mahinder Singh Bhasin v. M/s Ssangyong Engineering & Construction Co. Ltd.

Order dated 14.08.2015 passed by the High Court of M.P. in M.Cr.C. No. 3547 of 2010, reported in ILR (2015) MP 2505

Extracts from the Order:

According to the explanation given in that provision, the word "Debt or other liability" means a legally enforceable debt or other liability. When the dispute between the parties was not settled and the respondent had to pay the expenditure done by the applicant to fulfill the terms and conditions of the agreement as a sub-contractor then, the cheques which were kept for the security purpose could not be encashed. Those cheques were given against the mobilization advance and therefore, the mobilization advance was not legally enforceable liability at that time when the dispute between the parties was not settled.

When cheques issued by the applicant were issued for security purpose against mobilization advance and those were submitted to the bank for withdrawal

of the amount in a premature stage then, the entire pleadings of the complaint made by the respondent does not disclose the commission of any offence and therefore, in the light of judgment passed in case of ***State of Haryana v. Ch. Bhajanlal, AIR 1992 SC 604,*** these complaints are not legally maintainable. When complaint cannot be prosecuted under section 138 of N.I. Act, it is a good case in which inherent powers of this Court under section 482 of the CrPC may be invoked and complaint filed by the respondents against the applicant may be quashed.

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***236. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141**

In case of a company, vicarious liability of other persons will not arise till the company is prosecuted – Only direct involvement of an officer of a company would make such officer liable u/s 141 (2) – The accused being in-charge of and responsible for the conduct of business of the company must be specifically averred in the complaint u/s 141 – The specific averment may be direct or indirect. ***State of Haryana v. Brij Lal Mittal, (1998) 5 SCC 343; Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd., (2002) 7 SCC 655; National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal & Anr., (2015) 1 SCC 103; Tamil Nadu News Print & Papers Ltd. v. D. Karunakar & Ors., (2010) 3 SCC 330, A.K. Singhania v. Gujarat State Fertilizer Company Ltd. & Anr., (2013) 16 SCC 630; S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another, (2007) 4 SCC 70; Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581; Saroj Kumar Poddar v. State (NCT of Delhi) and another, (2007) 3 SCC 693 and Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi and others, (2007) 5 SCC 54*** **relied on.**

Secunderabad Health Care Ltd. v. Secunderabad Hospitals (P) Ltd., (1999) 96 Comp Cas 106 (AP); V. Sudheer Reddy v. State of A.P., (2000) 107 Comp Cas 107 (AP); R. Kanan v. Kotak Mahindra Finance Ltd., 2003) 115 Comp Cas 321 (Mad); Lok Housing ad Constructions Ltd. v. Raghupati Leasing and Finance Ltd., (2003) 115 Comp Cas 957 (Del) and Sunil Kumar Chhaparia v. Dakka Eshwaraiah, (2002) 108 Comp Cas 687 **(AP) cited with approval.**

Tamil Nadu News Print & Papers Ltd. v. D. Karunakar & Ors., (2015) 8 SCALE 733 referred.

Standard Chartered Bank v. State of Maharashtra & others Etc.

Judgment dated 06.04.2016 passed by the Supreme Court in Criminal Appeal No. 271 of 2016, reported in 2016 (2) Crimes 14 (SC)

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***237. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147**

(i) **Whether the compounding fee as applicable in negotiable instruments cases pursuant to the judgment of *Damodar S. Prabhu v. Sayyad Baba Lal H., (2010) 5 SCC 663 (dated 03/05/2010)* is applicable to cases which are compounded after 03.05.2010 retrospectively irrespective of the date on which the cheque is executed ? Held, Yes**

(ii) **Whether compounding fee is levyable in respect of compounding of an offence under section 138 of the Act if cheque is dated prior to 03.05.2010 (i.e. prior to the pronouncement of judgment in *Damodar S. Prabhu's case* (supra)? Held, Yes – Further held, the relevant date will be the date on which application for compounding is filed and not the date on which the cheque is issued.**

Virendra v. Shri Ram Transport Finance Co. Ltd.

Judgment dated 02.09.2015 passed by the High Court of M.P. in Criminal Revision No. 2404 of 2015 (DB) (Unreported)

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238. PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Object Explained CRIMINAL PROCEDURE CODE, 1973 – Section 482

Quashing the proceedings – Scope of interference u/s 482/397 Cr.P.C.

Dr. (Smt.) Pooja Agrawal v. Shivbhan Singh Rathore & Anr.

Order dated 14.10.2015 passed by the High Court of M.P. in Misc. Criminal Case No. 5967 of 2009, reported in 2016 CriLJ 1817

Extracts from the Order:

The Act of 1994 is an outcome of concern shown by both the Houses of Parliament. A Joint Committee of both the Houses prepared and presented a report in December, 1992. On the basis of report/recommendations aforesaid, a Bill was introduced in the Parliament. The basic reason of the worry/concern was that in the recent past Pre-natal Diagnostic Centres sprang up in the urban areas of the country using prenatal diagnostic techniques for determination of sex of the foetus. Such centres became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was that such centres became centres of female feticide. Such abuse of the technique is against the female sex and affects the dignity and status of women. Various Organisations working for the welfare and uplift of the women raised their heads against such an abuse. Justice Leila Seth in her book "Talking of Justice" has quoted Rabindranath Tagore. Tagore said "every time a child is born, it brings with it the hope that God is not yet disappointed

with man." After quoting Tagore, learned author expressed her pain by saying that "it appears to me that when a girl child is born in India, more often than not, man is disappointed with God. The birth of first daughter is often considered bad luck, the second a disaster and third a catastrophe". Rabindra Nath Tagore long back said:-

"O' Lord, why you have not given
woman the right to conquer her destiny?
Why does she have to wait
head bowed by the road side
Waiting with tired patience
hoping for a miracle on the morrow"

Needless to mention that said morrow has not yet come. Unless the society is enlightened and law is enforced strictly, such goal cannot be achieved. Despite showing concern and formulation of law on the subject, it is a matter of common knowledge that such incidents of female foeticide are going on and that is the reason sex ratio is falling down in various cities. This is happening mainly in Northern part of India. The Act of 1994 and Rules made there under needs to be strictly implemented.

As analyzed, the trial Court has not taken cognizance on mere perusal of complaint and statements of two witnesses. It has applied mind on relevant record also. Hence, the judgment of ***Pepso Foods Ltd.*** (supra) is of no assistance to the petitioner in the present case.

In ***Sharad Kumar Sanghi v. Sangita Rane, AIR 2015 SC (Cri) 1636*** the Apex Court considered the words "sufficient ground for proceeding". It means that grounds should be made out in the complaint for proceeding against the respondent. In my view, neither the allegations in the complaint are vague nor it can be said that it does not constitute an offence under the Act. There were sufficient grounds for proceeding against the petitioner and, therefore, this judgment has no application. Same is the view about the judgment of ***Monju Roy & ors v. State of West Bengal, AIR 2015 SC (Cri) 1628.*** The said matter also deals with omnibus statement. In the present case, there are specific allegations against the petitioner in the complaint. Hence, this judgment is of no help to the petitioner. In ***D.P. Gulati, Manager Accounts M/s Jetking Infotrain Ltd. v. State of Uttar Pradesh & anr., AIR 2015 SC 3760,*** the Apex Court was dealing with vexatious complaint. At this stage, it cannot be said that the complaint is vexatious. In ***Rishipal Singh*** (supra), the Supreme Court dealt with the scope of Section 482 CrPC. No doubt, powers under Section 482 CrPC are wide and proceedings can be quashed if certain parameters are satisfied. However, it is noteworthy that the Apex Court in ***Amit Kapoor vs. Ramesh Chander and another, (2012) 9 SCC 460,*** laid down broad principles for exercise the jurisdiction under Section 397/482 CrPC. It is

held that the principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of a charge either in exercise of jurisdiction under Section 397 or Section 482 CrPC or together, as the case may be, can be summarised. Though there are no limits of the powers of the Court under Section 482 CrPC but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 CrPC should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, as it an abuse of the process of court leading to injustice. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction. In exercise of its jurisdiction under Section 228 and/or under Section 482, the court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The court has to consider the record and documents annexed with by the prosecution. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

If the litmus test of the judgment in ***Amit Kapoor*** (supra) is applied in the factual matrix of the present matter, it cannot be said that the court below has committed any legal error in taking cognizance of the matter. Thus, no interference is required by this Court at this stage.

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239. PREVENTION OF CORRUPTION ACT, 1988 – Section 2 (c)

INDIAN PENAL CODE, 1860 – Section 21

Public Servant – General Manager of a multi-State co-operative bank – The High Court applied definition of "State" under Art. 12 of the Constitution of India to society concerned and held that respondent General Manager of cooperative bank was not a public servant since no deep and pervasive control was exercised by authorities over the bank or its day-to-day activities, internal management was not governed and controlled by Government or its authorities or Bank was not aided or funded in any manner by Government or its authorities nor service conditions of employees were regulated by them.

Held, High Court erred in entering into elaborate deliberation to arrive at conclusion that respondent was not a public servant – Any grant or any aid at time of establishment of society or in any construction or in any structural concept or any aspect would be "aid" u/s 2(c)(ix) of the 1988 Act – "Sprinkle of aid" to society would also bring an employee within definition of "public servant" since concept in entirety has to be understood in the backdrop of corruption.

State of Maharashtra and others v. Brijlal Sadasukh Modani

Judgment dated 15.12.2015 passed by the Supreme Court in Criminal Appeal No. 1329 of 2009, reported in (2016) 4 SCC 417

Relevant extracts from the Judgment:

As far as the State of Madhya Pradesh is concerned, there is no difficulty as the M.P. Cooperative Societies Act, 1960 itself declares the authorities as public servant. The issue that arises for consideration in the present case is whether a multi-State society which handles crores of rupees and the persons who handle such huge amounts of money should be allowed to escape the rigour of corruption charges under the 1988 Act on the ground that they do not come under the ambit and sweep of Article 12 of the Constitution or solely because of construction placed under Section 2(c)(ix) of the 1988 Act. That apart, another significant issue also arises for consideration. Section 2(c)(ix) to make an employee of a cooperative society provides certain conditions or conditions precedent to be satisfied and, therefore, the question would be, whether the High Court by only stating that it is the admitted position should have quashed the proceeding.

On a perusal of the decisions of this Court, it is manifest that stress has always been laid on Section 2(c)(ix) of the 1988 Act as a consequence of which the fallout is that the registered cooperative society must have received financial aid from the Central Government or the State Government or any other institution mentioned therein. In ***State of Maharashtra v. Prabhakarrao, (2002) 7 SCC 636,*** the Court was dealing with the issue whether the High Court was justified in holding that the accused was not a public servant. In the said case, the High Court had placed heavy reliance on the authority of ***State of Maharashtra v. Laljit Rajshi Shah, (2000) 2 SCC 699***.

In *Prabhakarrao* (supra), the court has distinguished the said decision and referred to Section 2 of the 1988 Act and in that context observed thus:

> "Under clause (iii) of Section 2 (c), any person in the service or pay of a corporation established by or under a Central, Provincial or State Act or an authority or a body owned or controlled or aided by the Government and under clause (ix) the President, Secretary and other office-bearers of a registered cooperative society engaged in agriculture,

industry, have been included in the definition of 'public servant'.

The question for consideration is whether the accused in the present case comes within the purview of the aforementioned clauses or any other clause of section 2 (c) of the Prevention of Corruption Act, 1988. For determination of the question, enquiry into facts, relating to the management, control and funding of the society, is necessary to be ascertained."

As we notice, the High Court has really been swayed by the concept of Article 12 of the Constitution, the provisions contained in the 1949 Act and in a mercurial manner taking note of the fact that the multi-State society is not controlled or aided by the Government has arrived at the conclusion. In our considered opinion, even any grant or any aid at the time of establishment of the society or in any construction or in any structural concept or any aspect would be an aid. We are inclined to think so as the term "aid" has not been defined. A sprinkle of aid to the society will also bring an employee within the definition of "public servant". The concept in entirety has to be understood in the backdrop of corruption.

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***240. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 19 and 20**

(i) Offence of taking illegal gratification under section 7 of the Act – Demand and acceptance – Presumption under section 20 of the Act, proof of – Proof of demand is a *sine qua non* – Further held, initial burden of proving that the accused accepted or obtained the amount other than legal remuneration is upon the prosecution – It is only when such burden being discharged, then the burden of proving the defense shifts upon the accused and a presumption would arise under section 20 of the Act.

(ii) Sanction for prosecution, validity of.

Facts of the case:

File regarding sanction for prosecution was first submitted to the Secretary of the concerning department thereafter forwarded to the Minister concerned who upon being satisfied granted sanction – Thereafter, Under Secretary issued the order of sanction – As the Under Secretary was only carrying out the decision of the Government by issuing sanction order on sanction being properly granted by the Minister itself, sanction held to be valid.

V. Sejappa v. State By Police Inspector Lokayukta, Chitradurga

Judgment dated 12.04.2016 passed by the Supreme Court in Criminal Appeal No. 747 of 2008, reported in AIR 2016 SC 2045

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***241. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 12**

INDIAN PENAL CODE, 1860 – Sections 498-A and 506

CRIMINAL PROCEDURE CODE, 1973 – Section 482

Application under section 12 of the Domestic Violence Act, limitation therefor – There is no limitation prescribed for filing the application – However, it must be filed within a reasonable time.

Swapnil Kolhe & ors. v. Smt. Kirti Kolhe

Order dated 26.08.2014 passed by the High Court of M.P. in Misc. Criminal Case No. 8955 of 2013, reported in 2015 (IV) MPJR SN 8

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242. SERVICE LAW:

Right to lien, availability of – Lien can be against a post and not on the place – On revocation of suspension order, it is not open to contend that the lien would be against the place where the employee was working at the relevant time when he was placed under suspension – It can only be against a post and not on the place – Further held, if the authority is competent to revoke suspension as also to transfer the employee, it is open to such authority to pass a composite order – Whether a transfer order can withstand the judicial scrutiny, will be an independent issue to be decided on settled legal principles.

Asif Mohd. Khan v. State of M.P. & ors.

Judgment dated 14.09.2015 passed by the High Court of M.P. in Writ Petition No. 7440 of 2013, reported in ILR (2015) MP 3141 (FB)

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***243. SPECIFIC RELIEF ACT, 1963 – Section 6**

Plaintiff dispossessed on 27.01.2004 – Suit for possession filed on 14.10.2014 – It was contended that after death of her husband, petitioner/ plaintiff came to know of the unlawful act of defendant in October 2004 – Report of dispossession was lodged in police on 27.01.2004 itself – Since the suit was not filed within six months, it is barred by limitation.

Chanda Bai Bhura (Smt.) v. Inderchand Bhura

Order dated 22.07.2014 passed by the High Court of M.P. in Civil Revision No. 191 of 2014, reported in ILR (2015) MP 2773

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244. SPECIFIC RELIEF ACT, 1963 – Sections 10 and 16 (c)

REGISTRATION ACT, 1908 – Section 49 Proviso

Suit for specific performance – Evidence – Unregistered agreement of sale, effect and use of – When an unregistered document is tendered in evidence, not as evidence of a completed sale, but as proof of an agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under proviso to section 49 of the Act of 1908 – The admission of an unregistered sale deed by the Court in such cases would be in consonance with the proviso appended to section 49.

Further held, suit for specific performance cannot be dismissed solely on the ground that agreement of sale was unregistered.

Akshay Doogad v. State of M.P. and others

(Oral) Judgment dated 18.08.2015 passed by the High Court of M.P. in First Appeal No. 323 of 2014, reported in 2016 (2) MPLJ 156 (DB)

Relevant extracts from the Oral Judgment:

The plaintiff has been non-suited only on the ground that the suit agreement being unregistered document was inadmissible in evidence and, therefore, decree of specific performance on the basis of such agreement cannot be granted. This view taken by the Trial Court is in the teeth of the exposition of the Supreme Court in the case of ***S. Kaladevi*** (supra). This very contention has been negatived by the Supreme Court in Paragraph Nos.11, 12 and 16 of the said decision, in particular, which read thus:-

> "11. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof

of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

12. Recently in the case of ***K.B. Saha and Sons Private Limited v. Development Consultant Limited1, (2008) 8 SCC 564*** this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

> ".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."

This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.
5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

x x x

16. The argument of learned counsel for the respondents with regard to Section 3(b) of 1963 Act is noted to be rejected. We fail to understand how the said provision helps the respondents as the said provision provides that nothing in 1963 Act shall be deemed to affect the operation of 1908 Act, on documents. By admission of an unregistered sale deed in evidence in a suit for specific performance as evidence of contract, none of the provisions of 1908 Act is affected; rather court acts in consonance with proviso appended to Section 49 of 1908 Act."

The Supreme Court has opined that when an unregistered document is tendered in evidence, not as evidence of a completed sale, but as proof of an agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of the Act of 1908. The Court went to observe that admission of an unregistered sale deed by the Court in such cases would be in consonance with the proviso appended to Section 49 of the Act of 1908. Considering this decision, the view taken by the trial Court on the issue under consideration will have to be overturned. The reason why the trial Court has not adverted to this Supreme Court decision has remained unexplained. We need not dilate on that matter as we have no hesitation in accepting the argument of the appellant that the sole basis on which the relief claimed by the appellant in the suit for specific performance has been rejected cannot be countenanced.

We, accordingly, reverse the said opinion of the trial Court and as a necessary corollary decree the suit in its entirety by granting relief of specific performance to the appellant as prayed.

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***245. VIDHAN SABHA SACHIVALAYA SEVA ADHINIYAM, 1981 (M.P.) – Section 5 (4) FUNDAMENTAL RULES (M.P.) – Rule 56 (2))**

Compulsory retirement, justification of – Explained.

During 20 years of service tenure, respondent had received poor grading in last 15 years – There were adverse remarks with regard to her working and conduct – Physical capacity of employee was also found to be very poor – Her performance during last few years had deteriorated and even her leave record was not good – As there was enough material on record suggesting the respondent to be dead wood, action taken of retiring her compulsorily under F.R. 56, held, proper.

Vidhan Sabha Sachivalaya & anr. v. Ku. Kamla Yadav

Order dated 08.04.2015 passed by the High Court of M.P. in W.A. No. 125 of 2015, reported in ILR (2015) M.P. 1666 (DB)

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PART-IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

NO. 3 OF 2016

[31st December, 2015.]

The following Act of Parliament received the assent of the President on the 31st December, 2015, and is hereby published for general information:—

An Act to amend the Arbitration and Conciliation Act, 1996.

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

1. Short title and commencement – (1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2015.

(2) It shall be deemed to have come into force on the 23rd October, 2015.

2. Amendment of Section 2 – In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section 2,—

(I) in sub-section (1),—

(A) for clause (e), the following clause shall be substituted, namely:— '(e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;';

(B) in clause (f), in sub-clause (iii), the words "a company or" shall be omitted;

(II) in sub-section (2), the following proviso shall be inserted, namely:—

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.".

3. Amendment of Section 7 – In section 7 of the principal Act, in sub-section (4), in clause (b), after the words "or other means of telecommunication", the words "including communication through electronic means" shall be inserted.

4. Amendment of Section 8 – In section 8 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely: —

"(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.";

(ii) in sub-section (2), the following proviso shall be inserted, namely:—

"Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.".

5. Amendment of Section 9 – Section 9 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:—

"(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.".

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

(i) in sub-sections (4), (5) and (6), for the words "the Chief Justice or any person or institution designated by him" wherever they occur, the words "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court" shall be substituted;

(ii) after sub-section (6), the following sub-sections shall be inserted, namely:—

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.";

(iii) in sub-section (7), for the words "the Chief Justice or the person or institution designated by him is final", the words "the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision" shall be substituted;

(iv) for sub-section (8), the following sub-section shall be substituted, namely:—

"(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.";

(v) in sub-section (9), for the words "the Chief Justice of India or the person or institution designated by him", the words "the Supreme Court or the person or institution designated by that Court" shall be substituted;

(vi) for sub-section (10), the following sub-section shall be substituted, namely:—

"(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.";

(vii) in sub-section (11), for the words "the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made", the words "different High Courts or their designates, the High Court or its designate to whom the request has been first made" shall be substituted;

(viii) for sub-section (12), the following sub-section shall be substituted, namely:—

'(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

(b) where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.';

(ix) after sub-section (12), the following sub-sections shall be inserted, namely:—

"(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.— For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.''.

7. Insertion of new section 11A – After section 11 of the principal Act, the following new section shall be inserted, namely:—

"***11A. Power of Central Government to amend Fourth Schedule – (1)*** If the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend

the Fourth Schedule and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft 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 disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by the both Houses of Parliament.''.

8. Amendment of Section 12 – In section 12 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.";

(ii) after sub-section (4), the following sub-section shall be inserted, namely:—

"(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

9. Amendment of Section 14 – In section 14 of the principal Act, in sub-section (1), in the opening portion, for the words "The mandate of an arbitrator shall terminate if ", the words "The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if " shall be substituted.

10. Substitution of new section for Section 17 – For section 17 of the principal Act, the following section shall be substituted, namely:—

"17. Interim measures ordered by arbitral tribunal – (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.".

11. Amendment of Section 23 – In section 23 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:—

"(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the

arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.".

12. Amendment of Section 24 – In section 24 of the principal Act, after the proviso to sub-section (1), the following proviso shall be inserted, namely:—

"Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.".

13. Amendment of Section 25 – In section 25 of the principal Act, in clause (b), at the end, after the words "allegations by the claimant", the words "and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited" shall be inserted.

14. Amendment of Section 28 – In section 28 of the principal Act, for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.".

15. Insertion of new sections 29A and 29B – After section 29 of the principal Act, the following new sections shall be inserted, namely:—

"***29A. Time limit for arbitral award*** – (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

29B. Fast track procedure – (1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.''.

16. Amendment of Section 31 – In section 31 of the principal Act,—

(i) in sub-section (7), for clause (b), the following clause shall be substituted, namely:—

'(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978.';

(ii) for sub-section (8), the following sub-section shall be substituted, namely:—

"(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.".

17. Insertion of new section 31A – After section 31 of the principal Act, t h e following new section shall be inserted, namely:—

'***31A. Regime for costs –*** (1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908, shall have the discretion to determine—

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.'.

18. Amendment of Section 34 – In section 34 of the principal Act,—

(I) in sub-section (2), in clause (b), for the Explanation, the following Explanations shall be substituted, namely:—

"Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.";

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

"(2A)An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.";

(III) after sub-section (4), the following sub-sections shall be inserted, namely:—

"(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.".

19. Substitution of new section for section 36 – For section 36 of the principal Act, the following section shall be substituted, namely:—

"36. Enforcement – (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.".

20. Amendment of Section 37 – In section 37 of the principal Act, in sub-section (1), for clauses (a) and (b), the following clauses shall be substituted, namely:—

"(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.".

21. Amendment of Section 47 – In section 47 of the principal Act, for the *Explanation*, the following *Explanation* shall be substituted, namely:—

'Explanation.—In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject- matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.'.

22. Amendment of Section 48 – In section 48 of the principal Act, for the *Explanation* to sub-section (2), the following *Explanations* shall be substituted, namely: —

"Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.".

23. Amendment of Section 56 – In section 56 of the principal Act, for the *Explanation*, the following *Explanation* shall be substituted, namely:—

'Explanation.— In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject- matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.'.

24. Amendment of Section 57 – In section 57 of the principal Act, in sub-section (1), for the *Explanation*, the following *Explanations* shall be substituted, namely:—

"Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.".

25. Insertion of new Fourth Schedule, Fifth Schedule, Sixth Schedule and Seventh Schedule – After the Third Schedule to the principal Act, the following new Schedules shall be inserted, namely:—

'THE FOURTH SCHEDULE

[See section 11 (14)]

Sum in dispute	**Model fee**
Up to Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and upto Rs 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

Note: In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent. on the fee payable as per the table set out above.

THE FIFTH SCHEDULE

[See section 12 (1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Previous services for one of the parties or other involvement in the case

20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

Relationship between an arbitrator and another arbitrator or counsel

25. The arbitrator and another arbitrator are lawyers in the same law firm.

26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Relationship between arbitrator and party and others involved in the arbitration

30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Other circumstances

32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

Explanation 1.— The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.— The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.— For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

THE SIXTH SCHEDULE

[See section 12 (1)(b)]

NAME:

CONTACT DETAILS:

PRIOR EXPERIENCE (INCLUDING EXPERIENCE WITH ARBITRATIONS):

NUMBER OF ONGOING ARBITRATIONS:

CIRCUMSTANCES DISCLOSING ANY PAST OR PRESENT RELATIONSHIP WITH OR INTEREST IN ANY OF THE PARTIES OR IN RELATION TO THE SUBJECT-MATTER IN DISPUTE, WHETHER FINANCIAL, BUSINESS, PROFESSIONAL OR OTHER KIND, WHICH IS LIKELY TO GIVE RISE TO JUSTIFIABLE DOUBTS AS TO YOUR INDEPENDENCE OR IMPARTIALITY (sLIST OUT):

CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN TWELVE MONTHS (LIST OUT):

THE SEVENTH SCHEDULE
[See section 12 (5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.— The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.— For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.'.

26. Act not to apply to pending arbitral proceedings – Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

27. Repeal and savings – (1) The Arbitration and Conciliation (Amendment) Ordinance, 2015, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

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मध्य प्रदेश राज्य न्यायिक अकादमी

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