JOTI JOURNAL

AUGUST 2015 (BI-MONTHLY)

मध्य प्रदेश राज्य न्यायिक अकादमी

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

MADHYA PRADESH STATE JUDICIAL ACADEMY

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL AUGUST - 2015

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CONSTITUTION OF INDIA :

भारत का संविधान :

CONTRACT ACT, 1872

संविदा अधिनियम, 1872

CRIMINAL PROCEDURE CODE, 1973

दण्ड प्रक्रिया संहिता, 1973

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Section 31 – The Apex Court held that the expressions concurrently and consecutively mentioned in the Cr.P.C. are of immense significance while awarding punishment to the accused for offences punishable under IPC and any other Special Act arising out of one trial or more – Award of former enure to the benefit of the accused whereas award of latter is detrimental to the accused's interest – So, it is legally obligatory upon the trial court to specify in clear terms in the order of conviction as to whether sentences awarded to the accused would run concurrently or consecutively.

धारा 31 – माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि दण्ड प्रक्रिया संहिता में उल्लेखित अभिव्यक्ति साथ साथ और एक के बाद एक का अत्यधिक महत्व उस समय होता है जब अभियुक्त को भारतीय दण्ड संहिता के अधीन दण्डनीय अपराध और विशेष अधिनियम के अधीन उत्पन्न अपराध में एक या अधिक विचारण में दंड दिया जाता है – पूर्व वाला (अर्थात दण्ड साथ साथ चलेंगे) अभियुक्त के लाभ के लिये होता है जबकि बाद वाला (अर्थात दण्ड एक के बाद एक चलेंगे) अभियुक्त के हितों के लिये नुकसानदायक होता है – इस कारण विचारण न्यायालय पर यह विधिक दायित्व होता है कि वह दोषसिद्धि के आदेश में यह विशेष रूप से उल्लेख करें कि क्या दण्ड साथ–साथ चलेंगे या एक के बाद एक भुगताए जायेंगे।

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(ii)Abuse of provisions under sections 156 (3) of the Code, prevention of.

(iii) Revisional power, exercise of – Opportunity of hearing, necessity of.

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धारा 167 (2) (ए) (i) – अभियुक्त का उसे जमानत पर रिहा करने का आलोप्य अधिकार – 90/60 दिनों की अवधि की गणना कैसे की जाये? **191*** **345**

Section 167 (2), Proviso (a) (ii) – Accused persons were taken into custody on 18.02.2013 for the offences under sections 399 and 402 of IPC – Charge-Sheet was filed on 22.04.2013 after expiry of sixteen days – Prior to the filing of charge sheet, accused filed application u/s 167 (2) Cr.P.C. seeking benefit of statutory bail – Trial Court allowed the application – Revisional Court set aside that order – High Court restored the order of trial Court because before filing charge sheet, accused had filed application u/s 167 (2) Cr.P.C.

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पुनः विचारण का आदेश कब किया जा सकता है ? **217 (i) & (iii) 397**

Sections 468 and 472 – (i) Gram crop was kept in the go-down of the the accused lastly on 27.05.2002 by the complainant – After four months, said crop was demanded first time. Complaint had to be lodged on or before 27.09.2005 but it was made on 10.09.2006 i.e. near about 9½ month belatedly – On perusal of written complaint it appears that in above period of 9½ months many time crop or its value was demanded by the complainant and every time accused persons used to promise the complainant to fulfill the said demand, so it is a case of continuing offence committed under section 406 of IPC and whenever demand was made, from that date a fresh period of limitation began to run – It would be a continuing offence under section 472 of Cr.P.C.

(ii) Period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with more severe punishment.

धाराएं 468 और 472 – (i) चने की फसल अभियुक्त के गोदाम में अंतिम बार 27.05.2002 को परिवादी द्वारा रखी गई चार माह बाद पहली बार उक्त फसल की मांग की गई परिवादी को 27.09.2005 को या उसके पूर्व शिकायत दर्ज कर देना थी किन्तु उसने 10.09.2006 को अर्थात लगभग 9½ बाद विलंब से शिकायत दर्ज की। लिखित शिकायत से यह प्रतित होता है कि उक्त 9½ माह में कई बार फसल या उसकी कीमत की मांग परिवादी द्वारा की गई थी और हर बार अभियुक्तगण ने परिवादी की उक्त मांग पूर्ण करने का आश्वासन दिया था, अतः यह एक सत्त जारी रहने वाला धारा 406 भा.दं.सं. के अधीन कारित अपराध है और जब–जब मांग की गई उस तारीख से एक नया परिसीमाकाल लागू होता है। धारा 472 दं.प्र.सं. के अधीन यह एक सत्त अपराध होगा।

(i) एक साथ विचारण किये जाने वाले अपराधों के बारे में परिसीमाकाल, उस अपराध के आधार पर निर्धारित होगा जो अपेक्षाकृत अधिक कठोर दंड से दंडनीय है। **195 350**

CRIMINAL TRIAL :

दाण्डिक विचारण :

– (i) Charge-sheet in respect of offences punishable under POCSO Act, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and IPC – Trial and jurisdiction of – Law explained.

(ii) Offences under POCSO Act, trial of – In exercise of powers conferred under section 28 of the POCSO Act, a Court of Sessions has been notified as a Special Court, therefore, Sessions Judges and Additional Sessions Judges posted in a Sessions Division may discharge the function of Special Court as "Children's Court".

(iii) Non-observance of section 193 Cr.P.C. in respect of an offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, effect of – Law explained.

(iv) Conflict between two special enactments, which shall prevail? Law explained.

(i) लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम और भारतीय दंड संहिता के अधीन दंडनीय अपराधों के बारे में आरोप पत्र – विचारण और क्षेत्राधिकार के बारे में – विधि समझाई गई।

(ii) पास्कों अधिनियम के अपराधों का विचारण – विधि समझाई गई।

(iii) धारा 193 दं.प्र.सं. के अपालन के बारे में विधि स्पष्ट की गई।

(iv) दो विशेष अधिनियमों में विरोधाभास होने पर कौन सा अधिनियम अधिभावी होगा? इस बारे में विधि समझाई गई। **196** **351**

– Offence of rape **–** Test Identification Parade – Non-significance of – T.I. parade ***vis-a-vis*** dock identification – Law explained.

Traumatic and tragic experience in the course of commission of such heinous offence and close proximity with the offender affords sufficient time to imprint upon the mind of the prosecutrix the identity of the offender – Identification of the offender in court by her is the substantive evidence – Test identification parade is not a rule of law but only a rule of prudence – Identification of the accused in court can be relied upon even in the absence of test identification parade.

बलात्संग का मामला – पहचान परेड – तात्विक या महत्वपूर्ण न होना – पहचान परेड की तुलना में न्यायालय कक्ष में पहचान – विधि समझाई गई।

अपराध के कारित होने के दौरान के मानसिक आघात पहुंचाने वाले और दुखद अनुभव तथा अपराधी से (अपराध कारित होने के दौरान) सामिप्य या निकटता, अभियोक्त्री के मस्तिष्क में अपराधी की पहचान अंकित करने के लिए पर्याप्त समय प्रदान करती है – अभियोक्त्री द्वारा अभियुक्त की न्यायालय में पहचान तात्विक साक्ष्य होती है – पहचान परेड (संचालित करवाना) विधि का नियम नहीं है बल्कि प्रज्ञा का नियम है – पहचान परेड के बिना भी न्यायालय में की गई अभियुक्त की पहचान पर भरोसा किया जा सकता है। **197** **358**

EVIDENCE ACT, 1872

साक्ष्य अधिनियम, 1872

Sections 3, 11 and 32 – (i) Plea of alibi – Burden of proof – The burden on the accused is rather heavy.

(ii) Dying declaration – 100% burn injury cases.

धाराएं 3, 11 और 32 – (i) घटनास्थल से अनुपस्थिति – प्रमाण भार – अभियुक्त पर अपेक्षाकृत भारी प्रमाणभार होता है।

(ii) मृत्यु पूर्व कथन – 100 प्रतिशत जलने से आई चोटों का प्रकरण। **198** **360**

Sections 3 and 114-A – Appreciation of evidence of prosecutrix in rape case – Whether corroboration is necessary ?

धाराएं 3 और 114–ए – बलात्कार के प्रकरण में अभियोक्त्री के साक्ष्य का मूल्यांकन – क्या पुष्टि आवश्यक है? **189(iii)***

340

Section 27 – Disclosure Statement, admissibility and significance of.

धारा 27 – प्रगटन कथन की ग्राह्यता और महत्व। **199*** **362**

Section 32 (1) – Dying declaration – Reliability, test and requirement of.

धारा 32 (1) – मृत्युकालिक कथन – विश्वसनीयता, जाँच और आवश्यकताएँ।

200* **363**

Section 65 (f) – Secondary evidence – Certified copy of documents obtained under Right to Information Act, admissibility of.

धारा 65 (एफ) – द्वितीयक साक्ष्य – सूचना का अधिकार अधिनियम, 2005 के अधीन प्राप्त की गई दस्तावेजों की प्रमाणित प्रतिलिपि की ग्राह्यता। **201** **366**

Section 132 – (i) Interpretation of proviso.

(ii) The rule against self-incrimination can be seen in (a) Section 161 Cr.P.C, 1973 (b) Sections 25 and 26 of the Evidence Act and (c) The proviso to section 132 of the Evidence Act.

धारा 132 – (i) परंतुक का अर्थान्वयन।

(ii) स्वदोशिता के विरूद्ध नियम को (ए) धारा 161 दंड प्रक्रिया संहिता, 1973 (बी) धारा 25 एवं 26, साक्ष्य अधिनियम; और (सी) धारा 132, साक्ष्य अधिनियम के परंतुक में देखा जा सकता है।

202 **365**

HINDU SUCCESSION ACT, 1956

हिन्दू उत्तराधिकारी अधिनियम, 1956

INDIAN PENAL CODE, 1860

भारतीय दण्ड संहिता, 1860

Sections 406 and 407 – See Sections 468 and 472 of the Criminal Procedure Code, 1973

धाराएं 406 और 407 – देखें दंड प्रक्रिया संहिता, 1973 की धारा 468 और 472

195 350

INFORMATION TECHNOLOGY ACT, 2000

सूचना प्रौद्योगिकी अधिनियम, 2000

Sections 66-A, 69-A and 79 – (i) Section 66-A I.T. Act, constitutional validity of – Being violative of Article 19 (1) (a) of the Constitution, is wholly unconstitutional and void.

(ii) Sections 69-A and 79 of I.T. Act and Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, constitutional validity of – Are constitutionally valid.

धाराएं 66–ए, 69–ए और 79 – (i) धारा 66–ए सूचना प्रौद्योगिकी अधिनियम की संवैधानिक वैधता – भारतीय संविधान के अनुच्छेद 19 (1)(ए) के उल्लंघन में होने से यह प्रावधान पूरी तरह असंवैधानिक और शून्य हैं।

(ii) धारा 69 ए और 79 सूचना प्रौद्योगिकी अधिनियम और सूचना प्रौद्यागिकी (आम जन द्वारा सूचना तक पहुंच की रोक के लिए प्रक्रिया और रक्षा उपाय) नियम, 2009 की संवैधानिक वैधता – ये संवैधानिक रूप से वैध है।

207 378

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000

Section 7 – Claim of juvenility – Such relief can be claimed even if the matter is finally decided.

धारा 7 – किशोरावस्था का दावा – ऐसे अनुतोष का दावा मामले के अंतिम रूप से निराकृत हो जाने के बावजूद किया जा सकता है। **208* 386**

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) RULES,2007

किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007

Rule 12 – See Section 7 of the Juvenile Justice (Care & Protection of Children) Act, 2000.

नियम 12 – देखें किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000 की धारा 7।

208* 386

LAND REVENUE CODE, 1959 (M.P.)

भू राजस्व संहिता,1959 (म.प्र.)

Section 165 (6), 170–B (1) and (2) – Permission under section 165(6) of M.P. Land Revenue Code – Obtained by playing fraud – Burden of proof – It is upon seller to prove that the permission was obtained by playing fraud.

Article 55 – Whether limitation for filing suit for recovery of balance amount would start from the date of sending recall notice for outstanding amount or when the assets of the company were sold and the balance amount payable was ascertained ? Held, limitation starts when the assets of the company were sold and the balance amount payable was ascertained.

अनुच्छेद 55 – क्या अवशेष राशि की वसूली के वाद दायर करने के लिये परिसीमा बकाया राशि के लिये रिकाल नोटिस भेजने की तारीख से प्रारम्भ होगी या जब कंपनी की संपत्ति बेची गई और अवशेष राशि जो देय थी वह अभिनिश्चित की गई उस तारीख से प्रारम्भ होगी? अभिनिर्धारित किया गया, जब कंपनी की संपत्ति बेची गई और देय अवशेष राशि अभिनिर्धारित की गई तब से प्रारम्भ होगी। **212 389**

MOTOR VEHICLES ACT, 1988

मोटर यान अधिनियम, 1988

Sections 147 and 149 – (i) Claimant was travelling in a transport vehicle along with his cattle after paying fare for cattle – Insurance company held, liable.

(ii) Want of valid D.L. – Burden of proof–It is upon insurance company to prove that.

धाराएं 147 और 149 – (i) दावेदार परिवहन यान में अपने मवेशी के साथ मवेशी का भाड़ा देने के बाद यात्रा कर रहा था – बीमा कंपनी का उत्तरदायी (प्रतिकर के लिए) होना अभिनिर्धारित किया गया।

(ii) चालन अनुज्ञप्ति का अभाव – प्रमाण भार – यह (प्रमाण भार) बीमा कंपनी पर है कि वह प्रमाणित करे कि दुर्घटना के समय चालक के पास वैध चालन अनुज्ञप्ति नहीं थी।

213 391

Section 163-A – If claimant himself was found negligent, he is not entitled to claim compensation on the principle of no fault liability under section 163-A of M.V. Act.

धारा 163–ए – यदि दावेदार स्वयं उपेक्षावान पाया गया था तब वह धारा 163–ए मोटर यान अधिनियम के अधीन त्रुटि के बिना दायित्व के सिद्धांत के आधार पर प्रतिकर प्राप्त करने का हकदार नहीं होता है।

214 392

Sections 166 and 168 – (i) Assessment of compensation in death case – Choice of multiplier– Deceased was bachelor – Claimants are parents.

(ii) Assessment of compensation in death case – Personal expenses of a bachelor deceased – Claimants are parents.

धाराएं 166 और 168 – (i) मृत्यु प्रकरण में प्रतिकर का निर्धारण – गुणक का चयन – मृतक अविवाहित था – दावेदार माता पिता हैं।

(ii) मृत्यु प्रकरण में प्रतिकर का निर्धारण – अविवाहित मृतक का व्यक्तिगत निर्वाह खर्च – दावेदार माता पिता हैं। **215** **394**

Sections 166 and 168 – Assessment of compensation in injury case.

धाराएं 166 और 168 – चोट के प्रकरण में प्रतिकर का निर्धारण। **216** **396**

N.I. ACT, 1881

पराक्राम्य लिखित अधिनियम, 1881

Sections 138 and 143 to 147 – Offence under section 138 of the Act of 1881, procedure for trial of – Law explained.

धाराएं 138 और 143 से 147 – धारा 138, अधिनियम, 1881 के अपराध के विचारण के लिए प्रक्रिया के बारे में विधि समझाई गई। **217 (ii)** **397**

PREVENTION OF CORRUPTION ACT, 1988

भ्रष्टाचार निवारण अधिनियम, 1988

Sections 19 and 20 – (i) Where it is proved that the amount was recovered from the possession of the accused, the burden of proof lies on him to prove that he received the same ***bona fidely*** or for some other purpose.

(ii) Mere error, omission or irregularity in sanction for prosecution is not considered fatal for the prosecution unless it has resulted in the failure of justice – Accused failed to show that failure of justice has occasioned – Convection held proper.

धाराएं 19 और 20 – (i) जहाँ यह प्रमाणित हो जाता है कि अभियुक्त के आधिपत्य से राशि बरामद हुई, अभियुक्त पर यह प्रमाण भार होता है कि वह यह प्रमाणित करे कि उसने राशि सद्भावना पूर्वक ली है या किसी अन्य उद्देश्य से ली है।

(ii) अभियोजन चलाने की अनुमति में किसी त्रुटि, लोप या अनियमितता अभियेाजन के लिए घातक नहीं होती है जबतक कि उसके परिणामस्वरूप न्याय की हानि न हुई हो – अभियुक्त यह दर्शाने में असफल रहा कि न्याय की हानि हुई है। दोषसिद्धि उचित होना अभिनिर्धारित किया गया।

218* **404**

PROPERTY LAW :

संपत्ति विधि :

See Sections 7, 8, 58, 60, 62, 72, 76 (a), and 111(c) of the Transfer of Property Act, 1882

देखें संपत्ति अंतरण अधिनियम, 1882 की धाराएँ 7, 8, 58, 60, 62, 72, 76 (ए) और 111 (सी)

219 **405**

RIGHT TO INFORMATION ACT, 2005

सूचना का अधिकार अधिनियम, 2005

SPECIFIC RELIEF ACT, 1963

विर्निदिष्ट अनुतोष अधिनियम, 1963

STATE FINANCIAL CORPORATIONS ACT, 1951

राज्य वित्त निगम अधिनियम, 1951

SUCCESSION ACT, 1925

उत्तराधिकार अधिनियम, 1925

TRANSFER OF PROPERTY ACT, 1882

संपत्ति अंतरण अधिनियम, 1882

Sections 7, 8, 58, 60, 62, 72, 76 (a), and 111(c) – (i) Lease by mortgagee – Redemption of mortgage, effect of – Law explained –

(ii) Doctrine of Bar against Clogs on Redemption, connotation and applicability of – Law explained.

धाराएं 7, 8, 58, 60, 62, 72, 76 (ए) और 111 (सी) – (i) बंधक ग्रहिता द्वारा पट्टा – बंधक के विमोचन हो जाने पर प्रभाव – विधि समझाई गई।

(ii) विमोचन में अवरोध के बारे में – विधि समझाई गई। **219** **405**

PART-III

(CIRCULARS/NOTIFICATIONS)

•

सम्पादकीय

प्रदीप कुमार व्यास
प्रभारी संचालक

सम्माननीय पाठक गण,

अकादमी वर्ष 01 जुलाई, 2015 से प्रारंभ हो चुका है इस अकादमी वर्ष में प्रथम प्रशिक्षण दिनांक 06 जुलाई, 2015 से वर्ष 2014 बैच के व्यवहार न्यायाधीश वर्ग –2 के Induction Training के द्वितीय चरण से प्रारंभ हो रहा है जो 01 अगस्त, 2015 तक चलेगा।

अगस्त, 2015 में 03.08.2015 से 07.08.2015 तक वर्ष 2012 बैच के व्यवहार न्यायाधीश वर्ग–2 का द्वितीय Refresher Course होना है जबकि 17.08.2015 से 22.08.2015 तक व्यवहार न्यायाधीश वर्ग–1 के लिए एक प्रशिक्षण कार्यक्रम रखा गया है।

माननीय मुख्य न्यायाधिपति महोदय के मार्गदर्शन में एक योग प्रशिक्षण कार्यक्रम 29 जून, 2015 से प्रारंभ किया गया है प्रथम कार्यक्रम 29 जून, 2015 से 04 जुलाई, 2015 तक प्रातः 6:30 बजे से 8:00 बजे तक माननीय उच्च न्यायालय के प्रशासनिक ब्लाक में सम्पन्न हुआ जिसमें रजिस्ट्री के अधिकारीगण एवं जिला न्यायालय जबलपुर के न्यायाधीशगण शामिल हुए। दिनांक 06 जुलाई, 2015 से माननीय उच्च न्यायालय के कर्मचारीगण के लिए भी योग प्रशिक्षण कार्यक्रम शुरू हुआ जो सतत् जारी रहेगा। इस कार्यक्रम को अकादमी की ओर से श्री कपिल मेहता, ओ.एस.डी. संयोजित कर रहे हैं। योग और प्राणायाम का महत्व अब सर्वविदित है और न्यायाधीश के लिए तो यह और आवश्यक है अतः प्रदेश के समस्त न्यायाधीशगण भी इस नवीन शुरूआत से मार्गदर्शन ले सकते है। वैसे तो प्राणायाम के बारे में सभी जानते है और इसका साहित्य भी बाजार में उपलब्ध है फिर भी न्यायाधीशगण के लिए पठन सामग्री भाग–2 में इस बारे में एक विस्तृत लेख प्रकाशित किया गया है जिसका अवलोकन किया जा सकता है।

इस अंक में एक लेख माननीय न्यायमूर्ति श्री एम.सी. गर्ग साहब का Writ Jurisdiction के बारे में प्रकाशित किया जा रहा है ताकि हमारे न्यायाधीशगण Writ के बारे में वैधानिक स्थिति जान सके। एक लेख स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 का शामिल किया गया है ताकि इस संबंध में वैधानिक स्थिति अल्प मात्रा के बारे में विचारण करने वाले मजिस्ट्रेट और अन्य विशेष न्यायाधीश महोदय के ध्यान में आ सके।

इस अंक में माननीय सर्वोच्च न्यायालय द्वारा एन.आई.एक्ट के मामलों के त्वरित निराकरण के बारे में दिये गये निर्देश भी शामिल किये गये हैं जिनके अनुसार इस प्रकार के मामले सुनने वाले सभी न्यायालय एक समय सीमा के भीतर इन मामलों को निपटावें ताकि आम आदमी का न्याय प्रणाली में विश्वास कायम रहे साथ ही मजिस्ट्रेट को धारा 143 के अधीन यह विवेकाधिकार होता है कि वे संक्षिप्त विचारण प्रक्रिया या समन विचारण प्रक्रिया अपना सकते है लेकिन उन्हें प्रारंभ में ही दोनों पक्षों को सुनकर इस संबंध में कारण अभिलिखित करना चाहिए कि वे समन विचारण प्रक्रिया क्यों अपनाना चाहते है जैसा कि धारा 143 के

परंतुक की अपेक्षा है। मजिस्ट्रेट को प्रारंभिक स्तर पर ही मामले में समझौता हो जावे इस बारे में हर संभव प्रयास करना चाहिए। अपील न्यायालयों को पुनः विचारण के लिए मामला तभी भेजना चाहिए जब यह अंतिम उपचार बचा हो। अपील न्यायालय को मजिस्ट्रेट ने विचारण की कौन सी प्रक्रिया अपनायी है यह सुनिश्चित करने के लिए पूरा अभिलेख सावधानी से देखना चाहिए।

यह अंक 23.07.2015 को अकादमी के वेब साइट पर अपलोड किया जा रहा है ताकि हमारे न्यायाधीशगण को नवीनतम वैधानिक स्थिति शीघ्र पता लग सके। हार्ड कापी शीघ्र प्रेषित की जावेगी। अकादमी से जून, 2015 तक के अंक प्रेषित किये जा चुके है। माननीय जिला जज महोदय से शीघ्र वितरण का अनुरोध है।

हर बार की तरह इस बार भी इस पत्रिका के बारे में आप के अमूल्य सुझाव आमंत्रित कर रहा हूँ।

आपका

प्रदीप कुमार व्यास

आनंदित व्यक्ति के प्रति मित्रता का भाव,
दुःखी व्यक्ति के प्रति करूणा का भाव,
पुण्यवान के प्रति प्रसन्नता का भाव और पापी के प्रति उपेक्षा का भाव,
इन भावनाओं का संवर्धन करने से मन शांत हो जाता है।

WRIT JURISDICTION

— By Hon'ble Shri Justice Mool Chand Garg
Judge, High Court of M.P., Jabalpur

HISTORICAL BACKGROUND

Writs were first introduced in India in 1774 by a Royal Charter of Britain. During this period, the East India Company started to be subjected to parliamentary control. The Charter created a Supreme Court at Calcutta and conferred on it the right to issue all writs as were issued in England.

Subsequently, Supreme Courts of Judicature were added in Madras in 1800 and Bombay in 1823 with similar provisions.

Later, the three Supreme Courts were replaced by High courts in the same places by the Indian High Courts Act of 1861, but the power to issue writs was confined only to those three high courts and that too within their jurisdictions only for writs of prohibition and certiorari and they inherited the superintending jurisdiction of the old Supreme Courts by virtue of Section 15 of the Indian High Courts Act, 1861 which provided:

> "High Court to superintend and to frame Rules of Practice for subordinate courts: Each of the High Court established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for Returns, and to direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction, and shall have power to make and issue General Rules for regulating the practice and proceedings of such Courts, and also to prescribe form for every proceeding in the said courts for which it shall think necessary that a form be provided, and also for keeping all Books, Entries and Accounts to be kept by the Officers, and also to settle Tables of Fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from time to time to alter any such Rules or Form or Table; and the Rules so made, and the Forms so framed, and the Tables so settled, shall be used and observed in the said Courts, provided that such General Rules and Forms and Tables be not inconsistent with the provisions of any law in force, and shall before they are issued have received the sanction, in the Presidency of Fort William, of the Governor-General-in-Council, and in Madras or Bombay of the Governor-in-Council of the respective Presidencies".

The other High Courts in India created under the Act did not have any power to issue writs. Slowly, the authority to issue writs of Habeas Corpus and Mandamus was curtailed and taken away. This remained the scenario until 1950. In 1950, the Constitution of India came into effect. The authority to issue writs of a certain nature was provided in the constitution to the Supreme Court under Article 32 for the protection of Fundamental rights and to the High Courts under Article 226 for the protection of fundamental rights as well as any other rights of any person.

INTRODUCTION

A very significant aspect of the Indian Constitution is the jurisdiction it confers on the Supreme Court and the High Courts to issue writs. The writs have been among the great safeguard provided by the British Judicial System for upholding the rights and liberties of the people. It was an act of great wisdom and foresight on the part of the Constitution to introduce the writ system in India, and, thus, constitute the High Courts into guardians of the people's legal rights.

In the pre-Constitution era, only the High Courts of Calcutta, Madras and Bombay enjoyed the jurisdiction to issue writs. The jurisdiction was, however, limited territorially as each High Court could issue writs not throughout the whole of its territorial jurisdiction but only within the area of the Presidency Town within which it enjoyed an original jurisdiction. No other High Court has such jurisdiction. Article 226 thus affects all the High Courts in a fundamental manner and adds greatly to their powers. Each High Court now has writ jurisdiction, and even the Calcutta, Madras and Bombay High Courts have benefited for they can now issue writs even outside the limits of their original jurisdiction.

In the modern era of the welfare state, when there is governmental action on a vast scale, a procedure to obtain speedy and effective redress against an illegal exercise of power by the executive is extremely desirable. Through writs, the High Courts are able to control, to some extent, the administrative authorities in the modern administrative age. The writ system provides an expeditious and less expensive remedy than any other remedy available through the normal court-process. The authority to issue writs of a certain nature was provided in the constitution to the Supreme Court under Article 32- for the protection of Fundamental rights and to the High Courts under Article 226 for the protection of fundamental rights as well as any other rights of any person which are as under –

A32. REMEDIES FOR ENFORCEMENT OF RIGHTS CONFERRED BY THIS PART

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise

within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

226. POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo-warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

ARTICLES 32 AND 226 OF THE CONSTITUTION - Right to Constitutional Remedies and power of High Court to issue writs

> **Article 32 was called "the very soul of the constitution and the very heart of it" by Dr. B.R. Ambedkar.**

Mere declaration of the fundamental right is meaningless until and unless there is an effective machinery for enforcement of the fundamental rights.So, a

right without a remedy is a worthless declaration. The framers of our Constitution adopted the special provisions in the Article 32 which provide remedies to the violated fundamental rights of a citizen. Supreme Court which is guardian of the fundamental rights in India has three kinds of jurisdiction *viz.* original, appellate and advisory.

Article 32 uses the power of original jurisdiction of the Supreme Court by which any person who has a complaint that his/her fundamental right has been violated within the territory of India may move directly to the Supreme Court. He/she may move to the High Court does not imply that he/ she cannot move directly to the Supreme Court.

Original jurisdiction of the Supreme Court extends to any dispute between:

- Government of India and one or more States
- between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends.

In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them.

In the case of ***I.R. Coelo v. State of T.N., (2007) 2 SCC 1,*** it is stated that,

> "The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. It is the job of the judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights. Judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of the values besides textual interpretation. It enables application of the principles of justice and law. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. The jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of the Constitution of India. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution."

Where as Art. 226 operates "notwithstanding anything in Article 32" [Art. 226(1)]. Thus, Articles 32 and 226 exist independently of each other. Art. 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. The High Court under Art. 226 is required to enforce rule of law and not pass an order or direction which is contrary to what has been injected in law.

In the case of ***Dwarka Prasad Agrawal v. B.D. Agrawal, (2003) 6 SCC 230, 242 (Para28),*** it is given that "the High Court while exercising a power of judicial review is concerned with illegality, irrationality and procedural impropriety of an order passed by the State and statutory authority.

Article 226 provides an important mechanism for judicial review of administrative action in the country. India is a democratic country governed by Rule of Law. Public authorities exercise various types of powers-executive, adjudicatory, legislative. It is necessary that public authorities act according to law and so they are subjected to judicial review. Judicial review of the action of the public authorities is an essential part of Rule of Law and the courts have been expressly entrusted with the power of judicial review as sentinel in qui vive. In ***Dadu v. State of Maharashtra, (2000) 8 SCC 437,*** it is clearly given that the –

> "Judicial review is the heart and soul of the constitution scheme. The judiciary is constituted as the ultimate interpreter of the Constitution and is assigned the delicate task of determining the context and scope of the powers conferred on each branch of the government, ensuring that the action of any branch does not transgress its limits."

In ***Sarabjit Rick Singh v. Union of India, (2008) 2 SCC 417, 436 (Para 49)*** where it is stated that the "superior courts while entertaining a writ petition exercise a limited jurisdiction of judicial review, inter alia, when constitutional/ statutory protection is denied to a person.

The great advantage of Article 226 is that its scope cannot be curtailed or whittled down by legislation. The jurisdiction of the High Court under Article 226 cannot be taken away by any legislation. Even when the legislature declares the action or decision of an authority final, and ordinary jurisdiction of the courts is barred, a High Court is still entitled to exercise its writ jurisdiction which remains unaffected by particular writ petition. Filing of a FIR in a particular State is not the sole criterion to decide that no cause of action has arisen even partly in the territorial limits of the jurisdiction of another State.

Under Article 226, the High Court is empowered to exercise its extraordinary jurisdiction to meet unprecedented extraordinary situation having no parallel. These powers are required to be sparingly used.

In the case of ***ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553,*** as follows:

> "Unless the action challenged in the writ petition pertains to the discharge of a public function or public duty by an authority, the courts will not entertain a writ petition which does not involve the performance of the said public function or public duty".

The Supreme Court has emphasized time and again that the power of the High Court under Article 226 is supervisory in nature and is not akin to appellate power. The main purpose of this power is to enable the High Court to keep the various authorities within the bounds of their powers, but not to sit as an appellate body over these authorities.

The Supreme Court has described the nature of the High Court's jurisdiction under Article 226 as follows:

> "..... in a proceeding under Article 226 and 227 of the Constitution the High Court cannot sit in appeal over the findings recorded by a competent Tribunal. The Jurisdiction of the High Court, therefore, is supervisory and not appellate. Consequently Article 226 is not intended to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or order to be made."

In ***Rourkela Shramik Sangh v. Steel Authority of India Ltd., (2003) 4 SCC 317,*** it was submitted that,

> "the High Court acts as an authority in terms of the supreme court granting liberty to the applicant in a case to approach the "authority" in accordance with law. The Apex Court held that the expression "authority" there, meant authority under a statute and the High Court is not authority while exercising its power under Article 226."

INTER-RELATIONSHIP OF ARTICLE 32 AND 226

Articles 32 and 226 are the provisions of the Constitution that together provide an effective guarantee that every person has a fundamental right of access to courts. Article 32 confers power on the Supreme Court to enforce the fundamental rights. It provides a guaranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to go undergo the dilatory process of proceeding from the lower to higher court as he has to do in other ordinary litigation. The Supreme Court is thus constitution the protector and guarantor of the fundamental rights.

The High courts have a parallel power under Article 226 to enforce the fundamental rights. Article 226 differs from Article 32 in that whereas Article 32 can be invoked only for the enforcement of Fundamental Rights, Article 226 can be invoked not only for the enforcement of Fundamental Rights but for any

other purpose as well. This means that the Supreme Court power under Article 32 is restricted as compared with the power of a High Court under Article 226, for, if an administrative action does not affect a Fundamental Right, then it can be challenged only in the High Court under Article 226, and not in the Supreme Court under Article 32. Another corollary to this difference is that a PIL (Public Interest Litigation) writ petition can be filed in Supreme Court under Article 32 only if a question concerning the enforcement of a fundamental right is involved. Under Article 226, a writ petition can be filed in a High court whether or not a Fundamental Right is involved.

The provision of legal aid is fundamental to promoting access to courts. The Supreme Court of India has taken imaginative measures to promote access to justice when people would otherwise be denied their fundamental rights. It has done this by the twin strategy of loosening the traditional rules of *locus standi*, and relaxing procedural rules in such cases. Thus where it receives a letter addressed to it by an individual acting *pro bono publico*, it may treat the letter as a writ initiating legal proceedings. In appropriate cases it has appointed commissioners or expert bodies to undertake fact-finding investigations. Thus, the mechanism of PIL now serves a much broader function that merely espousal of the grievances of the weak and the disadvantaged persons. It is now being used to ventilate public grievances where the society as a whole, rather than a specific individual, feels aggrieved.

Several sections of the constitution such as Articles 13 (Laws inconsistent with or in derogation of the fundamental rights (are void)); 14 (Equality before law); 20 (Protection in respect of conviction for offenses); 21 (Protection of life and personal liberty); 22 (Protection against arrest and detention in certain cases); 38 (State to secure a social order for the promotion of welfare of the people); 39 (Certain principles of policy to be followed by the State) have been interpreted in conjunction with Article 32 and 226 to extend right of access to courts and judicial redress in various matters.

CASES:

- *Bodhlsattwatsautarn v. Subhra Chakraborty*
- *Common Cause, a registered society v. Union of India*
- *Bandhua Mukti Morcha v. Union of India*
- *Ram Prasad v.State of Bihar*
- *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*
- *Khatri v. State of Bihar I*
- *Sheela Barse v. Union of India Writ jurisdiction of High Court -*

Blackstone describe a writ as “a mandatory letter from the King in Parliament, sealed with his great seal, directed to the sheriff of the county wherein the injury is commited, or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant or else to appear in court, and answer the accusation against him.”

Corpus juris secundam defines writ as a "judicial instrument by which the court commands some act to be done by the person to whom it is directed."

The aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation and Constitutional goal. Articles 32, 226, 227 and 136 of the constitution deal with different remedies available to the public for enforcement of fundamental rights, legal rights etc. Judicial review is integral part of the Constitution and its basic structures. Where a petition was filed describing it as election petition and writ petition, such petition is not maintainable.

No right could be absolute in a welfare state. Man is a social animal. He cannot live without the cooperation of a large number of persons. Every Article one uses is the contribution of many. Hence every individual right has to give way to the right of the public at large. Not every fundamental right under Part III of the Constitution is absolute and it is to be within permissible reasonable restriction. A writ court must balance public interest against private interest and if it is entirely against public interest, it may decline to interfere.

In ***P.N. Kumar v. Municipal Corporation of Delhi,*** their Lordships of the Supreme Court while disposing of a writ petition filed in the Supreme Court reserving liberty to the petitioner to file a petition in the High Court gave following reason:

(1) The scope of the powers of the High Courts under Article 226 of the Constitution is wider than the scope of the powers of this court under Article 32 of the Constitution.

(2) The relief prayed for in the petition is one which may be granted by the High Court and any of the parties who is dissatisfied with the judgment of the High Court can approach this court by way of an appeal. The fact that some case involving the very same point of law is pending in this court is no ground to entertain a petition directly bypassing the High Court.

(3) If the parties get relief at the High Court, they need not come here and to that extent the burden on this court is reduced.

(4) The hearing of the case at the level of the High Court is more convenient from several angles and will be cheaper to the parties. It saves lot of time too. It will be easier for the clients to give instructions to their lawyers.

(5) Our High Courts are High Courts. Each High Court has its own high traditions. They have judges of eminence who have initiative, necessary skills and enthusiasm. Their capacity should be harnessed to deal with every type of case arising from their respective areas, which they are competent to dispose of.

(6) Every High Court Bar has also its high traditions. There are eminent lawyers practising in the High Courts with wide experience in handling different kinds of cases, both original and appellate. They are fully aware of the history of every legislation in their States. Their services should be made available to the litigants in the respective States.

(7) This court has no time today even to dispose of cases which have to be decided by it alone and by no other authority. A large number of cases are pending from 10 to 15 years. Even if no new case is filed in this court hereafter, with the present strength of judges, it may, take more than 15 years to dispose of all the pending cases.

(8) If the cases which can be filed in the High Courts are filed in the High Court and not in this court, this court's task of acting as a original court which is a time-consuming process can be avoided and this court will also have the benefit of the decision of the High Court when it deals with an appeal filed against such decision.

(9) If cases which may be filed in the High Courts are filed in this court, it would affect the initiative of the High Courts. We should preserve the dignity, majesty and efficiency of the High Courts. The taking over by this court of the work which the High Courts can handle may undermine the capacity and efficiency of the High Courts and that should, therefore, be avoided.

(10) Lastly, the time saved by this court by not entertaining the cases which may be filed before the High Courts can be utilised to dispose of old matters in which parties are crying for relief.

Writs may be issued against any organ of the government or any statutory creation. On the Subject of who may file a writ petition, The Supreme court in the landmark case ***Satyanarayana Sinha v. Lal & Co.*** has given itself jurisdiction to determine whether any person or group has locus standi to file a petition.

A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinary" indicates, a person who has been prejudicial affected by an act or omission of an authority can file a writ even though- he has no proprietary or even fiduciary interest in the subject-matter thereof.

Under the Constitution, the following kinds of writs can be issued by the courts: the writs of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-Warranto. The various types of writs permissible under the Constitution will now be enumerated and discussed:

1. WHAT IS HABEAS CORPUS WRIT?

Habeas corpus literally means 'you may have the body'. It is the most valuable writ for personal liberty. It is a remedy available to a person who is confined without legal justification. Through this writ, the court let it know the reasons for detention of the person and if there is no justification, order the authority concerned to set the person free. The writ of habeas corpus, thus, entails the authority to produce the person before the court. The applicant of this writ may be the prisoner or any person on his behalf to safeguard his liberty. It seeks immediate relief from unlawful detention whether in prison or private custody.

HABEAS CORPUS CASE IN INDIA EXAMPLE

One of the most famous Habeas corpus case filed in India was at the time of Emergency, in Kerala High Court (The first Habeas corpus case in the history of Kerala). P. Rajan, a student of the erstwhile Regional Engineering College, was arrested by Kerala police and died due to torturing. His father, Mr T.V. Eachara Warrier filed a Habeas corpus in Kerala High Court in which the police finally confirmed that he died in custody.

2. WHAT IS CERTIORARI WRIT?

If any lower court or a tribunal gives its decision but based on wrong jurisdiction, the effected party can move this writ to a higher court like Supreme Court or High Court. The writ of certiorari issued to subordinate judicial or quasi- judicial body when they act:

a) Without or in excess of jurisdiction;
b) In violation of the prescribed procedure;
c) In contravention of principles of natural justice;
d) Resulting in an error of law apparent on the face of record.

The writs of prohibition and certiorari are of the same nature, the only difference being that the writ of prohibition is issued at an earlier stage, before the order is made and the writ of certiorari is available on a later stage i.e. after the order has been passed.

3. WHAT IS QUO-WARRANTO WRIT?

The word Quo-Warranto literally means “by .what warrants?” It is a writ issued with a view to restraining a person from acting in a public office to which he is not entitled. Quo-Warranto writ is issued against the person of public who occupies the public seat without any qualification for the appointment. It is issued to restrain the authority or candidate from discharging the functions of public office. For example, a person of 65 years has been appointed to fill a public office whereas the retirement age is 60 years. Now, the appropriate High Court has a right to issue a Writ of quo-warranto against the person and declare the office vacant.

The writ of quo-warranto to issue when:

a) The office is public and of substantive nature;
b) The office is created by the State or by the Constitution itself; and
c) The respondent must have asserted his claim to the office.

QUO-WARRANTO CASE IN INDIA EXAMPLE:

The vaults of Sree Padmanabhaswamy Temple, Kerala was opened in accordance with the quo warranto petition filed by the former IPS officer and Supreme Court lawyer, T. P. Sundara Rajan.

4. WHAT IS WRIT OF PROHIBITION?

A writ of prohibition is a writ directing a subordinate to stop doing something that they may not do, according to law, but are doing. This writ is normally issued by a superior court to the lower court asking it not to proceed with a case which does not fall under its jurisdiction. The writ lies in both for access of jurisdiction or absence of jurisdiction. It is generally issued before the trial of the case or during the pendency of the proceeding but before the order is made.

5. WHAT IS WRIT OF MANDAMUS?

Mandamus literally means a command. This writ of command is issued by the Supreme Court or High Court when any government, court, corporation or any public authority has to do a public duty but fail to do so. The writ may also be filed to stop the mentioned parties from doing a particular act that may be detrimental to the general public. It must be noted that a writ of mandamus or command may not be issued against the Indian President or Governor.

ARTICLE 227 - POWER OF SUPERINTENDENCE OVER ALL COURTS BY HIGH COURT :

The powers conferred under Article 227 of the Constitution to a High Court are to:

(a). call for returns from such courts;

(b). make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c). prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts;

Besides aforesaid powers, the High Court can also frame rules etc. The restriction of the powers of High Court under Article 227 of Constitution is not to pass any orders in respect to orders passed by the court or Tribunal constituted by or under any law relating to the Armed Forces.

Article 227 deal with the subject under the following heads:

(1). Legislative History:

(2). Nature and scope of the powers;

(3). Article 226 and 227 - Comparison and Contrast

(4). Discretionary Power and Judicial Review

(5). Miscellaneous issues.

1. LEGISLATIVE HISTORY :

As part of the overall plan to humiliate the High Courts, Article 227 was also amended drastically by the 42nd Amendment. Clause (1), in its present form, was the original clause which was resorted by the 44th Amendment with effect from 20-6-1979. The 42nd Amendment substituted clause (1) as follows:-

(1) “Every High Court shall have superintendence over all courts subject to its appellate jurisdiction”.

Clause (5) was inserted by the 42nd Amendment but deleted by the 44th Amendment. It read as follows:-

(2) "Nothing in this Article shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision".

The material part of Article 227 substantially reproduces the provision of section 107 of the Government of India Act, 1915 except that the power of superintendence has been extended to tribunals also. Section 107 was similar in terms to section 15 of the High Courts Act, 1861 which gave a power of Judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Courts. Section 107 was reproduced as section 224 in the Government of India Act, 1935 but section 224(2) was omitted when section 224 was replaced by Article 227 in the Constitution of India, this significant omission has been regarded by all the High Courts as having restored the power of judicial superintendence which the High Courts had under section 15 of the High Courts Act, 1861 and section 107 of the Governments of India Act, 1915.

In ***Surya Devi Rai v. Ram Chander Rai, AIR 2003 SC 3044,*** the historical background was discussed in the following words:

> *"The jurisdiction can be traced back to section 15 of the High Courts Act, 1861 which gave a power of jurisdiction superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. Section 107 of the Government of India Act, 1915 and then Section 224 of the Government of India Act, 1935, were similarly worded and reproduced the predecessor provision. However, sub-section (2) was added in Section 224 which confined the jurisdiction of the High Court to such judgments of the inferior courts which were not otherwise subject to appeal or revisional, That restriction has been carried forward in Article 227 of the Constitution. In that sense Article 227 of the Constitution has width and vigour unprecedented:*

Finally, the powers were codified under Article 227 which provides general power or superintendence over all courts in the territory where the High Court function. The superintendence not only is confined to courts but also to tribunals.

2. NATURE AND SCOPE OF THE POWERS :

Unlike Article 226, proceedings under Article 227 are not original proceedings and against the decision of a single judge of a High Court, there is no intra- court appeal to a division bench of the same High Court.

This Article confers extra-ordinary jurisdiction on a High Court and gives it the powers of superintendence over all the subordinate courts and tribunals within that state. It has been held that the power is not confined to administrative superintendence but includes, within its sweep, the power of judicial review. The

High Court can interfere under Article 227 in cases of erroneous assumption of jurisdiction, or acting beyond jurisdiction, refusing to exercise jurisdiction and error of law apparent on the record, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be Competent to quash such perverse findings of facts. In fact, the power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits and to see that they do the duty expected or required of them in a legal manner. The High Court has no jurisdiction to substitute its own views for the views of the statutory authority.

This Article confers several power and responsibility over all superintending courts and tribunals within the territory of jurisdiction of the High Court with the object of securing that all said institutions exercise their powers and discharge duties properly and in accordance with law. The Hon. Supreme Court has taken note of the aforesaid powers in the following words:

> *"There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned herein.*
>
> *In short, superintendence includes power to guide, advise and encourage Judges of subordinate courts, to direct subordinate courts and tribunals to carry out their orders, and to direct, inquiry with a view to take disciplinary action for flagrant maladministration of justice".*

3. ARTICLES 226 AND 227 – COMPARISON AND CONTRAST:

Despite the some overlapping in the field of operation of the two Articles, they really stand on an entirely different footing. The historical source and origin of these Articles and the models upon which they are patterned would bear this. Insofar as Article 226 is concerned, its direct ancestors is the writ jurisdiction possessed by the Chartered High Courts on their original sides. Really, one could go as far as 1774 when on 26th March, Letters Patent was signed by King George the Third. By this Letters Patent, a Court of Record called "The Supreme Court of judicature at Fort Williams, in Bengal" was established. The Letters Patent stated inter alia:

> ".... all and every the said courts and Magistrates shall be subject to the order and control of the said Supreme Court ... in such Sort, Manner, and Form, as the inferior courts and Magistrates of, and in ... England, are by law subject to the orders and control of our Court to King's Bench; to

> which End the said supreme Court .... is hereby empowered and authorised to award and issue a writ or writs of mandamus, certiorari procedendo, or Error, to be prepared in Manner above-mentioned, and directed to such Courts or Magistrates, as the cases may require ... "

This power came to be vested on the Recorder's Courts which were established in Bombay and Madras by Charter dated February 20, 1798. A jurisdiction similar to that of the Court of King's Bench in England lias far "as circumstances would admit" was conferred on these courts.

By Charter dated 8.12.1823, Supreme Courts were created in place of Recorder's Courts in Bombay and Madras. These Courts were to have the same powers and were subject to the same restrictions as those which the Supreme Court in Fort Williams had.

As against this pedigree of Article 226, the ancestors of Article 227 in the direct line are section 15 of the Indian High Courts Act, 1861; section 107 of the Government of India Act, 1915; and section 224 of the Government of India Act, 1935, as the power of superintendence conferred by these sections had undergone a change in section 224 of the Government of India Act, 1935, inspiration from which was taken while enacting the forty-second Amendment to the Constitution.

There is a preponderance of judicial opinion that section 107 of the Government of India Act, 1915 had conferred by section 224 of the Government of India Act, 1935 was characterized as that of "administration superintendence". The scope and power of superintendence under this section fell to be considered by a Division Bench of the Bombay High Court in ***Kawasji Pestonji v. Rustamji Sorabji, AIR 1949 Bombay 42.*** The Division Bench speaking through Chagla, C.J., held that a power of judicial superintendence did exist in the High Courts under section 224 and that if the judgment of an inferior court was subject to appeal or revision, the High Court would still have the power to interfere judicially apart from merely dealing with the judgment in appeal and revision. It was further held that the marginal note to the section, namely, Administrative functions of High courts",did not control the section and by reason of sub-section (2) the power of judicial superintendence was taken away only with regard to judgments which were not subject to appeal or revision.

The Supreme Court had occasion to decide the nature of the power under Article 227 in ***Waryam Singh v. Amarnath, AIR 1954 SC 215.*** In this connection, it was stated as below:

> "The material part of Article 227 substantially reproduces the provisions of section 107 of the Government of India Act, 1915, except that the power of superintendence has been extended by the Article also to tribunals. That the Rent Controller and the District Judge exercising jurisdiction under the Act are tribunals cannot and has not been

> controverted. The only question raised is as to the nature of the power of superintendence conferred by the Article. Reference is made to clause (2) of the Article in support of the contention that this Article only confers on the High Court administrative superintendence over the subordinate courts and tribunals. We are unable to accept this contention because clause (2) is, expressed to be without prejudice to the generality of the provisions in clause (1). Further, the preponderance of judicial opinion in India was that section 107 which was similar in terms to section 15 of the High Courts Act, 1861, gave a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court.

In this connection it has to be remembered that section 107 of the Government of India Act, 1915, was reproduced in the Government of India Act, 1935, as section 224. Section 224 of the 1935 Act, however, introduced sub-section (2), which was new, providing that nothing in the section should be construed as giving the High Court any jurisdiction to question any judgment of any inferior court which was not otherwise subject to appeal or revision. The idea presumably was to nullify the effect of the decisions of the different High Courts referred to above. Section 224 of the 1935 Act has been reproduced with certain modifications in Article 227 of the Constitution. It is significant to note that sub-section (2) to section 224, of the 1935 Act has been omitted from Article 227.

This significant omission has been regarded by all High Courts in India before whom this question has arisen. As having restored to the High Court the power of judicial superintendence it had under section 15 of the High Courts Act, 1861, and section 107 of the Government of India Act, 1915. See the cases referred to in ***Moti Lal v. The State through Shrimati Sagrawati(1).*** Our attention has not been drawn to any case which has taken a different view and, as at present advised, we see no reason to take a different view.

The following observation made by a full bench of Bombay High Court in ***S.D. Ghatge v. State of Maharashtra, AIR 1977 Bom. 384,*** after referring to the aforenoted view expresed in Waryam Singh's case, may also be noted:

> "It must be pointed out that the Court's decision that judicial superintendence was vested in the High Court under the original Article 227 actually rested on two grounds: (a) on construction the Court held that sub-Article (2) did not affect the generality of the provision contained in Sub-Article (1) which included judicial superintendence and (b) the preponderance of judicial opinion in India was that Section 107 of the Government of India Act, 1915 gave the power of judicial superintendence to High Court. Therefore, the decision on the point was principally based on construction

> of the Article. Further, while elaborating the second ground on which its decision rested the Court has observed that when Section 107 of the 1915 Act was replaced by Section 224 in the 1935 Act, Sub-section (2) of Section 224 was newly introduced and the idea presumably was to nullify the effect of the decisions of different High Courts but the expression the idea presumably was itself clearly suggests that that was not the definite opinion of the Court. It is thus clear that the two decisions on which reliance was placed by Counsel for the Union of India do not support the contention urged. In our view, on pure construction of Section 224 (2) and amended Article 227(5) it is clear that judicial supervision or superintendence, though limited in extent did vest and does vest in the High Court".

Article 226 and 227 of the Constitution of India enables the Hon'ble High Court to pass appropriate orders where ever either the authorities are exceeding their limit or are not performing their duties in accordance with law whereas, Article 226 permits the court to grant appropriate writs whenever the violation is alleged of any law or any procedure established by law or any authority as prescribed under Article 12 of the Constitution of India which of course have been defined by the Hon'ble Supreme Court from time to time. The power vested under Article 227 is a power in the High Court of superintendence which enables the High Court not only to look into the orders/action of the courts but also of Tribunals working in its territories i.e. to say if any court/Tribunal working in the territory of High Court commits any illegality while performing its function or does not perform its work in accordance with law then, the High Court in suo motu can look into the matter whether or not a petition is filed by aggrieved person or not.

However, the distinction between two powers i.e. one under Article 226 and the other under Article 227, is that the power to be exercised under Article 226 is in relation to any work done or not done by any authority as prescribed under Article 12 of the Constitution of India whereas, the power of superintendence with respect to the work being done by any court/Tribunal working in the territory of the High Court in which, the High Court is supposed to exercise its powers.

The difference between Articles 226 and 227 of the Constitution was well brought out in ***Umaji Keshao Meshram and ors. v. Smt. Radhikabai and anr., (1986) Supp. SCC 401.*** Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this Article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts

and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

To appreciate the distinction between the two, we can look into the judgment of the Apex Court, in the case of ***Surya Dev Rai Vs. Ram Chander Rai and Others, (2003) 6 SCC 675*** wherein, the difference between writ of certiorari under Article 226 and supervisory jurisdiction under Article 227 of the Constitution has been discussed. The power of High Court under Article 226 and power under Article 227 have been discussed in para 38 of the aforesaid judgment, which reads as under:

> "38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-
>
> (1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.
>
> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction

which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of

evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case".

In ***Chandrasekhar Singh & ors. v. Siva Ram Singh & ors., (1979) 3 SCC 118,*** the scope of jurisdiction under Article 227 of the Constitution came up for the consideration of this Court in the context of Sections 435 and 439 of the Criminal Procedure Code which prohibits a second revision to the High Court against decision in first revision rendered by the Sessions Judge. On a review of earlier decisions, the three-Judges Bench summed up the position of law as under :-

(i) that the powers conferred on the High Court under Article 227 of the Constitution cannot, in any way, be curtailed by the provisions of the Code of Criminal procedure;

(ii) the scope of interference by the High Court under Article 227 is restricted. The power of superintendence conferred by Article 227 is to be exercised sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors;

(iii) that the power of judicial interference under Article 227 of the Constitution is not greater than the power under Article 226 of the Constitution;

(iv) that the power of superintendence under Article 227 of the Constitution cannot be invoked to correct an error of fact which only a superior Court can do in exercise of its statutory power as the Court of Appeal; the High Court cannot, in exercise of its jurisdiction under Article 227, convert itself into a Court of Appeal.

Later, a two-judge Bench of this Court in ***Baby v. Travancore Devaswom Board & Ors., (1998) 8 SCC 310,*** clarified that in spite of the revisional jurisdiction being not available to the High Court, it still had powers under Article 227 of the Constitution of India to quash the orders passed by the Tribunals if the findings of fact had been arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an opposite conclusion. This power of the High Court under the Constitution of India is always in addition to the revisional jurisdiction conferred on it.

DOES THE AMENDMENT IN SECTION 115 OF C.P.C HAVE ANY IMPACT ON JURISDICTION UNDER ARTICLES 226 AND 227?

The Constitution Bench in ***L. Chandra Kumar v. Union of India & ors., (1997) 3 SCC 261,*** dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 226 and 227 of the Constitution is part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation. A recent Division Bench decision by Delhi High Court (Dalveer Bhandari and H.R. Malhotra, JJ) in ***Criminal Writ Petition NO.s.758, 917*** and ***1295 of 2002 Govind v. State (Govt. of NCT of Delhi)*** decided on April 7, 2003 (reported as ***[2003] 6 ILD 468*** makes an indepth survey of decided cases including almost all the leading decisions by this Court and holds "The power of the High Court under Article 226 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken either by judicial pronouncement or by the legislative enactment or even by the amendment of the Constitution. The power of judicial review is an inherent part of the basic structure and it cannot be abrogated without affecting the basic structure of the Constitution." The essence of constitutional and legal principles, relevant to the issue at hand, has been correctly summed up by the Division Bench of the High Court and we record our approval of the same.

It is interesting to recall two landmark decisions delivered by High Courts and adorning the judicial archives. In ***Balkrishna Hari Phansalkar v. Emperor, AIR 1933 Bombay 1,*** the question arose before a Special Bench: whether the power of superintendence conferred on the High Court by Section 107 of Government of India Act 1915 can be controlled by the Governor-General exercising his power to legislate. The occasion arose because of the resistance offered by the State Government to the High Court exercising its power of superintendence over the Courts of Magistrates established under Emergency Powers Ordinance, 1932. Chief Justice Beaumont held that even if power of revision is taken away, the power of superintendence over the courts constituted by the ordinance was still available. The Governor-General cannot control the powers conferred on the High Court by an Act of Imperial Parliament. However, speaking of the care and caution to be observed while exercising the power of superintendence though possessed by the High Court, the learned Chief Justice held that the power of

superintendence is not the same thing as the hearing of an appeal. An illegal conviction may be set aside under power of superintendence but - "we must exercise our discretion on judicial grounds, and only interfere if considerations of justice require us to do so."

In ***Manmatha Nath Biswas v. Emperor, (1932-33) 37 C.W.N. 201,*** a conviction based on no legal reason and unsustainable in law came up for the scrutiny of the High Court under the power of superintendence in spite of right of appeal having been allowed to lapse. Speaking of the nature of power of superintendence, the Division Bench, speaking through Chief Justice Rankin, held that the power of superintendence vesting in the High Court under Section 107 of the Government of India Act, 1915, is not a limitless power available to be exercised for removing hardship of particular decisions. The power of superintendence is a power of known and well recognised character and should be exercised on those judicial principles which give it its character. The mere misconception on a point of law or a wrong decision on facts or a failure to mention by the Courts in its judgment every element of the offence, would not allow the order of the Magistrate being interfered with in exercise of the power of superintendence but the High Court can and should see that no man is convicted without a legal reason. A defect of jurisdiction or fraud on the part of the prosecutor or error on the "face of the proceedings" as understood in Indian practice, provides a ground for the exercise of the power of superintendence.

The line between the two classes of case must be, however, kept clear and straight. In general words, the High Court's power of superintendence is a power to keep subordinate Courts within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner.

The principles deducible, well-settled as they are, have been well summed up and stated by a two-judges Bench of this Court recently in ***State, through Special Cell, New Delhi v. Navjot Sandhu @ Afshan Guru and Ors., JT 2003 (4) SC 605,*** para 28***,*** it was held:

(i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the state Legislature;

(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order;

(iii) the power must be exercised sparingly, only to move subordinate courts and Tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise".

In ***Shiv Shakti Coop. Housing Society, Nagpur v. M/s. Swaraj Developers & ors., (2003) 4 Scale 241,*** another two-Judges bench of this Court dealt with Section 115 of the C.PC. The Court at the end of its judgment noted the submission of the learned counsel for a party that even if the revisional applications are held to be not maintainable, there should not be a bar on a challenge being made

under Article 227 of the Constitution for which an opportunity was prayed to be allowed. The Court observed "If any remedy is available to a party, no liberty is necessary to be granted for availing the same."

It is well stated by justice Hidayatullah, that, "the power given by s.115 of the Code is clearly limited to the keeping of the subordinate courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writ of prohibition or mandamus. It is also not a full power of certiorari in as much as it arises only in a case of jurisdiction and not in a case of error ... where there is no question of jurisdiction, the decision cannot be corrected for it has been ruled that a court has jurisdiction to decide wrongly as well as rightly. But once a flaw of jurisdiction is found the HC need not quash and remit as is the practice in the English Law under the writ of certiorari but pass such order as it thinks fit."

So, the amendment in S.115 of the CPC in 2002 does not affect the jurisdiction of the HC under Article 226 & 227 of the Constitution. The power exists untrammeled by the Amendment in S.115 of the CPC and available to the exercised subject to rules of self discipline and practice which are well settled. The application can be filed by the party, or the High Court can suo motu take up the case. Application for revision can be filed only in jurisdictional matters and not any other.

4. DISCRETIONARY POWER AND JUDICIAL REVIEW:

As a general rule, it is accepted that court have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. In ***Small v. Moss,*** the Supreme Court of the United States observed:

> "Into that field (of administrative discretion) the courts may not enter.

Lord Halsbury also expressed the same view in ***Westminster Corpn. v. London & North Western Rly. Co.,*** and observed that:

> "where the legislature has confined the power to a particular body, with a discretion how it is used, it is beyond the power of any court to contest that discretion."

Thus the decision relating to social and economic policy, treaties, dissolving Parliament, mobilizing armed forces, etc. cannot be made the subject matter of judicial review.

In the leading case of ***Roberts v. Hopewood,*** the court observed:

> "There are many matters, which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another."

In India also, the same principle is accepted and in a number of cases, the Supreme Court has held that courts have no power to interfere with the orders passed by administrative authorities in exercise of discretionary powers. However, this does not, mean that there is no control over the discretion of the administration. As discussed above, the administrative possesses vast discretionary powers and if complete and absolute freedom is given, it will lead to arbitrary exercise of power. As it is rightly said, 'Every power tends to corrupt and absolute power tends to corrupt absolutely.' all powers have legal limits.

Where no laws exist, men might be arbitrary and very necessary acts of malevolent as instances of wanton oppression. There must be control over the discretionary powers of the administration so that there will be a 'government of laws and not of men'. It is bounden duty of courts to see that discretionary power conferred on the administration may not be abused and the administration should exercise them properly, responsibly and with a view to doing what is best in the public interest.

It was observed in the case of ***Khudiram v. State of W.B., (1975) 2 SCC 81,*** that 'there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion'. Similar view was also seen in the case of ***Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288,*** as follows:

> "The law has always frowned on uncanalised and unfettered discretion conferred on any instrumentality of the State and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated.

In ***Delhi Transport Corpn. v. D.T.C Mazdoor Congress, 1991 Supp (1) SCC 600,*** in the concurring judgment, Sawant, J. expressed a similar view. Emphasizing on the desirability of putting check on discretionary powers conferred on high-ranking officials, His Lordship rightly observed:

> "There is need to minimise the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however high-placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness do not go with the posts, however high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave

> any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law".

At the same time, however, the following observation of ***Benjamin N. Cardozo***, should always kept in mind:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains."

Judicial Review of action and inaction should be made with caution and not in haste. Whenever there is a necessity for judicial action and obligation, it should be taken. Such action must be taken in public interest and within permissible limits. The Court cannot usurp or abdicate, and the parameter of judicial review must be clearly defined and never exceeded. Judicial review of administrative action depends upon the facts and circumstances of each case. Its dimension is never closed and must remain flexible.

In the leading decision in Chief Constable of ***North Wales Police v. Evans,*** *Lord Hailsham* stated:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a manner which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

Lord Brightman was also of the same view. He observed: "Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made" and added that it would be an error to think that "the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself.

Thus in almost all democratic countries it is accepted that discretion conferred on the administration is not unfettered, uncontrolled or non- reviewable by courts. To keep the administration within bounds, courts have evolved principles and imposed conditions and formulated tests and taking recourse to those principles, they effectively control the abuse or arbitrary exercise of discretionary power by the administration.

5. MISCELLANEOUS ISSUES:

Some of the issues regarding the power of the High Court will be discussed as under -

- Whether the High Court can go into questions of fact.
- Whether question must be raised before the inferior tribunal.
- Whether the jurisdiction under Art. 227 can be taken away by legislation or not.

1. WHETHER THE HIGH COURT CAN GO INTO QUESTIONS OF FACT –

(1) In ***Deccan Merchant's Co-op. Bank v. Dulichand Jugraj Jain, AIR 1969 SC 1320, sitting under Art. 227,*** the High Court has the jurisdiction to go into questions of fact, to correct the errors of jurisdiction and the like but not to upset the pure findings of fact or to look into the evidence if justice so requires. It jurisdiction is supervisory and not appellate.

(2) But it would decline to do that, in the absence of clear and cogent reason, where the question depends upon appreciation of evidence, but was not raised before an appellate tribunal from which the matter is brought before the high court under Art. 227 but where the findings were patently erroneous and de hors the factual and legal position in record, interference was held to be proper and justified. ***(Savita Chemicals (P) Ltd v. Dyes and Chemical Workers' Union, (1999) 2 SCC 143)***.

(3) It would not also interfere with a finding of fact, within the jurisdiction of the inferior tribunal, except where it is perverse or not based on any material whatever, or evidence, or it has resulted in manifest injustice.

(4) It would not interfere with a concurrent findings on a question of fact requiring adjudication on appreciation of evidence, even though it may be jurisdictional. Of course, the position may be different where a question of law, such as interpretation of an act, is involved.

(5) Like Article 226, a findings of fact arrived at by a court below may not be interfered with in exercise of power under Article 227, if the same be based on consideration of relevant factors, and be not perverse, as stated in ***Venkatlal v. Bright Brothers Pvt. Ltd., AIR 1987 SC 1939.*** Similarly, if two views, are possible and the trial court has taken one view which is a possible view, the High Court shoyld not interfere with the findings under Article 227 merely because another view is attractive.

2. WHETHER QUESTION MUST BE RAISED BEFORE THE INFERIOR TRIBUNAL-

As in the case of a proceeding under Art. 226, so under Art. 227, where the question raised goes to the jurisdiction of the inferior tribunal, or a plea of non-joinder which invalidates the decision, or is a question which the inferior tribunal, was not competent to decide, e.g., the vires or constitutionality of the statute which created it, the petition cannot be rejected on the ground that the petitioner should have raised the point before the inferior tribunal.

But -

(a) Where a piece of evidence was admitted by the inferior tribunal without objection from the petitioner, the later will not be heard, under Art. 227, against the admissibility of that evidence, merely because the decision of the tribunal has gone against him.

(b) The High Court will not entertain a point of fact or a question as to defect of parties which was not raised before the inferior tribunal.

3. WHETHER THE JURISDICTION UNDER ART. 227 CAN BE TAKEN AWAY BY LEGISLATION OR NOT?

The power of the High Court Art. 227 cannot be taken away or barred by any legislation short of constitutional amendment. Nor can it be barred by providing that the decision of an inferior tribunal shall be final. ***(Chandrasekhar Singh v. Siya Ram Singh, AIR 1979 SC 1 (para 13)***.

CONCLUSION:

In the light of above discussion, the Apex Court formulated a 15 point principle on the exercise of High Court's jurisdiction under Article 227. The Court inter alia held that in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that a private individual is acting in collusion with a statutory authority.

According to the author, the Supreme Court's observations in the present case assumes even greater importance in the present environs when the reputation of the Indian judiciary is at stake. The current practice of the Bombay High Court in relation to Article 227 is disapprobable for the following reasons:

(a) Judges allow indiscriminate use of Article 227 because it is painful to decide a case within the strict framework of general laws and practice (as opposed to the supposedly inherent power of a High Court under the Constitution) as it requires greater knowledge and effort to apply the general law;

(b The instrument of Article 227 can be misused by a corrupt system of lawyers and judges to circumvent the law;

(c) The above practice is against the will and intent of the Parliament in the sense that it is being used to revive a practice that Parliament intended to end by amending section 115 of the CPC;

(d) The practice is in contempt of the decisions of the Supreme Court;

(e) It deprives the exchequer of revenues which it would have earned by way of court fees in case of a suit or similar proceeding; and

(f) It is unfair to other litigants as it delays disposal of their cases and distorts the process of administration of justice.

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स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 या एन.डी.पी.एस. एक्ट

प्रदीप कुमार व्यास
प्रभारी संचालक,
मध्यप्रदेश राज्य न्यायिक अकादमी

इस अधिनियम के तहत गठित विशेष न्यायालय के विशेष न्यायाधीश के समक्ष प्रवेश, तलाशी, जब्ती, गिरफ्तारी, को लेकर कई प्रश्न उत्पन्न होते है और उनके बारे में विभिन्न न्याय दृष्टांत प्रस्तुत होते है जिसमें विशेष न्यायालय अमूल्य समय कई बार नष्ट होता है साथ ही अल्पमात्रा वाले मामले न्यायिक मजिस्ट्रेट के न्यायालयों में चलते है अतः वहां भी परेशानी आती है अतः यहां हम इन विषयों पर उत्पन्न होने वाले प्रश्नों और उन पर नवीनतम वैधानिक स्थिति के बारे में चर्चा करेंगे।

I. धारा 41, 42 और 43 के अधीन तलाशी

अधिनियम की धारा 41, 42 और 43 इस प्रकार है :–

धारा 41 वारन्ट जारी करने की शक्ति और प्राधिकार – (1) महानगरीय मजिस्ट्रेट अथवा प्रथम श्रेणी मजिस्ट्रेट अथवा इस संबंध में राज्य सरकार द्वारा विशेष तौर पर सशक्त द्वितीय श्रेणी का कोई मजिस्ट्रेट किसी व्यक्ति की गिरफ्तारी के लिए जिसके बारे में इस अधिनियम के अंतर्गत दण्डित करने योग्य किसी अपराध को कारित करने का उसको विश्वास हो, अथवा किसी भवन प्रवहण अथवा स्थान की चाहे रात में अथवा दिन में खोज करने के लिए वारन्ट जारी कर सकता है, जिसमें किसी स्वापक औषधि अथवा मनः प्रभावी पदार्थ अथवा नियंत्रित पदार्थ होने का उसे विश्वास हो, जिसके संबंध में इस अधिनियम के अंतर्गत दण्डित करने योग्य अपराध कारित किया हो अथवा कोई दस्तावेज अथवा अन्य वस्तु जो उस अपराध के कमीशन का साक्ष्य प्रस्तुत कर सकता है, अथवा कोई अवैध रूप से अर्जित सम्पत्ति अथवा कोई दस्तावेज अथवा अन्य वस्तु जो किसी अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर सकती है, जो कि इस अधिनियम के अध्याय 5–क के अन्तर्गत अभिग्रहण अथवा स्थिरीकरण अथवा समपहरण के लिए दायी होती हैं, को रखा अथवा छुपाया है।

(2) केन्द्रीय उत्पाद शुल्क, स्वापक, सीमा शुल्क, राजस्व आसूचना विभागों अथवा केन्द्रीय सरकार के किसी अन्य विभाग का, पैरा सैन्य बल अथवा सशस्त्र बल को सम्मिलित करते हुए, राजपत्रित श्रेणी का ऐसा कोई अधिकारी जिसे केन्द्रीय सरकार द्वारा, साधारण अथवा विशेष आदेश द्वारा, इस संबंध में सशक्त किया जाता है, अथवा राज्य सरकार के राजस्व, औषधि नियंत्रण, उत्पाद शुल्क, पुलिस अथवा किसी अन्य विभाग का कोई ऐसा अधिकारी, जिसे राज्य सरकार के साधारण अथवा विशेष आदेश द्वारा इस संबंध में सशक्त किया जाता है, यदि उसे व्यक्तिगत जानकारी अथवा किसी व्यक्ति द्वारा दी गई सूचना और लिखित में ली गई सूचना से विश्वास करने का कारण हो, किसी व्यक्ति ने इस अधिनियम के अन्तर्गत दण्डित करने योग्य अपराध कारित किया अथवा कोई स्वापक औषधि अथवा मनः प्रभावी पदार्थ अथवा नियंत्रित पदार्थ जिसके संबंध में इस अधिनियम के अन्तर्गत अपराध कारित किया गया है अथवा कोई दस्तावेज अथवा अन्य वस्तु जो उस अपराध के कमीशन के साक्ष्य के प्रस्तुत कर सकती है अथवा कोई अवैध रूप से अर्जित सम्पत्ति अथवा कोई दस्तावेज अथवा अन्य वस्तु जो किसी अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर

सकती है, जो इस अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर सकती है, जो इस अधिनियम के अध्याय 5–क के अन्तर्गत अभिग्रहण अथवा समपहरण के लिए दायी हैं, किसी भवन, प्रवहण अथवा स्थान में रखा अथवा छुपाया है, अपने अधीनस्थ लेकिन चपरासी, सिपाही अथवा कांस्टेबल की श्रेणी से उच्च किसी अधिकारी को ऐसे व्यक्ति को गिरफ्तार करने के लिए अथवा किसी भवन, प्रवहण अथवा स्थान की चाहे दिन में अथवा रात में तलाशी लेने के लिए अधिकृत कर सकेगा अथवा स्वयं ऐसे व्यक्ति को गिरफ्तार कर सकेगा अथवा ऐसे भवन, प्रवहरण अथवा स्थान की तलाशी ले सकेगा।

(3) अधिकारी जिसे उप–धारा (1) के अन्तर्गत वारन्ट प्रेषित किया गया और अधिकारी जिसे गिरफ्तारी करने अथवा तलाशी लेने के लिए अधिकृत किया गया हो अथवा अधिकारी जिसे उप–धारा (2) के अन्तर्गत इस प्रकार से अधिकृत किया गया, धारा 42 के अन्तर्गत कार्य करने वाले अधिकारी की सभी शक्तियाँ उसके पास होगी।

धारा 42. वारन्ट अथवा प्राधिकार के बिना प्रवेश, तलाशी, अभिग्रहण अथवा गिरफ्तार करने की शक्ति – (1) केन्द्रीय उत्पाद शुल्क, स्वापक सीमा शुल्क, राजस्व आसूचना विभागों अथवा केन्द्रीय सरकार के किसी अन्य विभाग का, पैरा सैन्य बल अथवा सशस्त्र बल भी सम्मिलित करते हुए, कोई ऐसा अधिकारी (जो किसी चपरासी, सिपाही अथवा कांस्टेबल की श्रेणी से उच्च अधिकारी हो), जिसे केन्द्रीय सरकार द्वारा, साधारण अथवा विशेष आदेश द्वारा इस संबंध में सशक्त किया जाता हैं, अथवा राज्य सरकार के राजस्व, औषधि नियन्त्रण, उत्पाद–शुल्क, पुलिस अथवा किसी अन्य विभाग का कोई ऐसा अधिकारी (जो किसी चपरासी, सिपाही अथवा कांस्टेबल की श्रेणी से उच्च अधिकारी हो), जिसे राज्य सरकार के साधारण अथवा विशेष आदेश द्वारा इस संबंध में सशक्त किया जाता हैं, यदि उसे व्यक्तिगत जानकारी अथवा किसी व्यक्ति द्वारा दी गई सूचना और लिखित में ली गई सूचना से विश्वास करने का कारण हो कि किसी व्यक्ति ने इस अधिनियम के अतर्गत दण्डित करने योग्य अपराध कारित किया अथवा कोई स्वापक औषधि अथवा मनः प्रभावी पदार्थ और नियन्त्रित पदार्थ जिसके संबंध में इस अधिनियम के अन्तर्गत अपराध कारित किया गया हैं, अथवा कोई अवैध रूप से अर्जित सम्पत्ति अथवा कोई दस्तावेज अथवा अन्य वस्तु जो किसी अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर सकती हैं, जो इस अधिनियम के अध्याय 5–क के अन्तर्गत अभिग्रहण अथवा स्थिरीकरण अथवा समपहरण के लिए दायी हैं, किसी भवन, प्रवहण अथवा परिवेष्टित स्थान में सूर्योदय अथवा सूर्यास्त के मध्य रखा अथवा छुपाया है–

(क) किसी ऐसे भवन, प्रवहरण अथवा स्थान में प्रवेश कर सकेगा और तलाशी ले सकेगा;

(ख) प्रतिरोध के मामले में, किसी दरवाजे को तोड़ सकेगा और इस प्रविष्टि को करने के लिए किसी अन्य बाधा को हटा सकेगा;

(ग) ऐसी औषधि अथवा पदार्थ और उसके उत्पादन में प्रयुक्त सभी सामग्रियों और किसी अन्य सामग्री और किसी जानवर अथवा प्रवहरण को अभिगृहित कर सकेगा, जिसके लिए इस अधिनियम के अंतर्गत अधिहरणीय किये जाने के लिए विश्वास करने का कारण हो, इस अधिनियम के अन्तर्गत दण्डित करने योग्य किसी अपराध के कमीशन के साक्ष्य को प्रस्तुत कर

सकेगा अथवा किसी अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर सकेगा, जो कि इस अधिनियम के अध्याय 5–क के अन्तर्गत अभिग्रहरण अथवा स्थिरीकरण अथवा समपहरण के लिए दायी है; और

(घ) निरूद्ध कर सकेगा और तलाशी ले सकेगा और यदि वह उपयुक्त सोचता है, किसी व्यक्ति को गिरफ्तार कर सकेगा, जिसके लिए उसके पास विश्वास करने का कारण हो कि उसने इस अधिनियम के अन्तर्गत दण्डित करने योग्य किसी अपराध को कारित कियाः

{परन्तु निर्मित औषधियों के निर्माता अथवा मनःप्रभावी पदार्थ अथवा नियंत्रित पदार्थ के अनुज्ञा धारक के बारे में किस जो इस अधिनियम के अधीन अथवा उसके अंतर्गत बनाए गए किसी नियम अथवा आदेश के अधीन प्रदान किया गया, उस अधिकारी की ओर से शक्तियों का इस्तेमाल किया जाएगा जो उप–निरीक्षक के नीचे के स्तर का नहीं होंः परन्तु यह और} उस अधिकारी के पास विश्वास करने का कारण हो कि तलाशी वारन्ट अथवा प्राधिकार अपराधी को बचने के लिए सुविधा के साक्ष्य के छुपाव के लिए अवसर प्रदान किए बिना प्राप्त नहीं किया जा सकता, वह अपने विश्वास के आधारों को अभिलेखित करने के पश्चात् सूर्यास्त और सूर्योदय के मध्य किसी भी समय उस भवन, प्रवहरण अथवा परिवेष्टित स्थान में प्रवेश कर सकेगा और तलाशी ले सकेगा।

(2) जब कोई अधिकारी उप–धारा (1) के अन्तर्गत किसी सूचना को लिखित में लिखता हैं अथवा उसके परन्तुक के अन्तर्गत अपने विश्वास के लिए आधारों को अभिलेखित करता हैं, वह 72 घण्टों के भीतर उसकी एक प्रति अपने अव्यवहित उच्च अधिकारी को भेजगा।}

धारा 43. लोक स्थान में अभिग्रहण और गिरफ्तार करने की शक्ति – धारा 42 में उल्लेखित किसी विभागों का कोई अधिकारी –

(क) किसी लोक स्थान में अथवा अभिवहन में, किसी स्वापक औाषधि अथवा मनः प्रभावी पदार्थ अथवा नियन्त्रित पदार्थ जिसके संबंध में उसके पास विश्वास करने का कारण हैं कि इस अधिनियम के अंतर्गत दण्डित करने योग्य अपराध को कारित किया और उस औषधि अथवा पदार्थ के साथ, किसी जीव–जन्तु, प्रवहरण अथवा वस्तु जो इस अधिनियम के अन्तर्गत अधिहरणीय हैं, किसी दस्तावेज अथवा अन्य वस्तु, जिसके लिए उसके पास विश्वास करने का कारण हैं, इस अधिनियम के अन्तर्गत दण्डित करने योग्य अपराध के कमीशन के साक्ष्य को प्रस्तुत कर सकेगा, अथवा कोई दस्तावेज अथवा अन्य वस्तु, जो किसी अवैध रूप से अर्जित सम्पत्ति को धारण करने के साक्ष्य को प्रस्तुत कर सकगा, जो इस अधिनियम के अध्याय 5–क के अन्तर्गत अभिग्रहण अथवा स्थिरीकरण अथवा समपहरण के लिए दायी है; अभिगृहित कर सकेगा;

(ख) किसी व्यक्ति को निरूद्ध कर सकेगा और तलाशी ले सकगा, जिस के लिए उसके पास विश्वास करने का कारण हो कि उसने इस अधिनियम के अन्तर्गत दण्डित करने योग्य किसी अपराध को कारित किया, और यदि ऐसे व्यक्ति के पास उसके आधिपत्य में कोई स्वापक औषधि अथवा मनः प्रभावी पदार्थ अथवा नियन्त्रित पदार्थ हो और ऐसा आधिपत्य अवैधानिक प्रतीत होता है, उसे और उसके साथ के किसी अन्य व्यक्ति को गिरफ्तार कर सकेगा।

स्पष्टीकरण – इस धारा के प्रयोजनों के लिए, अभिव्यक्ति ''लोक स्थान'' में किसी लोक प्रवहण, होटल, दुकान अथवा अन्य स्थान सम्मिलित होता हैं, जो जनता द्वारा प्रयुक्त किये जाने के लिए आशयित होता हैं अथवा जिस स्थान तक जनता पहुंच सकती हैं।}

1. धारा 41 (1) के तहत वारंट जारी करने की शक्ति

धारा 41(1) अधिनियम के तहत वारंट कौन जारी कर सकता है ?

कभी–कभी उक्त प्रश्न विशेष न्यायाधीश महोदय के समक्ष उत्पन्न होता है कि क्या वे तलाशी वारंट जारी कर सकते है? क्योंकि धारा 41 (1) में केवल महानगर मजिस्ट्रेट या प्रथम श्रेणी मजिस्ट्रेट या विशेष रूप से सशक्त द्वितीय श्रेणी मजिस्ट्रेट का उल्लेख है। न्याय दृष्टांत ***मोहम्मद मलिक मोदल विरूद्ध प्रांजल बरदालाई, ए.आई. आर. 2005 एस.सी. 2406*** में यह प्रतिपादित किया गया है कि विशेष न्यायालय को धारा 41 अधिनियम के तहत गैर जमानती वारंट जारी करने की शक्ति है। धारा 36 ए अधिनियम से यह बिल्कुल स्पष्ट है और धारा 36 ए अधिनियम धारा 41 (1) अधिनियम के तहत विशेष न्यायालय द्वारा वारंट जारी करने की शक्ति को सीमित नहीं करते है।

अतः यदि गिरफ्तारी या तलाशी वारण्ट के लिए आवेदन चाहे मजिस्ट्रेट को किया जाये या विशेष न्यायाधीश को किया जाये उन्हें तत्काल कार्यवाही करना चाहिए। इस बारे में भ्रमित नहीं होना चाहिए कि ये शक्तियाँ कौन प्रयोग करेगा।

2. धारा 42 (2) की प्रकृति

प्रश्न – क्या यह प्रावधान आज्ञापक है ?

विशेष न्यायालय के समक्ष यह प्रश्न प्रायः उत्पन्न होता है कि क्या धारा 42 (2) के अनुसार धारा 42 (1) के तहत प्राप्त सूचना को लेखबद्ध करना और उसकी प्रतिलिपि उच्च अधिकारी को भेजना आज्ञापक है ?

न्याय दृष्टांत ***करनेल सिंह विरूद्ध स्टेट ऑफ हरियाणा (2009) 8 एस.सी.सी. 539*** पांच न्यायमूर्तिगण की पीठ ने निर्णय चरण 34 में यह प्रतिपादित किया है यदि धारा 41 (2) और धारा 42 (2) अधिनियम के तहत सूचना को अभिलिखित करने को आज्ञापक प्रावधान के रूप में अर्थान्वयन किया गया तो यह अत्यावश्यक परिस्थितियों की अविलंबता को पंगू बना देगा और दांडिक तलाशी और जब्ती को (जो कि उक्त अत्यावश्यक परिस्थितियों में की जानी चाहिये थी) व्यर्थ कर देगा। इन प्रावधानों का अपराधियों द्वारा दोषमुक्ति का एक बड़ा आधार बना कर दुरूपयोग नहीं होने देना चाहिये। परिणाम स्वरूप इन प्रावधानों को विवेकीय या Discretionary के रूप में लेना चाहिये जो की अधिनियम के दुरूपयोग को चेक करने के लिये हो न की ड्रग माफिया को बच निकलने देने के लिये।

उक्त संवैधानिक पीठ के न्याय दृष्टांत के उक्त पैरा में इन प्रावधानों का विवेकीय बतलाया है साथ ही निर्णय चरण 33 में यह भी बतलाया है अधिनियम में 02.10.2001 से धारा 42 में संशोधन किया गया है और 72 घंटे के भीतर प्राप्त सूचना की प्रतिलिपि उच्च अधिकारी को भेजने का प्रावधान किया गया है संशोधन से पहले उच्च अधिकारी को प्राप्त सूचना की प्रतिलिपि तत्काल भेजने का प्रावधान था विधायिका ने जो छूट दी है वह अधिनियम के उद्देश्य को प्राप्त करने के लिये दिया जाना स्पष्ट होता है और इस प्रावधान के आज्ञापक होने का उत्तर इस संशोधन के प्रकाश में दिया जाना चाहिये।

3. पूर्णतः अननुपालन क्या अनुमत है ?

प्रश्न – क्या धारा 42 (2) अधिनियम का पूर्णतः अननुपालन या total non-compliance अनुमत है ?

उक्त न्याय दृष्टांत ***करनेल सिंह विरूद्ध स्टेट ऑफ हरियाणा, निर्णय चरण 33*** में यह प्रतिपादित किया है कि धारा 42 (2) का पूर्णतः अननुपालन अनुमति योग्य नहीं है किन्तु विलंब से पालन और ऐसे विलंब का संतोषजनक स्पष्टीकरण दे देना धारा 42 का स्वीकार योग्य अनुपालन होगा उदाहरण के लिये यदि विलंब किया गया तो इसका परिणाम यह होगा की अभियुक्त भाग जायेगा या पदार्थ या साक्ष्य नष्ट कर दी जायेगी या उस स्थान से हटा ली जायेगी ऐसी परिस्थिति में प्राप्त सूचना को अभिलिखित न करना या उसकी प्रतिलिपि तत्काल वरिष्ठ अधिकारी को न भेजना धारा 42 का उल्लंघन नहीं समझा जायेगा। किन्तु पुलिस अधिकारी को जब सूचना प्राप्त हुई थी तब वह पुलिस थाने पर था और उसके पास कार्यवाही करने के लिये पर्याप्त समय था उसके बाद भी उसने प्राप्त सूचना को अभिलिखित नहीं किया उसकी प्रतिलिपि वरिष्ठ अधिकारी को नहीं भेजी तब यह एक संदेहास्पद परिस्थिति होगी और धारा 42 का यह स्पष्ट उल्लंघन होगा। इसी प्रकार जहां पुलिस अधिकारी ने प्राप्त सूचना को न तो अभिलिखित किया और न उसकी प्रतिलिपि अपने वरिष्ठ अधिकारी को भेजी तब भी इसे धारा 42 का स्पष्ट उल्लंघन माना जायेगा।

धारा 42 का पर्याप्त या तात्विक अनुपालन किया गया या नहीं यह एक तथ्य का प्रश्न है जो प्रत्येक मामले के तथ्यों के आधार पर निराकृत होगा।

इस मामले में निर्णय चरण 35 में यह भी प्रतिपादित किया गया है कि धारा 42(1) और धारा 42(2) अधिनियम का अनुपालन जो की प्राप्त सूचना को अभिलिखित करने और उसकी प्रतिलिपि वरिष्ठ अधिकारी को भेजने के बारे में है वह प्रवेश, तलाशी और जब्ती से पहले होना चाहिये किन्तु विशेष परिस्थितियों में जहां अत्यावश्यक स्थिति हो वहां सूचना को अभिलिखित करना और उसकी प्रतिलिपि वरिष्ठ अधिकारी को भेजना एक युक्तियुक्त समय के लिये स्थगित किया जा सकता है जो की प्रवेश तलाशी और जब्ती के बाद का समय होगा क्योंकि अत्यावश्यकता और त्वरित कार्यवाही का प्रश्न होता है।

न्यायदृष्टांत ***दलेल सिंह विरूद्ध स्टेट ऑफ हरियाणा, एआईआर 2009 एससी सप्लीमेंट 2880*** के अनुसार जब पुलिस अधिकारी कस्बे में पेट्रोल डियूटी पर था तब उसे सूचना मिली उसने वायरलैस पर अपने वरिष्ठ अधिकारी को सूचना दी परिस्थितियाँ अत्यावश्यक थी इसे तात्विक अनुपालन माना जायेगा।

न्यायदृष्टांत ***राजेन्द्र विरूद्ध स्टेट ऑफ एम.पी., एआईआर 2004 एससी 1103*** के अनुसार अधिकृत अधिकारी ने सूचना प्राप्त होने पर उसे लिखा और वरिष्ठ अधिकारी को प्रतिलिपि भी भेजी अतः धारा 42 का अनुपालन न करने का तर्क अमान्य किया गया।

न्याय दृष्टांत ***किशन चंद विरूद्ध स्टेट ऑफ हरियाणा, (2013) 2 एस.सी.सी. 502*** के अनुसार धारा 42 का पूर्णतः पालन न करना अनुमत नहीं है पूर्णतः पालन न होने पर अभियुक्त के हितों

पर प्रतिकूल प्रभाव पड़ने का प्रश्न अतात्विक हो जाता है। विलंब से अनुपालन करना व विलंब संतोषजनक स्पष्टीकरण देने से इस प्रावधान का अनुपालन होना स्वीकार किया जा सकता है।

न्याय दृष्टांत राम नारायण रायकवार विरूद्ध स्टेट ऑफ एम.पी., आई.एल.आर. 2011 एम.पी. 3167 के अनुसार धारा 42 का पूर्णतः अनुपालन न करना इस प्रावधान का उल्लंघन है।

4. धारा 57 अधिनियम का अनुपालन और धारा 42 (2) अधिनियम का संबंध

कभी–कभी यह प्रश्न उत्पन्न होता है कि क्या धारा 57 अधिनियम के तहत गिरफ्तारी और जब्ती का प्रतिवेदन वरिष्ठ अधिकारी को भेज देना धारा 42 (2) अधिनियम का अनुपालन माना जा सकता है ?

न्याय दृष्टांत ***किशन चंद विरूद्ध स्टेट ऑफ हरियाणा, (2013) 2 एस.सी.सी. 502*** के अनुसार धारा 57 अधिनियम की रिपोर्ट भेजना धारा 42 का अनुपालन नहीं है। धारा 42 व 57 पृथक प्रावधान है ये आपस में जुड़े हुये नहीं है। ये प्रावधान भिन्न–भिन्न क्षेत्र में और भिन्न–भिन्न स्टेज पर लागू होते है ये अंतर ध्यान में रखना चाहिये।

5. अभियुक्त के हितों पर प्रतिकूल असर गिरना

क्या धारा 42(2) का अनुपालन न करने से अभियुक्त के हितों पर प्रतिकूल असर गिरता है ? न्याय दृष्टांत ***किशन चंद विरूद्ध स्टेट ऑफ हरियाणा, (2013) 2 एस.सी.सी. 502*** के अनुसार धारा 42 का पूर्णतः पालन न करना अनुमत नहीं है पूर्णतः पालन न होने पर अभियुक्त के हितों पर प्रतिकूल प्रभाव पड़ने का प्रश्न अतात्विक हो जाता है। विलंब से अनुपालन करना व विलंब संतोषजनक स्पष्टीकरण देने से इस प्रावधान का अनुपालन होना स्वीकार किया जा सकता है।

इस प्रकार यदि धारा 42(2) अधिनियम का अनुपालन यदि पूरी तरह से नहीं किया गया तो यह अभियोजन के लिए घातक होता है। लेकिन अनुपालन यदि विलंब से किया है और विलंब का स्पष्टीकरण भी लिया गया है तो यह घातक नहीं होता है।

6. धारा 42 के अनुपालन का प्रभाव कब देखेंगे ?

धारा 42 का अनुपालन हुआ या नहीं यह प्रारंभिक स्तर पर विचार में नहीं लिया जा सकता जब अभियोजन का प्रमाण पेश हो जाता है और साक्ष्य मूल्यांकन की स्टेज आती है उस समय इस प्रश्न को विचार में लिया जा सकता है क्योंकि यह तथ्य का प्रश्न है। इस संबंध में न्यायदृष्टांत ***मोहम्मद मलिक मोदल विरूद्ध प्रांजल वरदा लाई, एआईआर 2005 एससी 2406*** अवलोकनीय कई बार जमानत पर या आरोप पर विचार करते समय भी धारा 42 का अनुपालन न करने का तर्क रखा जा सकता है जो उस स्टेज पर मान्य किये जाने योग्य नहीं होगा।

7. धारा 42 (2) का अनुपालन कब आवश्यक नहीं

कुछ परिस्थितियाँ ऐसी होती है जिनमें धारा 42 (2) का अनुपालन आवश्यक नहीं होता है जो इस प्रकार हैः–

1. जब तलाशी और जप्ती राजपत्रित अधिकारी द्वारा की जाती है तब धारा 42 (2) अधिनियम का अनुपालन आवश्यक नहीं होता है क्योंकि अधिनियम में राजपत्रित अधिकारी पर अपेक्षाकृत अधिक विश्वास दर्शाया गया है इस संबंध में न्यायदृष्टांत ***एम. प्रभुलाल विरूद्ध अस्सिटेंट डायरेक्टर, डायरेक्टरेट ऑफ रिवेन्यू इंटेलिजेंस, एआईआर 2003 एससी 4311*** अवलोकनीय है। इस संबंध में न्यायदृष्टांत ***यूनियन ऑफ इंडिया विरूद्ध सत्रोहन (2008) 8 एससीसी 313*** भी अवलोकनीय है।

2. न्यायदृष्टांत ***जी. श्रीनिवास गौड़ विरूद्ध स्टेट ऑफ ए.पी., एआईआर 2005 एससी 3647*** में भी यह प्रतिपादित किया गया है कि राजपत्रित अधिकारी के लिए धारा 42 के तहत उसके वरिष्ठ अधिकारी को सूचना भेजना आवश्यक नहीं है।

3. न्यायदृष्टांत ***मो. हुसैन फराह विरूद्ध यूनियन ऑफ इंडिया, एआईआर 1999 एससी 3343*** के अनुसार जहाँ तलाशी डायरेक्टर ऑफ रेवेन्यू इंटेलिजेस के अधिकारियों द्वारा ली गई जिनका उल्लेख धारा 41 में किया गया है उनके लिए धारा 42 का अनुपालन करना आवश्यक नहीं है।

4. न्यायदृष्टांत ***स्टेट ऑफ उड़ीसा विरूद्ध एस. मोहन्ति, एआईआर 2000 एस सी 3494*** के अनुसार जब अधिकृत अधिकारी द्वारा तलाशी और जप्ती की जाती है तब धारा 41 के प्रावधान लागू होते है धारा 42 के प्रावधान लागू नहीं होते है और दंप्रसं. के प्रावधानों की कठोर अनुपालन आवश्यक नहीं होती है।

5. न्यायदृष्टांत ***सय्यार पूरी विरूद्ध स्टेट ऑफ राजस्थान, एआईआर 1998 एससी 3224*** के अनुसार अभियुक्त लोक मार्ग पर बैठा था वहाँ तलाशी और जप्ती की गई तब धारा 42(2) अधिनियम का अनुपालन आवश्यक नहीं है।

इस मामले में यह भी अभिनिर्धारित किया गया है कि अन्वेषण अधिकारी के लिए नक्शा मौका बनाना आवश्यक नहीं है।

6. न्यायदृष्टांत ***रामकुमार विरूद्ध सीबीआई, (2008) 5 एससीसी 385*** के अनुसार बस की संयोग वश तलाशी या चान्स रिकवरी लोक मार्ग पर की गई धारा 42 लागू नहीं होगी।

7. न्यायदृष्टांत ***बाबूभाई उद्धव जी पटेल विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2006 एससी 102*** के अनुसार संदिग्ध वाहनों की सामान्यतः की जाने वाली तलाशी में एक टेंकर से मादक पदार्थ जप्त हुआ ऐसे में तलाशी वारण्ट लेने के प्रावधान लागू नहीं होते है। उस मामले में यह भी कहा गया की डी.आई.जी. ने पीएसआई को एक सूचना दी की एक जिले से एक वाहन मादक पदार्थ लेकर गुजर सकता है यह एक सामान्य सूचना थी जिसको धारा 42 के तहत लेखबद्ध करना आवश्यक नहीं माना गया।

8. न्यायदृष्टांत ***अमित भाई आजम भाई मलिक विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2009 एससी 1371*** के अनुसार जहाँ अनुसंधान अधिकारी को अन्य अपराध के अनुसंधान मे या नियमित पेट्रोलिंग के दौरान संदिग्ध पदार्थ का आधिपत्य ज्ञान में आता है वहाँ धारा 42 का अनुपालन आवश्यक नहीं होता है।

9. न्यायदृष्टांत ***कमलेश्वर सिंह विरूद्ध स्टेट ऑफ एम.पी., 1997 सीआरएलजे 1284*** के अनुसार जब प्रधान आरक्षक अन्य अपराध का अनुसंधान कर रहा था उस दौरान निषिद्ध पदार्थ जप्त हुआ धारा 42 लागू नहीं होगी क्योंकि उसे कोई पूर्व सूचना नहीं थी।

10. न्यायदृष्टांत ***स्टेट, एनसीटी देहली विरूद्ध मालविन्दर सिंह, एआईआर 2007 एससी 539*** सप्लीमेंट 237 के अनुसार पुलिस अधिकारी जब पेट्रोल डियूटी पर था तब उसे सूचना मिली उसने लोक स्थान पर वाहन रोका और तलाशी और जप्ती की धारा 42 का अनुपालन आवश्यक नहीं है। इस मामले में यह भी कहा गया जहाँ राजपत्रित अधिकारी स्वयं तलाशी लेता है तब भी धारा 42 लागू नहीं होती है।

11. न्यायदृष्टांत ***मो. इरशाद विरूद्ध यूनियन ऑफ इंडिया, 2005 (3) एमपीएलजे 455*** के अनुसार लोक स्थान से एम.पी. एस.आर.टी के बस से जप्ती की गई धारा 42 लागू नहीं होगी धारा 43 लागू होगी।

12. लोक स्थान से राजपत्रित अधिकारी की उपस्थिति में तलाशी धारा 42 (2) लागू नहीं होगी। इस संबंध में गोपाल शर्मा विरूद्ध सी.बी.आई., आईएलआर 2008 एम.पी. 131 अवलोकनीय है।

13. जहाँ धारा 41 (1) अधिनियम के वारण्ट के अधीन कोई अधिकारी तलाशी लेता है तब उसके द्वारा सूचना को अभिलिखित करने की अनिवार्यता नहीं होती है क्योंकि वह तलाशी वारण्ट प्राप्त करने के आवेदन में ही अपने विश्वास के आधार पर अभिलिखित कर देता है अतः उसके लिए फिर से प्राप्त सूचना लेखबद्ध करना केवल दोहराव कहा जायेगा।

8. धारा 42 और धारा 43 का अंतर

जब तलाशी लोक स्थान पर ली जाती है तब धारा 42 लागू नहीं होती है बल्कि धारा 43 लागू होती है इस संबंध में न्यायादृष्टांत ***नारायण स्वामी विरूद्ध असिस्टेंट डायरेक्टर रेवेन्यू इंटेलिजेंस, एआईआर 2002 एससी 3658*** अवलोकनीय है जो एयर पोर्ट पर की गई तलाशी और जप्ती के बार में है।

न्यायदृष्टांत ***स्टेट ऑफ हरियाणा विरूद्ध जरनेल सिंह, एआईआर 2004 एससी 249*** के अनुसार लोक स्थान पर लोक वाहन के जाँच में टेंकर की तलाशी से पापी हस्क बरामद हुई कोई पूर्व सूचना नहीं थी वाहन की सामान्य प्रक्रिया में जाँच की गई थी धारा 42 और 50 लागू नहीं होगी बल्कि धारा 43 लागू होगी।

न्यायदृष्टांत ***रविन्द्रन उर्फ जॉन विरूद्ध सुपरिटेन्डेन्ट ऑफ कस्टम, (2007) 6 एससीसी 410*** के अनुसार किसी भवन, प्रवहण या स्थान की तलाशी किसी निषिद्ध पदार्थ के बारे में सूर्यास्त एवं सूर्योदय के बीच लेने में धारा 42 लागू होती है जबकि धारा 43 लोक स्थान पर तलाशी और जप्ती के बारे में लागू होती है।

सूचना को लिखना और 72 घंटे की भीतर उसकी प्रतिलिपि वरिष्ट को भेजना धारा 42 में जरूरी है धारा 43 में नहीं है। इस मामले में धारा 42 और 43 को स्पष्ट किया गया है।

न्यायदृष्टांत ***डायरेक्टर ऑफ रेवेन्यू विरूद्ध मो. निसार होलिया, (2008) 2 एससीसी 372*** के अनुसार होटल एक लोक स्थान है लेकिन उस होटल में यदि एक व्यक्ति एक कमरे को आक्यूपाई (अपने आधिपत्य में) किये हुए है तो वह कमरा लोक स्थान नहीं है। धारा 42 की सूचना न तो लेखबद्ध की न वरिष्ठ अधिकारियों को भेजी दोष सिद्धि अपास्त की गई।

न्यायदृष्टांत ***गंगा बहादुर थापा विरूद्ध स्टेट ऑफ गोवा, (2000) 10 एससीसी 312*** के अनुसार होटल एक लोक स्थान है उसकी तलाशी में धारा 42 लागू नहीं होगी धारा 43 लागू होगी।

9. डिस्पेच नम्बर न बतलाना

न्यायदृष्टांत ***कृष्णा कवर उर्फ ठाकुरीन विरूद्ध स्टेट ऑफ राजस्थान, एआईआर 2004 एससी 2735*** के अनुसार प्रेषण नम्बर की विशिष्टिया न बतला पाना गवाह के वरिष्ठ अधिकारी को सूचना भेजने संबंधी कथनों को अविश्वसनीय नहीं बना देता है।

10. जप्ती पंचनामा मौके पर न बनाना

न्यायदृष्टांत ***खेत सिंह विरूद्ध यूनियन ऑफ इंडिया, एआईआर 2002 एससी 1450*** के अनुसार जप्ती पंचनामा मौके पर न बना कर कस्टम विभाग के कार्यालय में बनाया गया पूरी प्रक्रिया में अभियुक्त उपस्थित था ऐसे अभियोग नहीं थे कि अधिकारियों ने जप्त सामान में कुछ मिलावट की है। अभियुक्त के हितों पर कोई प्रतिकूल असर नहीं हुआ है दोषसिद्धि उचित पाई गई।

11. साजन अब्राह्म और अब्दुल रशिद इब्राहिम मंसूरी के प्रकरण में अंतर

न्यायदृष्टांत ***साजन अब्राह्म विरूद्ध स्टेट ऑफ केरला, एआई आर 2001 एससी 3190*** तीन न्यायमूर्तिगण की पीठ और न्यायदृष्टांत ***अब्दुल रशिद इब्राहिम मंसूरी विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2000 एससी 821*** तीन न्यायमूर्तिगण की पीठ ने उक्त अंतर को न्यायदृष्टांत ***करनेल सिंह विरूद्ध स्टेट ऑफ हरियाणा, (2009) 8 एससीसी 539*** पांच न्यायमूर्तिगण की पीठ निर्णय चरण 35 में स्पष्ट किया है और यह अभिमत दिया है दोनों न्यायदृष्टांत में उनके तथ्यों के आधार पर अभिमत दिया गया है। साजन अब्राह्म धारा 42 में संशोधन के बाद की स्थिति को स्पष्ट करता है जबकि अब्दुल रशिद का मामला धारा 42 में संशोधन के पूर्व का है।

12. क्या विचारण दूषित हो जाएगा

न्यायदृष्टांत ***करनेल सिंह विरूद्ध स्टेट ऑफ हरियाणा, (2009) 8 एससीसी 539*** संविधान पीठ के अनुसार इन प्रावधानों का अनुपालन न करने से विचारण दूषित नहीं होता है यदि ऐसे अनुपालन न करने से अभियुक्त के हितों पर कोई प्रतिकूल असर न गिरता हो निर्णय चरण 33 इस बारे में अवलोकनीय है।

13. पुलिस अधिकारी या कर्मचारी का पंच गवाह होना

न्यायदृष्टांत ***जी. श्रीनिवास गौड विरूद्ध स्टेट ऑफ ए.पी., एआईआर 2005 एससी 3647*** के अनुसार पुलिस कर्मचारी के पंच गवाह होने पर कोई विधिक बाधा नहीं है।

कभी–कभी ऐसी स्थिति बनती है कि कोई भी व्यक्ति पंच गवाह बनने को तैयार नहीं होता है ऐसे में पुलिस अधिकारी या कर्मचारी को पंच गवाह बनाना पड़ता है इसे ध्यान में रखना चाहिए।

इस संबंध में न्यायदृष्टांत ***जरनेल सिंह विरूद्ध स्टेट ऑफ पंजाब, एआईआर 2011 एससी 964*** भी अवलोकनीय है।

II. व्यक्ति की तलाशी

इस संबंध में धारा 50 अधिनियम ध्यान में रखना होती है जो कि इस प्रकार है :–

धारा 50 वे शर्तें जिनके अधीन व्यक्तियों की तलाशी ली जाएगी. – (1) जब धारा 42 के अधीन सम्यक् रूप से प्राधिकृत कोई अधिकारी, धारा 41, धारा 42 या धारा 43 के उपबंधों के अधीन किसी व्यक्ति की तलाशी लेने वाला है तब वह, ऐसे व्यक्ति को यदि ऐसा व्यक्ति ऐसी अपेक्षा करे तो, बिना अनावश्यक विलंब के धारा 42 में उल्लिखित किसी विभाग के निकटतम राजपत्रित अधिकारी या निकटतम मजिस्ट्रेट के पास ले जाएगा।

(2) यदि ऐसा अपेक्षा की जाती हैं तो अधिकारी ऐसे व्यक्ति को तब तक निरूद्ध रख सकेगा जब तक वह उसे उप–धारा (1) में निर्दिष्ट राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष नहीं ले जा सकता।

(3) यदि ऐसा राजपत्रित अधिकारी या मजिस्ट्रेट, जिसके समक्ष कोई ऐसा व्यक्ति लाया जाता हैं, तलाशी के लिए कोई उचित आधार नहीं पाता हैं तो वह ऐसे व्यक्ति को तत्काल उन्मोचित कर देगा किन्तु अन्यथा वह निदेश देगा कि तलाशी ली जाए।

(4) किसी स्त्री की तलाशी, स्त्री से भिन्न किसी अन्य व्यक्ति द्वारा नहीं ली जाएगी।

(5) जब धारा 42 के अन्तर्गत पूर्ण रूप से अधिकृत अधिकारी के पास विश्वास करने का कारण हो कि उस व्यक्ति जिसकी तलाशी ली जा रही हैं, के कब्जे में किसी स्वापक औषधि अथवा मनः प्रभावी पदार्थ अथवा नियन्त्रित पदार्थ अथवा वस्तु अथवा दस्तावेज को उसे अलग किए बिना, जिसकी तलाशी ली जानी हैं, नजदीकी राजपत्रित अधिकारी या मजिस्ट्रेट के पास तलाशी करने के लिए ले जाना संभव नहीं हैं, तो नजदीकी राजपत्रित अधिकारी या मजिस्ट्रेट के पास उस को ले जाने की बजाय, वह उस व्यक्ति की तलाशी ले सकेगा, जिस प्रकार से दण्ड प्रक्रिया संहिता, 1973 की धारा 100 के अन्तर्गत प्रदान किया गया है।

(6) उप–धारा (5) के अन्तर्गत तलाशी लेने के पश्चात् अधिकारी उस विश्वास के लिए कारणों को अभिलेखित करेगा, जिसके कारण तलाशी की आवश्यकता हुई और 72 घंटों के भीतर, उसकी एक प्रति अपने उच्चतम अधिकारी को भेजेगा।

1. प्रावधान की प्रकृति

धारा 50 व्यक्ति की तलाशी के बारे में है इस प्रावधान कि प्रकृति का प्रश्न प्रायः विशेष न्यायालय के समक्ष उत्पन्न होता है।

न्यायदृष्टांत ***विजय सिंह चन्दूबा जडेजा विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2011 एससी 77*** पांच न्यायमूर्तिगण की पीठ के समक्ष यही प्रश्न विचारणीय था कि क्या धारा 50 अधिनियम अधिकृत अधिकारी पर यह कर्तव्य अधिरोपित करती है कि वह संदिग्ध व्यक्ति को उसके इस अधिकार की सूचना दे कि वह अपनी तलाशी राजपत्रित अधिकारी या मजिस्ट्रेट की उपस्थिति में करवा सकता है या अधिकृत अधिकारी द्वारा केवल संदिग्ध व्यक्ति से यह पूछना पर्याप्त है कि क्या वह अपनी तलाशी राजपत्रित अधिकारी या मजिस्ट्रेट की उपस्थिति में करवाना चाहता है ?

निर्णय चरण 25 में उक्त संवैधानिक पीठ ने यह अभिमत दिया कि अधिकृत अधिकारी के लिए यह आदेशसूचक या अनिवार्य है कि वह जब किसी व्यक्ति तलाशी लेने वाला हो तो उस व्यक्ति को उसके इस अधिकार से अवगत करावे कि वह व्यक्ति अपनी तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष करवा सकता है। धारा 50(1) अधिनियम आज्ञापक या मेन्डेटरी है और इस का कठोरता से अनुपालन आवश्यक है।

इस तरह पूर्व में न्यायदृष्टांत ***जोसफ फ्रेन्डिस विरूद्ध स्टेट ऑफ गोवा, (2000) 1 एससीसी 707 : एआईआर 2000 एससी 350 एवं प्रभाशंकर दुबे विरूद्ध स्टेट ऑफ एम.पी., एआईआर 2004 एससी 486*** में जो तात्विक अनुपालन की धारणा बतलाई गई है वह न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध बल्देव सिंह, (1999) 6 एससीसी 172 : 1999 सीआरएलजे 3672*** पांच न्यायमूर्तिगण की पीठ निर्णय चरण 57 (1) के अनुरूप नहीं है।

न्यायदृष्टांत ***माया वेंकटेश्वरालू विरूद्ध स्टेट ऑफ ए.पी., (2012)5 एससीसी 226*** के अनुसार धारा 50 (1) का कठोरता से अनुपालन आवश्यक है। बल्देवसिंह और विजय सिंह के संविधान पीठ के न्यायदृष्टांतों से यह स्थिति बिल्कुल स्पष्ट है।

न्यायदृष्टांत ***स्टेट ऑफ देहली विरूद्ध रामअवतार, एआईआर 2011 एससी 2699*** के अनुसार तात्विक अनुपालन का सिंद्धात लागू नहीं होगा अभियुक्त को उसके धारा 50 के अधिकार की जानकारी देना होगी।

न्यायदृष्टांत ***अशोक कुमार शर्मा विरूद्ध स्टेट ऑफ राजस्थान, (2013) 2 एससीसी 67*** के अनुसार धारा 50 के आज्ञापक प्रावधान का अनुपालन न करने से पूरी कार्यवाही दूषित हो जाती है इस मामले में अधिकृत अधिकारी ने केवल यह जानकारी दी थी कि वह (अभियुक्त) चाहे तो उसकी तलाशी मजिस्ट्रेट या राजपत्रित अधिकारी के सामने करवा सकता है। इस मामले में यह भी कहा गया था कि विधि का ज्ञान न होना क्षम्य नहीं है लेकिन एक ग्रामीण अशिक्षित व्यक्ति से या गरीब अशिक्षित व्यक्ति से यह आशा नहीं की जा सकती की वह देश के सारे कानून को जानता है इसी कारण धारा 50 में विधायिका ने यह व्यवस्था कि की अधिकृत अधिकारी अभियुक्त को उसके इस अधिकार को जानकारी दे कि वह अपनी तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के सामने करवा सकता है।

इस तरह उक्त न्यायदृष्टांत ***विजय सिंह सी. जड़ेजा और बल्देव सिंह*** दोनों पांच न्यायमूर्तिगण की पीठ के अनुसार धारा 50 (1) की तात्विक अनुपालना पर्याप्त नहीं है बल्कि संदिग्ध व्यक्ति को उसके इस अधिकार की जानकारी देना आवश्यक है कि वह अपनी तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष करवा सकता है।

2. राजपत्रित अधिकारी या मजिस्ट्रेट

न्यायदृष्टांत ***विजय सिंह चन्दूबा जडेजा विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2011 एससी 77*** पांच न्यायमूर्तिगण की पीठ ने निर्णय चरण 22 में यह अभिमत भी दिया है कि धारा 50 अधिकृत अधिकारी को यह विकल्प देती है कि वह संदिग्ध व्यक्ति को या तो निकटतम राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष ले जाये लेकिन हम यह अनुभव करते है कि अधिकृतता, पारदर्शिता और पूरी कार्यवाही पर विश्वसनीयता बनी रहे इसके लिए संदिग्ध व्यक्ति को निकटतम मजिस्ट्रेट के समक्ष ले जाने का प्रथम अवसर पर प्रयास करना चाहिए क्योंकि मजिस्ट्रेट पर अन्य अधिकारी की तुलना में आम आदमी अधिक विश्वास करता है। यह तलाशी की कार्यवाही में विश्वसनीयता बढ़ाता है और अभियोजन को बल भी देता है।

हालांकि न्यायदृष्टांत ***मनोहर लाल विरूद्ध स्टेट ऑफ राजस्थान, (1996) 11 एससीसी 391, रघुबीर सिंह विरूद्ध स्टेट ऑफ हरियाणा, 1996 सीआरएलजे 1694 और टी.टी. हनिफा विरूद्ध स्टेट ऑफ केरला, (2004) 5 एससीसी 128*** के अनुसार यह पुलिस अधिकारी पर निर्भर है कि वह अभियुक्त को निकटतम राजपत्रित अधिकारी या मजिस्ट्रेट जो भी सुविधाजनक रूप से उपलब्ध हो उसके पास ले जाये। इस वैधानिक स्थिति को उक्त न्यायदृष्टांत विजय सिंह में ओवररूल्ड नहीं किया है।

विशेष न्यायालय को यह देखना चाहिए क्या अधिकृत अधिकारी ने निकटतम मजिस्ट्रेट के समक्ष अभियुक्त को ले जाने का प्रयास किया या नहीं। लेकिन अधिकृत अधिकारी यदि निकटतम राजपत्रित अधिकारी के समक्ष अभियुक्त को ले गया है तो यह प्रावधान का अनुपालन माना जा सकता है।

3. व्यक्ति क्या है ?

न्यायदृष्टांत ***स्टेट ऑफ एच.पी. विरूद्ध पवन कुमार, एआईआर 2005 एससी 2265*** तीन न्यायमूर्तिगण की पीठ में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि धारा 50 (1) केवल व्यक्ति की तलाशी में लागू होती है। व्यक्ति का अर्थ एक मनुष्य से है जो कपड़े, जूते पहने हो लेकिन एक व्यक्ति जो बेग, ब्रीफकेस, कन्टेनर ले जा रहा हो और उस बेग, ब्रीफकेस या कन्टेनर की तलाशी ली जाना हो वहाँ धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***यासीन योबीन विरूद्ध डिपार्टमेंन्ट ऑफ कस्टम, 2013 (3) क्राईमस 342*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि व्यक्ति की तलाशी या वाहन और आर्टिफिशियल आबजेक्ट की तलाशी में अंतर की रेखा बहुत बारीक है अतः बहुत सावधानी से विचार करना चाहिए।

न्यायदृष्टांत ***अजमेर सिंह विरूद्ध स्टेट ऑफ हरियाणा, (2010) 3 एससीसी 746*** के अनुसार वाहन, बर्तन, ब्रीफकेस, बेग आदि जो अभियुक्त ले जा रहा था उनकी तलाशी में धारा 50 लागू नहीं होती धारा 50 केवल व्यक्ति की तलाशी पर लागू होती है। इस संबंध में न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध माखन चंद, एआईआर 2011 एससी 3061, स्टेट ऑफ राजस्थान विरूद्ध दौलत राम, (2005) 7 एससीसी 36*** और ***स्टेट ऑफ हरियाणा विरूद्ध रणबीर सिंह, (2006) 5 एससीसी 167*** अवलोकनीय है।

न्यायदृष्टांत ***स्टेट ऑफ हरियाणा विरूद्ध मणिराम, (2008) 8 एससीसी 292*** के अनुसार आर्टिकल की तलाशी और व्यक्ति की तलाशी में अंतर होता है आर्टिकल की तलाशी में धारा 50 लागू नहीं होती है।

न्यायदृष्टांत ***अब्दुल रशीद इब्राहिम मंसूरी विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2000 एससी 821*** तीन न्यायमूर्तिगण पीठ के अनुसार वाहन में बेग पाया गया उसकी तलाशी में धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध बलबीर सिंह, एआईआर 2005 एससी 27*** अभियुक्त से कार्ट या गाड़ी की तलाशी में 18 थैली पापी हक्स बरामद हुए धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***सरजू लाल विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2000 एससी 403*** के अनुसार अभियुक्त स्कूटर पर जा रहा था उस पर एक बैग टंगा था उस बैग की तलाशी में धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध बलवन्त राय, एआईआर 2005 एससी 1576*** के मामले में अभियुक्त सड़क के किनारे थैलों पर बैठा हुआ था उन थैलों में पापी हक्स बरामद हुआ अभियुक्त के शरीर से 200 रूपये बरामद हुए। धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***घसीटा साहू विरूद्ध स्टेट ऑफ एम.पी., एआईआर 2008 एम.पी. 1425*** के अनुसार व्यक्ति की तलाशी और मकान की तलाशी में अंतर होता है धारा 50 के केवल व्यक्ति की तलाशी में लागू होती है मकान की तलाशी में धारा 42 अधिनियम व धारा 100 दंप्रसं., 1973 लागू होती है।

न्यायदृष्टांत ***गोपाल शर्मा विरूद्ध सी.बी.आई., आईएलआर 2008 एम.पी. 131*** के अनुसार अभियुक्त द्वारा ले जाये जा रहे बेग, ब्रीफकेस, आर्टिकल या बर्तन की तलाशी व्यक्ति की तलाशी नहीं है। धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***स्टेट ऑफ राजस्थान विरूद्ध मनोज शर्मा, एआईआर 2009 एससी 2642*** के अनुसार घर के अंदर के स्थान से बरामदगी में धारा 50 लागू नहीं होती है।

न्यायदृष्टांत ***कृष्णकुमार विरूद्ध स्टेट ऑफ हरियाणा, (2014) 6 एससीसी 644*** अभियुक्त प्लास्टिक की थैली ले जा रहा था उसकी तलाशी में धारा 50 लागू नहीं होगी।

न्यायदृष्टांत ***कश्मीरी लाल विरूद्ध स्टेट ऑफ हरियाणा, (2013) 6 एससीसी 595*** के अनुसार वाहन की तलाशी में धारा 50 लागू नहीं होगी यही विधि ***नवदीप सिंह विरूद्ध स्टेट ऑफ हरियाणा, (2013) 2 एससीसी 584*** में भी प्रतिपादित की गई।

4. क्या अभियुक्त का निवेदन आवश्यक है ?

न्यायदृष्टांत ***कालायथ नस्सार विरूद्ध स्टेट ऑफ केरला, एआईआर 2000 एससी 733*** के अनुसार अभियुक्त के लिए यह आवश्यक नहीं है कि वह यह निवेदन करे कि उसकी तलाशी मजिस्ट्रेट या राजपत्रित अधिकारी की उपस्थिति में ली जाये।

5. क्या धारा 50 (1) के अधिकार की लिखित जानकारी आवश्यक है ?

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध बलदेव सिंह, (1999) 6 एससीसी 172*** निर्णय चरण 57 (1) के अनुसार धारा 50 (1) के अधिकार की जानकारी लिखित में देना आवश्यक नहीं है।

न्यायदृष्टांत ***साजन इब्राहिम विरूद्ध स्टेट ऑफ केरला, एआईआर 2001 एससी 3190*** तीन न्यायमूर्तिगण की पीठ के अनुसार अभियुक्त को मजिस्ट्रेट या राजपत्रित अधिकारी की उपस्थिति में तलाशी के अधिकार की जानकारी मौखिक दी गई वह वैध है।

न्यायदृष्टांत ***नवदीप सिंह विरूद्ध स्टेट ऑफ हरियाणा, (2013) 2 एससीसी 584*** के अनुसार धारा 50 के अनुपालन में कोई प्रारूप निर्धारित नहीं है केवल अभियुक्त को उसके अधिकार की जानकारी हो जाना चाहिए।

6. धारा 50 (4) के बारे में

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध इंदिरा रानी, (2000) 10 एससीसी 429*** और ***फतो उर्फ फूला उर्फ कमला विरूद्ध स्टेट ऑफ एम.पी. 2004 (2) एम.पी. एचटी 67 : 2004 सीआरएलजे 4353*** के अनुसार एक महिला अभियुक्त की तलाशी महिला पुलिस कर्मचारी द्वारा ही ली जाना चाहिए। यह प्रावधान आज्ञापक है।

7. संयोगवश तलाशी या चांस रिकवरी

अभियुक्त पुलिस पार्टी को देख कर भागा उसके इस संदिग्ध आचरण के कारण उसकी तलाशी ली गई पुलिस अधिकारी को इस बारे में ज्ञान नहीं था की अभियुक्त निषिद्ध पदार्थ रखे हुए है धारा 50 लागू नहीं होगी। इस संबंध में न्यायदृष्टांत ***भारत भाई भगवान जी भाई विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2003 एससी 7, स्टेट ऑफ पंजाब विरूद्ध बलबीर सिंह, एआईआर 1994 एससी 1872,*** और ***विक्रम विरूद्ध स्टेट ऑफ एम.पी., 2002 (3) एमपीएलजे 383*** भी अवलोकनीय है।

न्यायदृष्टांत ***स्टेट ऑफ हरियाणा विरूद्ध सुनील कुमार (2014)4 एससीसी 70*** के अनुसार एक तलाशी जो संयोग वश या अप्रत्याशित या एक्सीडेन्टल होती है उसे संयोगवश तलाशी या चांस रिकवरी कहते है उसमें धारा 50 लागू नहीं होती है।

8. अधिकृत अधिकारी और धारा 50 (1)

यदि अधिकृत अधिकारी ने तलाशी ली है तब भी धारा 50 लागू होगी। इस संबंध में न्यायदृष्टांत ***अहमद विरूद्ध स्टेट ऑफ गुजरात, एआईआर 2000 एससी 2790*** अवलोकनीय है।

इस संबंध में न्यायदृष्टांत ***स्टेट ऑफ राजस्थान विरूद्ध रामचन्द्र, (2005) 5 एससीसी 151*** भी अवलोकनीय है।

9. धारा 50 का अनुपालन न करने का प्रभाव

उक्त न्यायदृष्टांत ***विजय सिंह सी. जडेजा निर्णय चरण 22*** संविधान पीठ के अनुसार धारा 50 का कठोरता से अनुपालन न करने से निषिद्ध पदार्थ की जप्ती संदेहास्पद हो जाती है और ऐसी तलाशी में व्यक्ति की तलाशी से जप्त आर्टिकल के आधार पर की गई दोष सिद्ध दूषित हो जाती है।

उक्त न्यायदृष्टांत ***स्टेट ऑफ देहली विरूद्ध रामअवतार, एआईआर 2011 एससी 2699*** के अनुसार धारा 50 का अनुपालन नहीं किया ऐसी जप्ती अवैध है और गवाहों के कथनों के आधार पर ऐसी तलाशी और जप्ती को ग्राह्य नहीं किया जा सकता क्योंकि जो प्रत्यक्षतः नहीं किया जा सकता उसे अप्रत्यक्ष रूप से भी नहीं किया जा सकता।

न्यायदृष्टांत ***स्टेट ऑफ उड़ीसा विरूद्ध एस. महोन्ती, एआईआर 2000 एससी 3494*** के अनुसार एक अभियुक्त के मकान से और दूसरे अभियुक्त से ब्राउन शुगर बरामद हुई धारा 50 दूसरे अभियुक्त पर लागू होगी प्रथम के बारे में नहीं।

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध बलदेव सिंह, (1999) 6 एसीसी 172*** के अनुसार धारा 54 की उपधारणा केवल तभी ली जा सकती है जब अभियोजन यह स्थापित करे कि अभियुक्त के आधिपत्य से निषिद्ध पदार्थ जप्त हुआ है और तलाशी धारा 50 का अनुपालन कर के ली गई है। एक अवैध तलाशी में धारा 54 अधिनियम की उपधारणा नहीं ली जा सकती। इस मामले में यह भी कहा गया कि धारा 50 का अनुपालन न करने पर अभियुक्त के हितो पर प्रतिकूल असर गिरता है।

10. तलाशी अधिकारी अन्य मामले में दोषी

न्यायदृष्टांत ***पोन अधिहन्त विरूद्ध डिप्टी डायरेक्टर नारकोटीक्स, एआईआर 1999 एससी 2353*** के अनुसार तलाशी अधिकारी की साक्ष्य विश्वसनीय पाई गई उसे 10 वर्ष बाद भ्रष्टाचार के मामले में दोषी पाया गया यह तथ्य असंगत है।

11. वाहन पेश न करना

न्यायदृष्टांत ***कश्मीरी लाल विरूद्ध स्टेट ऑफ हरियाणा, (2013) 6 एससीसी 595*** के अनुसार स्कूटर न्यायालय में पेश नहीं किया गया लेकिन उसके दस्तावेज पेश किये और प्रमाणित किये गये अभियुक्त से बरामदगी प्रमाणित हुई।

अतः वाहन पेश न करने का कोई विपरीत प्रभाव नहीं पाया गया।

इस प्रकार धारा 41 से 43 व धारा 50 अधिनियम के अनुपालन के बारे में उक्त वैधानिक स्थितियों को ध्यान मे रखते हुए प्रकरणों का शीघ्र निराकरण करना चाहिए।

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DIRECTION ISSUED BY HON'BLE THE APEX COURT FOR SPEEDY DISPOSAL OF CASES UNDER 138 N.I. ACT, 1881

(J.V. Baharuni and another v. State of Gujarat and another
Criminal Appeal No. 2221 of 2014, Dated 16.10.2014)

To summarise and answer the issues raised herein, following directions are issued for the Courts seized off with similar cases :

1. All the subordinate Court must make and endeavour to expedite the hearing of cases in a time bound manner which in turn will restore the confidence of the common man in the justice delivery system. When law expects something to be done within prescribed time limit, some efforts are required to be made to obey the mandate of law.
2. The learned Magistrate has the discretion under section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to section 143 of the N.I. Act. Such reasons should necessarily be recorded by the trial Court so that further litigation arraigning the mode of rial can be avoided.
3. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.
4. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of trial and speedy disposal of cases.
5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The Appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial.
6. While examining the nature of the trial conducted by the trial Court for the purpose of determining whether it was summary trial or summons trial, the primary and predominant test to be adopted by the Appellate Court should be whether it was only the substance of the evidence that was recorded or whether the complete record of the deposition of the witness in their chief examination, cross-examination and re-examination in verbatim was faithfully placed on record. The Appellate Court has to go through each and every minute detail of the trial Court record and then examine the same independently and thoroughly to reach at a just and reasonable conclusions.

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PART - II
NOTES ON IMPORTANT JUDGMENTS

***174. ARBITRATION AND CONCILIATION ACT, 1996 – Section 8**

CIVIL PROCEDURE CODE, 1908 – Section 9

If an application under section 8 of the Arbitration and Conciliation Act,1996 is duly filed before the civil court, what should be the approach of the court? Held, the approach of the civil court should not be to see whether the court has jurisdiction but should be to see whether its jurisdiction has been ousted – There is a lot of difference between above two approaches – Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliances of the procedure under the special statute – The general law should yield to the special law – The approach shall not be to see whether there is still jurisdiction in the civil court under the general law.

माध्यस्थ और सुलह अधिनियम, 1996 – धारा 8

सिविल प्रक्रिया संहिता, 1908 – धारा 9

यदि सिविल न्यायाल के सामने धारा 8 माध्यस्थ और सुलह अधिनियम, 1996 के अधीन एक आवेदन सम्यक रूप से प्रस्तुत किया जाता है तब न्यायालय का उस पर क्या दृष्टिकोण होना चाहिये? अभिनिर्धारित किया गया सिविल न्यायालय का दृष्टिकोण यह नहीं होना चाहिये कि वह यह देखे कि क्या न्यायालय को क्षेत्राधिकार है बल्कि उसका दृष्टिकोण यह होना चाहिये कि क्या क्षेत्राधिकार बाधित है। इन दोनों दृष्टिकोणों में काफी अंतर है। एक बार यदि न्यायालय के ध्यान में यह लाया जाता है कि उसका क्षेत्राधिकार एक विशेष विधान द्वारा विहित प्रक्रिया के क्रम में ले लिया गया है तब सिविल न्यायालय को सर्वप्रथम यह देखना चाहिये कि क्या विशेष विधान के अधीन

निर्धारित प्रक्रिया के अनुपालन में उसका क्षेत्राधिकार बाधित है। विशेष विधि सामान्य विधि पर अभिभावी होती है – यह दृष्टिकोण नहीं होना चाहिये कि सामान्य विधि के अधीन अब भी सिविल न्यायालय को क्षेत्राधिकार है।

M/s. Sundaram Finance Limited and another v. T.Thankam

Judgment dated 20.02.2015 passed by the Supreme Court in Civil Appeal No. 2079 of 2015, reported in AIR 2015 SC 1303

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***175. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 and 42**

Jurisdiction of civil court to entertain an application under section 34 of the Act of 1996 – The Arbitration proceeding has been conducted within the jurisdiction of Raichur Court which has jurisdiction as per section 20 of CPC and is subordinate to the High Court of Karnataka which entertained the application under section 11 of the Act of 1996 – The award can be challenged before a court subordinate to the High Court of Karnataka but not before a court subordinate to the High Court of Bombay.

माध्यस्थ और सुलह अधिनियम, 1996 – धाराएं 34 और 42

सिविल न्यायालय का धारा 34 अधिनियम, 1996 के अधीन आवेदन ग्रहण करने का क्षेत्राधिकार – माध्यस्थ कार्यवाही का संचालन रायचुर न्यायालय के क्षेत्राधिकार में किया गया था जो कि धारा 20 सीपीसी के तहत क्षेत्राधिकार रखती है और वह कर्नाटक उच्च न्यायालय के अधीनस्थ है जिसने धारा 11 अधिनियम, 1996 के अधीन आवेदन ग्रहण किया था। अवार्ड को चुनौती कर्नाटक उच्च न्यायालय के अधीनस्थ न्यायालय के समक्ष दी जा सकती है लेकिन बाम्बे उच्च न्याायालय के अधीनस्थ न्यायालय के समक्ष अवार्ड को चुनौती नहीं दी जा सकती।

M/s. Bhandari Udyog Limited v. Industrial Facilitation Council and another

Judgment dated 20.02.2015 passed by the Supreme Court in Civil Appeal No. 2077of 2015, reported in AIR 2015 SC 1320

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176. CIVIL PROCEDRUE CODE, 1908 – Section 96 and Order 2 Rule 2
SPECIFIC RELIEF ACT, 1963 – Sections 10, 19(b), 20 and 38
CONTRACT ACT, 1872 – Section 55
LIMITATION ACT, 1963 – Article 54

(i) Applicability of bar under Order 2 Rule 2 of C.P.C., conditions precedent therefor – Law explained.

Cause of action in latter suit must be same as that of the former suit – In this regard, ingredients for claiming reliefs in both the suits are also relevant – However, similarity of pleadings in both the suits is not relevant – In order to determine such bar, Court must examine cause of action, relief claimed, applicable legal provisions and entire factual matrix of both the suits.

(ii) Plaintiff put in possession under part-performance of contract for sale, filed first suit for permanent injunction restraining defendants from interfering with his possession over suit house – Cause of action for such suit was based on threat given by defendants to dispossess him from suit house by sale thereof by defendant no. 2 (owner) to defendant no. 1 (subsequent purchaser) – Plaintiff filed subsequent suit for

specific performance of agreement for sale of suit house also – Cause of action for such suit was based on non-performance of agreement of sale by defendant no. 2 in his favour despite legal notice to perform seller's part – Held, cause of action of both suits and ingredients for claiming two suits are different, hence, bar under Order 2 Rule 2 CPC not attracted.

(iii) Sale of property to third person (subsequent purchaser) – Rights of person under contract for sale and proper form of decree for enforcement of – Explained.

Decree for specific performance of agreement for sale of immovable property in favour of plaintiff (purchaser) – Property already sold by defendant no. 2 (owner) to defendant no. 1 (subsequent purchaser) – Held, plaintiff may be directed by Court to pay an additional amount over and above agreed sale consideration to owner with a view to balance equities between parties and/or to compensate owner for loss caused due to escalation of price of land – Defendant no. 2 (owner) and defendant no. 1 (subsequent purchaser) may also be directed by the Court to execute sale deed of suit property jointly in favour of plaintiff to avoid any legal complications – Further held, defendant no. 2 (owner) cannot retain sale consideration received from defendant no. 1 (subsequent purchaser), therefore, Court can direct the former to refund such sale price to the latter with interest. (*Durga Prasad v. Deepchand, AIR 1954 SC 75* relied on)

(iv) Whether time is essence of contract? Determination of – Intention of parties in this regard can be inferred from express terms of contract, conduct of parties there to, nature of property and surrounding circumstances.

(v) Suit for specific performance of agreement for sale of immovable property – Period of limitation, commencement of – It starts from the date of performance of the agreement – In absence of such fixed date, limitation runs from the date when plaintiff had notice of refusal of performance.

(vi) First appeal – Powers of first appellate court, scope of – It can re-appreciate entire evidence and come to its own independent conclusion – Further held, grant of relief and exercise of discretionary power by first appellate Court on the basis of such re-appreciation should not be interfered with by the second appellate court unless the same is either against settled principles of law or arbitrary or perverse.

सिविल प्रक्रिया संहिता, 1908 – धारा 96 और आदेश 2 नियम 2
विर्निदिष्ट अनुतोष अधिनियम, 1963 – धाराएं 10, 19 (बी), 20 और 38
संविदा अधिनियम, 1872 – धारा 55
परिसीमा अधिनियम, 1963 – अनुच्छेद 54

(i) आदेश 2 नियम 2 सीपीसी के अधीन वर्जन या बाधा के लागू होने की पूर्ववर्ती शर्त – विधि समझाई गई।

पश्चातवर्ती वाद का वादकारण और पूर्ववर्ती वाद का वादकारण समान होना चाहिए – इस संबंध में दोनों वादों में चाहे गये अनुतोष के लिए घटक भी तात्विक होते हैं – किन्तु दोनों वादों में अभिवचनों में समानता तात्विक नहीं होती है – उक्त बाधा के निर्धारण के क्रम में न्यायालय को दोनों वादों के वादकारण, दावा किया गया अनुतोष, लागू होने वाले विधिक प्रावधान और पूरे तथ्यों को देखना चाहिए।

(ii) वादी को विक्रय की संविदा के भागिक पालन के अधीन संपत्ति के आधिपत्य में रखा गया, उसने वादग्रस्त मकान पर उसके आधिपत्य में हस्तक्षेप को रोकने के लिए प्रतिवादी के विरूद्ध स्थायी निषेधाज्ञा का प्रथम वाद प्रस्तुत किया – इस वाद का वादकारण प्रतिवादीगण द्वारा उसे वादग्रस्त मकान से मकान को प्रतिवादी कमांक 2 द्वारा प्रतिवादी कमांक 1 को विकय करके आधिपत्य विहिन करने की धमकी देने पर आधारित था – वादी ने पश्चातवर्ी वाद वादग्रस्त मकान के विकय अनुबंध के विनिर्दिष्ट पालन के लिए प्रस्तुत किया – इस वाद का वादकारण विधिक सूचना पत्र देने के बाद भी विकय अनुबंध का पालन विकेता द्वारा न करने पर आधारित था – अभिनिर्धारित किया गया दोनों वाद के वादकारण और उनमें दावा किये गये अनुतोष के घटक भिन्न है आदेश 2 नियम 2 सीपीसी की बाधा आकर्षित नहीं होती।

(iii) तृतीय व्यक्ति (पश्चातवर्ती क्रेता) को संपत्ति का विक्रय – विक्रय की संविदा के अधीन क्रेता के अधिकार और डिक्री का उचित प्रारूप – विधि समझाई गई।

(iv) क्या समय संविदा का सार है ? निर्धारण – पक्षकारों का इस संबंध में आशय संविदा की अभिव्यक्त शर्तों, पक्षकारों के आचरण, संपत्ति की प्रकृति और अन्य परिस्थितियों के प्रकाश में निर्धारण करना चाहिए।

(v) अचल संपत्ति के विक्रय के करार के विनिर्दिष्ट पालन के वाद की परिसीमा का प्रारंभ – यदि अनुबंध में कोई तिथि नियत है तब उस तिथि से प्रारंभ होती है – ऐसी नियत तिथि के अभाव में जब वादी को पालन से इंकार की सूचना हो उस तारीख से परिसीमा प्रारंभ होती है।

(vi) प्रथम अपील न्यायालय की शक्तियों का विस्तार – विधि समझाई गई।

Rathnavathi and another v. Kavita Ganashamdas

Judgment dated 29.10.2014 passed by the Supreme Court in Civil Appeal No. 9949 of 2014, reported in (2015) 5 SCC 223

Extracts from the Judgment:

In the instant case when we apply the aforementioned principle, we find that bar contained in Order 2 Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits.

So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement.

In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39 Rule 1 & 2 of CPC. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of The Act.

One of the basic requirements for successfully invoking the plea of Order 2 Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order 2 Rule 2 of CPC to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.

Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order 2 Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.

We cannot accept the submission of learned senior counsel for the appellants when she contended that since both the suits were based on identical pleadings and when cause of action to sue for relief of specific performance of agreement was available to the plaintiff prior to filing of the first suit, the second suit was hit by bar contained in Order 2 Rule 2 of CPC.

The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could

not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order 2 Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order 2 Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order 2 Rule 2 of CPC for filing the second suit.

Since the plea of Order 2 Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

In the light of foregoing discussion, we have no hesitation in upholding the finding of the High Court on this issue. We, therefore, hold that second suit (OS No. 2334 of 2000) filed by the plaintiff for specific performance of agreement was not barred by virtue of bar contained in Order 2 Rule 2 CPC.

This takes us to the next question as to whether suit for specific performance was barred by limitation prescribed under Article 54 of the Limitation Act?

In order to examine this question, it is necessary to first see the law on the issue as to whether time can be the essence for performance of an agreement to sell the immovable property and if so whether plaintiff in this case performed her part within the time so stipulated in the agreement?

The learned Judge J.C. Shah (as His Lordship then was), speaking for the Bench examined this issue in ***Gomathinayagam Pillai and Ors. v. Pallaniswami Nadar, AIR 1967 SC 868***, in the light of English authorities and Section 55 of the Contract Act and held as under:

> "……It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable

property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In ***Jamshed Khodaram Irani v. Burjorji Dhunjibhai I.L.R. 40 Bom. 289*** the Judicial Committee of the Privy Council observed that the principle underlying S. 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :

"Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.... Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in ***Tilley v. Thomas I.L.R. (1867) Ch. 61*** :-

"...The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice ***Turner said in Roberts v. Berry (1853) 3 De G.M. G. 284,*** there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds... mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

In ***Govind Prasad Chaturvedi v. Hari Dutt Shastri and Anr., (1977) 2 SCC 539,*** this Court placing reliance on the law laid down in ***Gomathinayagam Pillai*** (supra), reiterated the aforesaid principle and held as under:

"…….It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

Apart from the normal presumption that in the case of an agreement of sale of immovable properly time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract."

Again in the case reported in ***Smt. Chand Rani v. Smt. Kamal Rani, (1993) 1 SCC 519,*** this Court placing reliance on law laid down in aforementioned two cases took the same view. Similar view was taken with more elaboration on the issue in ***K.S. Vidyanadam and Ors. v. Vairavan, (1997) 3 SCC 1,*** wherein it was held as under:

> "It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in ***Chand Rani v. Kamal Rani, (1993) 1 SCC 519.***

"25....it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) :

(1) from the express terms of the contract;

(2) from the nature of the property; and

(3) from the surrounding circumstances,for example, the object of making the contract."

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

11.....Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so....."

The aforesaid view was upheld in ***K. Narendra v. Riviera Apartments (P) Ltd., (1999) 5 SCC 77.***

Applying the aforesaid principle of law laid down by this Court to the facts of the case at hand, we have no hesitation in holding that the time was not the essence of agreement for its performance and the parties too did not intend that it should be so.

Clauses 2 and 3 of the agreement (Annexure P-1), which are relevant to decide this question reads as under:

"2. The purchaser shall pay a sum of Rs.50,000/-(Rupees Fifty Thousand only) as advance to the seller at the time of signing this agreement, the receipt of which the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.

3. The Seller covenants with the Purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the Purchaser after paying penalty. In case it is not possible then the time

stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties."

Reading both the clauses together, it is clear that time to perform the agreement was not made an essence of contract by the parties because even after making balance payment after the expiry of lease period, which was to expire in 1995, defendant no. 2 as owner had to make efforts to transfer the land in the name of plaintiff. That apart, we do not find any specific clause in the agreement, which provided for completion of its execution on or before any specific date.

Since it was the case of the plaintiff that she paid the entire sale consideration to defendant 2 and was accordingly placed in possession of the suit house, the threat of her dispossession in 2000 from the suit house coupled with the fact that she having come to know that defendant 2 was trying to alienate the suit house, gave her a cause of action to serve legal notice to defendant 2 on 6.3.2000 calling upon defendant 2 to perform her part and convey the title in the suit house by executing the sale deed in her favour. Since defendant 2 failed to convey the title, the plaintiff filed a suit on 31.3.2000 for specific performance of the agreement.

Article 54 of the Limitation Act which prescribes the period of limitation for filing suit for specific performance reads as under:

"54.	For specific Performance of a contract.	Three years	The date fixed for the performance, or,if no such date is fixed, when the plaintiff has notice that performance is refused

A mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance of the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed. However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement.

In our considered opinion, the High Court being the last Court of appeal on facts /law while hearing first appeal under Section 96 of CPC was well within its powers to appreciate the evidence and came to its own conclusion independent to that of the trial court's decision. One can not dispute the legal proposition that the grant/refusal of specific performance is a discretionary relief, and, therefore, once it is granted by the appellate court on appreciation of evidence, keeping in view the legal principle applicable for the grant then further appellate court should be slow to interfere in such finding, unless the finding is found to be either against the settled principle of law, or is arbitrary or perverse.

This Court while hearing appeal under Article 136 is not inclined to again appreciate the entire ocular/documentary evidence like that of first appellate court unless the parameters noticed above are successfully made out in the case. Such does not appear to be a case of this nature.

It is pertinent to mention that despite holding that the plaintiff paid the entire sale consideration of Rs. 3,50,000/- to defendant 2, the High Court directed the plaintiff to pay an additional sum of Rs 4 lacs over and above Rs. 3,50,000/- to defendant 2 towards sale consideration. Though no reasons were assigned by the High Court while rendering this finding, but it seems that it must have been done either to balance the equities between the parties and/or to compensate defendant 2 the loss caused to her due to escalation in prices of immoveable properties.

Be that as it may, since the plaintiff has not challenged this finding by filing any appeal or cross objection in these appeals, this Court refrains from going into its correctness in these appeals filed by the defendants.

In the light of the foregoing discussion, we do not find any merit in the submissions urged by the learned senior counsel for the appellants and accordingly we uphold the findings of the High Court on the issues relating to merits.

Before concluding we consider apposite to take note of two more issues. The High Court while passing the decree directed both the defendants i.e. owner of the suit house (vendor) defendant 2 and subsequent purchaser (defendant 1) to execute the sale deed of the suit house jointly in favour of the plaintiff' to avoid any legal complications, provided the plaintiff pays Rs. 4 lacs over and above Rs. 3,50,000/- to the owner of suit house (defendant 2).

A direction of this nature is permissible. It was so held by this Court way back in the year 1954 in ***Lala Durga Prasad and Anr. v. Lala Deep Chand and Ors., AIR 1954 SC 75,*** wherein the learned Judge Vivian Bose J. known for his subtle power of expression and distinctive style of writing while speaking for the bench held as under:

> "In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in ***Kafiladdin v. Samiraddin, AIR1931Cal 67*** and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, paragraph 207; also ***Potter v. Sanders, 67 E.R. 1057***. We direct accordingly."

We respectfully follow these observations and accordingly uphold the direction issued by the High Court for execution of the sale deed.

In a contract for sale of immovable property for consideration, if a seller fails to transfer the title to the purchaser, for any reason, on receipt of consideration towards the sale price then a seller has no right to retain the sale consideration to himself and he has to refund the same to the purchaser. When the contract fails then parties to the contract must be restored to their respective original position which existed prior to execution of contract as far as possible provided there is no specific term in the contract to the contrary.

Though this litigation is not between inter se owner and subsequent purchaser of the suit house yet in order to do substantial justice between the parties and to see the end of this long litigation and to prevent a fresh suit being instituted by defendant 1 against defendant 2 for refund of sale consideration which will again take years to decide and lastly when neither it involve any intricate adjudication of facts, nor it is going to cause any prejudice to the parties, we consider it just and proper to invoke our power under Article 142 of the Constitution of India in the peculiar facts and circumstances of the case as narrated above and accordingly direct defendant 2 (owner of the suit house) to refund Rs. 4 lacs to defendant 1 within three months after execution of sale deed by them in favour of plaintiff pursuant to the impugned judgment/decree.

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177. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Amendment in written statement – Defendant tried to withdraw an admission after closure of the trial without any sufficient reason – He was aware of the facts previously – Application rightly rejected by the trial Court.

सिविल प्रक्रिया संहिता, 1908 – आदेश 6 नियम 17

लिखित कथन में संशोधन – प्रतिवादी ने बिना किसी पर्याप्त कारण के विचारण समाप्त होने के बाद एक स्वीकारोक्ति वापस लेने का प्रयास किया – वह तथ्यों को पहले से जानता था – विचारण न्यायालय द्वारा आवेदन सही रूप से खारिज किया गया।

Mahendra Gupta v. Mohd. Yunus

Order dated 26.04.2013 passed by the High Court of M.P. in W.P. No. 3915 of 2013, reported in ILR (2014) MP 2284

Extracts from the Order:

It has to be seen that the applications for amendment in the pleadings are to be made bona fide and not with an intention to cause prejudice to the opposite party. Here in the case in hand, the petitioner who was aware of all such happenings and the pleadings, has deliberately not made any pleading in the written statement and virtually has admitted that he was the sole tenant in the suit premises. By way of amendment, the petitioner is trying to withdraw such an admission that too after closure of the trial. Nothing has been explained as to

why such a pleading could not be raised at the relevant time by the petitioner. This being so, it cannot be said that the order passed by the Court below was not justified or correct.

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***178. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 (d)**

Stage of raising objection regarding non-maintainability of suit which is barred by law – Such objection goes to the root of the case – Hence, it can be raised at any time by the defendant by taking recourse to the provisions of Order 7 Rule 11 (d) of the CPC – For deciding this objection, only averments made in the plaint are relevant.

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 11 (डी)

वाद विधि द्वारा वर्जित होने के कारण प्रचलन योग्य न होने के संबंध में आपत्ति उठाने का प्रक्रम – ऐसी आपत्ति प्रकरण के जड़ तक जाती है इस कारण प्रतिवादी द्वारा आदेश 7 नियम 11 (डी) सीपीसी के प्रावधानों की सहायता लेकर किसी भी समय उठायी जा सकती है – इस आपत्ति का निराकरण करने के लिये केवल वाद पत्र के अभिवचन सुसंगत होते हैं।

Om Aggarwal v. Haryana Financial Corporation and others

Judgment dated 23.02.2015 passed by the Supreme Court in Civil Appeal No. 4972 of 2007, reported in (2015) 4 SCC 371

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179. CIVIL PROCEDURE CODE, 1908 – Order 18 Rule 3

Evidence where there are several issues – Right to rebuttal on a particular issue, when can be reserved by a party? Held, the party beginning the evidence has the option to file an application reserving his right to rebuttal either at the commencement of his evidence or latest at the stage of conclusion of his evidence and before commencement of the evidence of the other side.

सिविल प्रक्रिया संहिता, 1908 – आदेश 18 नियम 3

जहां कई वाद प्रश्न हैं वहां साक्ष्य – एक वादप्रश्न विशेष पर खंडन का अधिकार – एक पक्षकार द्वारा कब सुरक्षित किया जा सकता है? अभिनिर्धारित किया गया, पक्षकार जो साक्ष्य को प्रारंभ करता है उसे साक्ष्य के प्रारंभ में यह विकल्प होता है कि वह उसका साक्ष्य प्रारंभ करते समय एक आवेदन देकर खंडन का अधिकार सुरक्षित कर ले या उसकी साक्ष्य समाप्ति पर और दूसरे पक्ष की साक्ष्य प्रारंभ होने के पूर्व तक वह खंडन का अधिकार सुरक्षित कर ले।

Mahesh v. Harisingh and others

Order dated 01.08.2014 passed by the High Court of M.P. in W.P. No. 1971 of 2014, reported in 2015 (2) MPLJ 101

Extracts from the Order:

Rule 3 of the Civil Procedure Code does not provide for any stage when the option is to be exercised by the party beginning the evidence, therefore, there is no bar in filing the application by that party after conclusion of his evidence, but keeping in view the object of the provision such an application is to be filed by the party concerned before commencement of the evidence by the other parties. Meaning thereby the party beginning the evidence has the option to file an application reserving his right either at the commencement of his evidence or latest at the stage of conclusion of his evidence and before commencement of the evidence of the other side. This view is duly supported by the judgment of this Court in the matter of ***Chandrabai v. Rahul Kumar, 1984 MPWN Note No. 483,*** judgment of the Rajasthan High Court in the matter of ***Inderjeeet Singh v. Maharaj Raghunath Singh and others, AIR 1970 Rajasthan 278,*** judgment of the Mysore High Court in the matter of ***S. Chandra Keerti v. Abdul Gaffar and others, AIR 1971 Mysore 17*** and judgment of the Andhra Pradesh High Court in the matter of ***Illapu Nookalamma v. Illapu Simchachalam, AIR 1969 AP 82***.

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***180 CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 4**

LIMITATION ACT, 1963 – Section 5

Death of defendant – Appeal, abatement of – Law explained.

When one of the legal representatives is already on record, the appeal does not abate – In such eventuality, appellant is neither required to apply for setting aside the abatement nor to file an application for condonation of delay under section 5 of the Limitation Act.

सिविल प्रक्रिया संहिता, 1908 – आदेश 22 नियम 4

परिसीमा अधिनियम, 1963 – धारा 5

प्रतिवादी की मृत्यु – अपील का उपशमित होना – विधि समझाई गई।

जहाँ एक वैध प्रतिनिधि पहले से अभिलेख पर हो वहाँ अपील उपशमित नहीं होती है – ऐसे अवसर पर अपीलार्थी के लिए न तो उपशमन को अपास्त करवाना आवश्यक होता है न ही धारा 5 परिसीमा अधिनियम के तहत विलंब क्षमा करवाने का आवेदन प्रस्तुत करना आवश्यक होता है।

Municipal Corporation, Dewas v. Sagarmal and others

Order dated 01.04.2015 passed by the High Court of M.P. in Second Appeal No. 443 of 2010, reported in 2015 (2) MPLJ 274

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181. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

(i) Temporary Injunction – Being an equitable and discretionary relief, cannot be granted as a matter of course or on mere asking – Apart from three basic elements i.e. *prima facie* case, balance of convenience and irreparable injury, the conduct of the parties is also a relevant factor.

(ii) Possession of trespasser cannot be protected – Possession must be legal.

सिविल प्रक्रिया संहिता, 1908 – आदेश 39 नियम 1 और 2

(i) अस्थाई व्यादेश – एक साम्यपूर्ण और विवेकीय अनुतोष – केवल मांगा है या सहज में नहीं दिया जा सकता – तीन मूलभूत तत्वों अर्थात् प्रथम दृष्टया प्रकरण, सुविधा का संतुलन और अपूरणीय क्षति के अलावा पक्षकारों का आचरण भी सुसंगत कारक होता है।

(ii) अतिक्रमण कर्ता का आधिपत्य सुरक्षित नहीं रखा जा सकता – आधिपत्य वैध होना चाहिए।

Rajesh Mishra v. Ram Vilas Singh Kushwaha

Order dated 12.03.2015 passed by the High Court of M.P. in W.P. No. 3571 of 2014, reported in 2015 (2) JLJ 101

Extracts from the Order :

The Apex Court in ***Narendra Kante v. Aanuradha Kante and others***, ***2010 (2) JLJ 210*** opined that, while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements regarding existence of a prima facie case, balance of convenience and irreparable injury, it has also to take into consideration the conduct of the parties since grant of injunction is an equitable relief.

This Court in ***Kamal Singh v. Jairam Singh***, ***1986 (1) MPWN 159***, opined that temporary injunction cannot be claimed merely on the basis of possession. The possession must be legal. Possession of trespassers cannot be protected. Same view is taken by this Court in ***Dattatraya Vaishampayan v. Ianakarya Vibhag Karmachari Grih Nirman Sahakari Samiti***, ***1990 (1) MPWN 136***.

The Apex Court in ***M/s. Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and others, AIR 1995 SCW 3521*** opined as under:

> "In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct

was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief, His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39, rule 1 or rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the adinterim or temporary injunction order already granted in the pending suit or proceedings."

Same view is taken by Supreme Court in ***Mandali Ranganna and others etc. v. T. Ramachandran and others, (2008) 11 SCC 1*** and ***Gangubai Bablya Chaudhary v. Sitaram Balachandra Sukhtankar, (1983) 4 SCC 31***. In view of aforesaid judgments, it is clear that injunction cannot be granted as a matter of course or on mere asking. Apart from three necessary ingredients, i.e., prima facie case, balance of convenience and irreparable loss, the Courts are required to see the conduct of the parties. In the present case, the best available evidence with the plaintiff (mentioned in para 3 of plaint) was deliberately suppressed which creates serious doubt about the status of the plaintiff as a tenant. No prima facie case is established by the plaintiff showing that he is a tenant. The conduct of plaintiff also suggest that he was not entitled for any injunction. Mere possession on the basis of forcible entry cannot be a ground for grant of injunction. If injunctions are granted in such cases, it will encourage trespassers and encroachers. They may misuse and abuse the judicial process. The judgments cited by the learned counsel for the respondents` are based on different factual backdrops. The said judgments have no application in the facts and circumstances of the present case.

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182. CIVIL PROCEDURE CODE, 1908 – Order 40 Rule 1

Object of appointment of Receiver and his tenure – The prime objective is to preserve the property by taking possession or otherwise and to keep an account of rent and profits that may be realized by the Receiver and to submit it before the court till the *lis* is finally decided – Ordinarily, the function of receivers who are appointed comes to an end with the final decision of the case – Even after the final decision, the court has discretion to take further assistance of the Receiver as and when the need arises.

सिविल प्रक्रिया संहिता, 1908 – आदेश 40 नियम 1

प्रापक या रिसीवर नियुक्त करने का उददेश्य और उसकी अवधि – रिसीवर नियुक्त करने का प्रमुख उददेश्य संपत्ति को उसका आधिपत्य लेकर या अन्यथा सुरक्षित करना और उसके किराए और लाभों का लेखा रखना जो रिसीवर द्वारा प्राप्त किये जा सकते हैं तथा उसे न्यायालय के समक्ष विवाद के अंतिम निराकरण तक प्रस्तुत करना होता है – सामान्यतः रिसीवरों का कार्य जो नियुक्त किये जाते हैं प्रकरण के अंतिम निराकरण पर समाप्त हो जाता है – यद्यपि अंतिम निराकरण के बाद न्यायालय यदि आवश्कता उत्पन्न होती है तो अपने विवेकाधिकार पर रिसीवर की आगे सहायता ले सकते है।

M/s. Sherali Khan Mohamed Manekia v. The State of Maharashtra and ors.

Judgment dated 27.02.2015 passed by the Supreme Court in Civil Appeal No. 2475 of 2015, reported in AIR 2015 SC 1394

Extracts from the Judgment :

Normally, when a Receiver is appointed on an interlocutory application without any limit of time, it is necessary to provide for the continuance of his appointment in the final judgment. In ***Halsbury Laws of England,*** 3rd Edn., Vol. 32 (Lord Simond) at page 386 says :-

> "When a receiver is appointed for a limited time, as in the case of interim orders, his office determines on the expiration of that time without any further order of the court, and if the appointment is 'until judgment or further order' it is brought to an end by the judgment in the action. The judgment may provide for the continuance of the receiver, but this is regarded as a new appointment. If a further order of the court, though silent as to the receivership, is inconsistent with a continuance of the receiver, it may operate as a discharge."
>
> When a receiver has been appointed on an interlocutory application without any limit of time, it is not necessary to provide for the continuance of his appointment in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers. So also the appointment of a receiver by the judgment in an administration action need not be continued by the order, no further consideration."

In Law of Receiver, 4th Edn. by James L. High, the following observation appears at page 985:-

"the functions of a receiver usually terminate with the termination of the litigation in which he was appointed. And when the bill upon which the appointment was made is afterwards dismissed upon demurrer, the duties of the receiver cease as between the parties to the action..... And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal the funds which he has received during the course of his receivership....But an order of discharge does not necessarily follow, in all cases, because of the determination of the suit, and the court may, upon sufficient cause shown, either discharge or continue the receiver, according to the exigencies of the case."

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183. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 23-A and Order 43 Rule 1(u)

Passing order of remand by appellate court – Though discretionary but should not be passed in a routine manner – There must be twin requirements: (i) The trial court disposed of the case otherwise than on a preliminary point and (ii) The decree is reversed in appeal and retrial is considered necessary – An unwarranted order of remand unnecessarily prolongs litigation and should be avoided.

सिविल प्रक्रिया संहिता, 1908 – आदेश 41 नियम 23–ए और आदेश 43 नियम 1(यू) अपील न्यायालय द्वारा प्रतिप्रेषण या रिमांड का आदेश पारित करना – यद्यपि विवेकीय है लेकिन रूटिन में पारित नहीं करना चाहिए – दो शर्तें होना आवश्यक हैः (i) विचारण न्यायालय ने मामला प्रारंभिक बिन्दु पर निराकृत करने के अलावा निराकृत किया था और (ii) अपील में डिक्री उलट दी गई और पुनः विचारण आवश्यक होना माना गया – प्रतिप्रेषण का अनावश्यक आदेश विवाद को अनावश्यक लंबित करता है – इससे बचना चाहिए।

Murarilal v. Ram Kumar Ojha & anr.

Order dated 20.08.2014 passed by the High Court of M.P. in M.A. No. 788 of 2010, reported in ILR 2014 M.P. 2162

Extracts from the Order:

The Hon'ble Supreme Court in the case of ***Municipal Corporation, Hyderabad v. Sunder Singh, (2008) 8 SCC 485*** has lucidly and succinctly explained the scope and application of the aforesaid provision, as contained under Order XLI Rule 23 of CPC with reference to nature of jurisdiction of the appellate court. Relevant para 18 of the judgment is reproduced below:-

"18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order 41 Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."

Order XLI Rule 23A of CPC in the statute w.e.f. 1/2/1977 provides for application of Order XLI Rule 23 of CPC in the matters where the court from whose decree an appeal is preferred has disposed of the case otherwise than on preliminary point, and the decree is reversed in appeal and re-trial is considered necessary, the appellate court shall have the same powers as it has under Order XLI Rule 23 of CPC. As such, the twin requirements of the provision are to the effect that; (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and retrial is considered necessary. In other words, if the appellate court finds a judgment under appeal to be not satisfactory in the manner required by Order XXII Rule 3 CPC or Order XLI Rule 21 CPC and, hence, it is not a judgment in the eyes of law, it may set aside the same and send the matter back for rewriting of the judgment so as to protect valuable rights of the parties. However, the appellate court should be circumspect in ordering remand and it should not be exercised when the case is not covered either by Rule 23 or 23A of Order XLI of CPC as an unwarranted order of remand unnecessary prolongs the litigation, which in all fairness should be avoided. ***P. Purushottam Reddy and another v. Pratap Steels Ltd.,(2002) 2 SCC 686*** is referred to. Though the provision confers discretionary jurisdiction on the appellate court, but order of remand should not be passed routinely.

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***184. CONSTITUTION OF INDIA – Article 141**

Law of precedent – Judgments of Apex Court – *Ratio decidendi,* determination of – They are not to be read as statutory instruments – The ratio of the judgment has to be culled out, keeping in view the facts and circumstances involved in a particular case.

भारत का संविधान – अनुच्छेद 141

पूर्व निर्णय की विधि – सर्वोच्च न्यायालय का निर्णय – रेशियों डेसीडेन्डी का निर्धारण – उन्हें वैधानिक लिखितम की तरह नहीं पढ़ा जाता है – किसी निर्णय का रेशियों किसी विशिष्ट मामलों के तथ्यों और परिस्थितियों के प्रकाश में देखा जाता है।

Oil and Natural Gas Corporation Ltd. v. Official Liquidator of Ambica Mills Company Ltd. and others

Judgment dated 17.04.2014 passed by the Supreme Court in Civil Appeal No. 1746 of 2006, reported in (2015) 5 SCC 300

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***185. CONSTITUTION OF INDIA – Articles 226 and 227**

(i) Whether judicial orders of the civil Court are amenable to writ jurisdiction under Article 226 of the Constitution? Held, No.

(ii) Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

(iii) Writ of Mandamus does not lie against a private person – Not discharging any public duty.

(iv) ***Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675*** **overruled.**

भारत का संविधान – अनुच्छेद 226 और 227

(i) क्या सिविल न्यायालय के न्यायिक आदेश भारतीय संविधान के अनुच्छेद 226 के अधीन रिट क्षेत्राधिकार में परीक्षण योग्य हैं? अभिनिर्धारित किया गया, नहीं।

(ii) अनुच्छेद 227 का क्षेत्राधिकार अनुच्छेद 226 के क्षेत्राधिकार से भिन्न होता है।

(iii) एक निजी व्यक्ति, जो कोई लोक कृत्य का निर्वाहन नहीं करता है, उसके विरूद्ध समादेश याचिका चलने योग्य नहीं होती है।

(iv) सूर्यदेव राय वि. रामचंद्र राय, (2003) 6 एस.सी.सी. 675 को ओवररूल्ड किया गया ।

Radhey Shyam and another v. Chhabi Nath and others

Judgment dated 26.02.2015 passed by the Supreme Court in Civil Appeal No. 2548 of 2009, reported in (2015) 5 SCC 423 (Three Judge Bench)

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186. CONSTITUTION OF INDIA – Article 246

(i) Power of Legislature, scope and competence of – Legislation, howsoever within legislative competence of legislature, it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution – It is immaterial that such legislation (i.e. amendment to Constitution) has been carried out by following the procedure contemplated under Part XI of the Constitution.

(ii) Doctrine of separation of powers, applicability of – In every new constitution (Count/Tribunal), which makes separate provisions for the legislature, the executive and the judiciary, it is taken as acknowledged/conceded, that the basic principle of separation of powers would apply – And that, the three wings of governance would operate in their assigned domain.

(iii) Transfer of Judicial Power, permissibility and requirement of – Judicial power vested in superior courts can be transferred to co-ordinate courts/tribunals – But whenever there is such transfer, all conventions/customs/practices of the court sought to be replaced, have to be incorporated in the court/tribunals created – The newly created court/tribunal would have to be established, in consonance with the salient characteristics and standards of the court which is sought to be substituted.

भारत का संविधान – अनुच्छेद 246

(i) विधायिका की शक्तियों का विस्तार और सक्षमता – विधायिका चाहे कानून बनाने में सक्षम होती हैं, यह अनुमति योग्य नहीं है कि वह इस तरीके से कानून बनाये कि वह संविधान की ''मूलभूत संरचना'' या **Basic Structure** के उल्लंघन में हो – यह अतात्विक है कि ऐसा कानून (संविधान का संशोधन) संविधान के भाग **XI** में बतलाई प्रकिया का अनुपालन करके बनाया गया है।

(ii) शक्तियों के पृथक करण के सिद्धांत का लागू होना – प्रत्येक नये संविधान में जो विधायिका, कार्यपालिका और न्यायपालिका के लिए पृथक प्रावधान बनाता है, यह एक स्वीकृत (तथ्य) के रूप में लेना होता है कि शक्तियों के पृथक करण के मूलभूत सिद्धांत लागू होंगे और शासन के तीन अंग उनके क्षेत्रों में उसे लागू करेगें।

(iii) न्यायिक शक्तियों के अंतरण की अनुमति और अनिवार्यताएँ – वरिष्ठ न्यायालयों में निहित न्यायिक शक्तियाँ समवर्ती न्यायालयों/अधिकरणों को अंतरित की जा सकती है – किन्तु जहाँ ऐसा अंतरण होता है वहाँ सभी परिपाटियाँ/प्रथाएँ/पद्धतियाँ इस प्रकार सृजित न्यायालय/अधिकरणों जो कि (मूल) न्यायालय को प्रतिस्थापित करके सृजित की गई है उनमें समाविष्ट करना ही चाहिए – नवीन सृजित न्यायालय/अधिकरण जो स्थापित किये जायेंगे वे (मूल) न्यायालय के मानक और विशेषताओं के अनुरूप होंगे जिनकों की वे प्रतिस्थापित करना चाहते है।

Madras Bar Association v. Union of India and another

Judgment dated 25.09.2014 passed by the Supreme Court in Transferred Case (C) No. 150 of 2006, reported in AIR 2015 SC 1571 (Five Judge Bench)

Extracts from the Judgment:

Even though we have declined to accept the contention advanced on behalf of the petitioners, remised on the "basic structure" theory, we feel it is still essential for us, to deal with the submission advanced on behalf of the respondents in response. We may first record the contention advanced in behalf of the respondents. It was contended, that a legislation (not being an amendment to the Constitution), enacted in consonance of the provisions of the Constitution,

on a subject within the realm of the concerned legislature, cannot be assailed on the ground that it violates the "basic structure" of the Constitution. For the present controversy, the respondents had placed reliance on Articles 245 and 246 of the Constitution, as also, on entries 77 to 79, 82 to 84, 95 and 97 of the Union List of the Seventh Schedule, and on entries 11A and 46 of the Concurrent List of the Seventh Schedule. Based thereon it was asserted, that Parliament was competent to enact the NTT Act. For examining the instant contention, let us presume it is so. Having accepted the above, our consideration is as follows. The Constitution regulates the manner of governance in substantially minute detail. It is the fountainhead distributing power, for such governance. The Constitution vests the power of legislation at the Centre, with the Lok Sabha and the Rajya Sabha, and in the States with the State Legislative Assemblies (and in some States, the State Legislative Councils, as well). The instant legislative power is regulated by "Part XI" of the Constitution. The submission advanced at the hands of the learned counsel for the respondents, insofar as the instant aspect of the matter is concerned, is premised on the assertion that the NTT Act has been enacted strictly in consonance with the procedure depicted in "Part XI" of the Constitution. It is also the contention of the learned counsel for the respondents, that the said power has been exercised strictly in consonance with the subject on which the Parliament is authorized to legislate. Whilst dealing with the instant submission advanced at the hands of the learned counsel for the respondents, all that needs to be stated is, that the legislative power conferred under "Part XI" of the Constitution has one overall exception, which undoubtedly is, that the "basic structure" of the Constitution, cannot be infringed, no matter what. On the instant aspect, some relevant judgments, rendered by constitutional benches of this Court, have been cited hereinabove. It seems to us, that there is a fine difference in what the petitioners contend, and what the respondents seek to project. The submission advanced at the hands of the learned counsel for the petitioners does not pertain to lack of jurisdiction or inappropriate exercise of jurisdiction. The submission advanced at the hands of the learned counsel for the petitioners pointedly is, that it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution. This Court has repeatedly held, that an amendment to the provisions of the Constitution, would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out, by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination, that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable. Such submissions advanced at the hands of the learned counsel for the respondents are, therefore, liable to be disallowed. And are accordingly declined.

II. Whether the transfer of adjudicatory functions vested in the High Court to the

NTT violates recognized constitutional conventions? III. Whether while transferring jurisdiction to a newly created court/tribunal, it is essential to maintain the standards and the stature of the court replaced?

We have given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the petitioners, insofar as the first perspective is concerned. We find substance in the submission advanced at the hands of the learned counsel for the petitioners, but not exactly in the format suggested by the learned counsel. A closer examination of the judgments relied upon lead us to the conclusion, that in every new constitution, which makes separate provisions for the legislature, the executive and the judiciary, it is taken as acknowledged/conceded, that the basic principle of "separation of powers" would apply. And that, the three wings of governance would operate in their assigned domain/province. The power of discharging judicial functions, which was exercised by members of the higher judiciary, at the time when the constitution came into force, should ordinarily remain with the court, which exercised the said jurisdiction, at the time of promulgation of the new constitution. But the judicial power could be allowed to be exercised by an analogous/similar court/tribunal, with a different name. However, by virtue of the constitutional convention, while constituting the analogous court/tribunal, it will have to be ensured, that the appointment and security of tenure of judges of that court would be the same, as of the court sought to be substituted. This was the express conclusion drawn in ***Hinds v. The Queen Director of Public Prosecutions v. Jackson Attorney General of Jamaica (Intervener), 1976 AII ER Vol. (1) 353***. In ***Hinds case*** (supra) it was acknowledged, that Parliament was not precluded from establishing a court under a new name, to exercise the jurisdiction that was being exercised by members of the higher judiciary, at the time when the constitution came into force. But when that was done, it was critical to ensure, that the persons appointed to be members of such a court/tribunal, should be appointed in the same manner, and should be entitled to the same security of tenure, as the holder of the judicial office, at the time when the constitution came into force. Even in the treatise "Constitutional Law of Canada" by Peter W. Hogg, it was observed; if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a superior, district or county Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a superior, district or county Court, satisfy the requirements and standards of the substituted court. This would mean, that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service, as were available to the judges of the court sought to be substituted. In the judgments under reference it has also been concluded, that a breach of the above constitutional convention could not be excused by good intention (by which the legislative power had been exercised, to enact a given law). We are satisfied, that the aforesaid exposition of law, is in consonance with the position expressed by this Court, while dealing with the

concepts of "separation of powers", the "rule of law" and "judicial review". In this behalf, reference may be made to the judgments in ***L. Chandra Kumar v. Union of India, (1997) 3 SCC 261*** as also, in ***Union of India v. Madras Bar Association, (2010) 11 SCC 87.*** Therein, this Court has recognized, that transfer of jurisdiction is permissible, but in effecting such transfer, the court to which the power of adjudication is transferred, must be endured with salient characteristics, which were possessed by the court from which the adjudicatory power has been transferred. In recording our conclusions on the submission advanced as the first perspective, we may only state, that our conclusion is exactly the same as was drawn by us while examining the petitioners' previous submission, namely, that it is not possible for us to accept, that under recognized constitutional conventions, judicial power vested in superior courts cannot be transferred to coordinate courts/tribunals. The answer is, that such transfer is permissible. But whenever there is such transfer, all conventions/customs/practices of the court sought to be replaced, have to be incorporated in the court/tribunal created. The newly created court/tribunal would have to be established, in consonance with the salient characteristics and standards of the court which is sought to be substituted.

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187. CRIMINAL PROCEDURE CODE, 1973 – Sections 2 (d) and 154

Police Officer on deputation, powers of – Inspector of Police deputed to Lokayukat can *suo motu* register FIR after being satisfied with the material facts published in the newspaper that there is a cognizable offence to be investigated by the police against the suspect/accused and may investigate the matter in accordance with law.

दण्ड प्रक्रिया संहिता, 1973 – धाराएँ 2 (डी) और 154

प्रतिनियुक्ति पर होने पर पुलिस अधिकारी की शक्तियाँ – पुलिस निरीक्षक को लोकायुक्त में प्रतिनियुक्ति किया गया वह स्वतः ही प्रथम सूचना प्रतिवेदन दर्ज कर सकता है यदि वह समाचार पत्र में प्रकाशित तात्विक तथ्यों से इस बारे में संतुष्ट होता है कि एक संज्ञेय अपराध है जिसका पुलिस द्वारा संदेही/आरोपी के विरूद्ध अनुसंधान होना है और वह विधि अनुसार मामले का अनुसंधान कर सकता है।

Yunus Zia v. State of Karnataka & anr.

Order dated 09.04.2015 passed by the Supreme Court in Criminal Appeal No. 594 of 2015, reported in 2015 (2) Crimes 219 (SC)

Extracts from the Order:

We have heard both the learned senior counsels for the parties and perused the reports published in the Newspapers on the dates mentioned above which were taken into consideration suo-moto by the second respondent, wherein he has registered the FIR after being satisfied with the material facts published in the Newspapers that there is a cognisable offence to be investigated by the

police against the appellant. The same cannot be found fault with either by the High Court or by this Court for the reason that the second respondent, who is on deputation to the Lokayukta, is an Inspector of Police attached to the State of Karnataka. Therefore, he has got every power under Section 2(d) of the CrPC, to act suo-moto and take cognisance of the offence/offences alleged to have been committed by the appellant on the basis of the reports published against him, which according to him warranted registration of an FIR and investigate the matter against him in accordance with law. The learned senior counsel on behalf of the respondents has rightly made the categorical submission that there is no need for the registration of the FIR under Section 9 of the Lokayukta Act, in relation to the matters to be investigated under Section 8 of the Lokayukta Act. Therefore, in the light of the above contentions urged on behalf of the parties and in view of the law laid down by this Court under the Lokayukta Act and keeping in mind the apprehension expressed by the learned senior counsel on behalf of the appellant with regard to the investigation that may be carried out by the Lokayukta Police, we are of the considered view that the learned Judge of the High Court has rightly declined to exercise his inherent power to quash the proceedings, which does not call for our interference in this appeal. Having regard to the facts and circumstances of the case, it would be just and proper for this Court to see that justice is meted out and the case is fairly investigated by the Corps of Detectives (COD) of the State. The said investigation shall be entrusted to an officer of the rank equivalent to the Superintendent of Police in the COD. For the foregoing reasons and the decisions of this Court referred to supra, we direct the second respondent to transmit the FIR to the COD Bangalore for further investigation in the matter. The COD represented by the Director General of Police must entrust the same to the officer of the rank of Superintendent of Police for conducting impartial investigation and proceed with the matter in accordance with law.

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

INDIAN PENAL CODE, 1860 – Section 381

Accused was convicted by the trial court for theft of insured parcel, which offence is punishable under section 381 of IPC and was sentenced to undergo S.I. for 6 months and to pay a fine of Rs. 2000 and for offence punishable under section 52 of the Indian Post Office Act, 1898 and was sentenced to undergo S.I. for 6 months and to pay a fine of Rs. 2000 – It was not mentioned in the judgment as to whether both the sentences will run concurrently or consecutively – ASJ and High Court upheld the order of the trial court – The Apex, Court held that the expressions 'concurrently' and 'consecutively' mentioned in Cr.P.C. are of immense significance while awarding punishment to the accused for offences punishable under IPC or any other Special Act arising out of one trial or more – Award of former enure to the benefit of the accused whereas award of latter is

detrimental to the accused's interest – So, it is legally obligatory upon the trial court to specify in clear terms in the order of conviction as to whether sentences awarded to the accused would run concurrently or consecutively.

दण्ड प्रक्रिया संहिता, 1973 – धारा 31

भारतीय दण्ड संहिता, 1860 – धारा 381

विचारण न्यायालय द्वारा अभियुक्त बीमित पार्सल चुराने के लिये दोषसिद्ध किया गया था, जो अपराध धारा 381 भा.द.सं. के अधीन दंडनीय है और अभियुक्त को 6 माह का साधारण कारावास तथा 2000 रूपये के अर्थदण्ड से दण्डित किया था और धारा 52 भारतीय डाक कार्यालय अधिनियम, 1898 के तहत 6 माह का साधारण कारावास और 2000 रूपये अर्थदण्ड से दण्डित किया था – निर्णय में यह उल्लेख नहीं किया था कि क्या दोनों दण्ड साथ साथ चलेंगे या एक के बाद एक प्रारंभ होंगे– अपर सत्र न्यायाधीश और उच्च न्यायालय ने विचारण न्यायालय के आदेश को स्थिर रखा – माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि दण्ड प्रक्रिया संहिता में उल्लेखित अभिव्यक्ति साथ साथ और एक के बाद एक का अत्यधिक महत्व उस समय होता है जब अभियुक्त को भारतीय दण्ड संहिता के अधीन दण्डनीय अपराध और विशेष अधिनियम के अधीन उत्पन्न अपराध में एक या अधिक विचारण में दंड दिया जाता है – पूर्व वाला (अर्थात दण्ड साथ साथ चलेंगे) अभियुक्त के लाभ के लिये होता है जबकि बाद वाला (अर्थात दण्ड एक के बाद एक चलेंगे) अभियुक्त के हितों के लिये नुकसानदायक होता है– इस कारण विचारण न्यायालय पर यह विधिक दायित्व होता है कि वह दोषसिद्धि के आदेश में यह विशेष रूप से उल्लेख करें कि क्या दण्ड साथ साथ चलेंगे या एक के बाद एक भुगताए जायेंगे।

Nagaraja Rao v. Central Bureau of Investigation

Judgment dated 16.01.2015 passed by the Supreme Court in Criminal Appeal No.104 of 2015, reported in (2015) 4 SCC 302

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***189. CRIMINAL PROCEDURE CODE, 1973 – Section 154**

INDIAN PENAL CODE, 1860 – Section 376

EVIDENCE ACT, 1872 – Sections 3 and 114-A

(i) Delay in lodging FIR in sexual offence due to reluctance of the prosecutrix or her family members to go to the police station and to lodge a report about the incident which concerned the reputation of the prosecutrix and honour of the entire family – In such type of cases, after giving very cool thought and considering all *pros* and *cons* arising out of an unfortunate incident, an FIR of sexual offence is generally lodged either by prosecutrix or by her family member.

(ii) Whether lapses on the part of I.O. in any manner affect the credibility of the statement of prosecutrix ? Held, No, because she has no control over the investigation.

(iii) Appreciation of evidence of prosecutrix in rape cases – Whether corroboration is necessary? Held, the testimony of the prosecutrix in such type of cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement or where there are compelling reasons for rejecting her testimony, there is no justification on the part of the court to reject her testimony.

दंड प्रक्रिया संहिता, 1973 – धारा 154

भारतीय दंड संहिता, 1860 – धारा 376

भारतीय साक्ष्य अधिनियम, 1872 – धाराएं 3 और 114–ए

(i) लैंगिक अपराध में प्रथम सूचना प्रतिवेदन दर्ज कराने में विलंब – अभियोक्त्री और उसके परिवार के सदस्यों द्वारा पुलिस थाने पर जाकर घटना की रिपोर्ट दर्ज करवाने के बारे में अनिच्छुक रहना, क्योंकि अभियोक्त्री की प्रतिष्ठा और पूरे परिवार का सम्मान जुड़ा होता है – इस प्रकार के मामलों में शांत दिमाग से विचार करके और उस दुर्भाग्यपूर्ण घटना से उत्पन्न सभी पहलुओं पर विचार करने के उपरांत सामान्यतः लैगिक अपराध के मामले में अभियोक्त्री या उसके परिवार के सदस्य द्वारा प्रथम सूचना दर्ज करवाई जाती है।

(ii) क्या अनुसंधान अधिकारी के भाग पर की गई कमियाँ अभियोक्त्री के कथनों को किसी भी तरह से प्रभावित करती है ? अभिनिर्धारित किया गया नहीं क्योंकि उसका (अभियोक्त्री) का अनुसंधान पर कोई नियंत्रण नहीं रहता है।

(iii) बलात्कार के प्रकरण में अभियोक्त्री की साक्ष्य का मूल्यांकन – क्या पुष्टि आवश्यक है ? अभिनिर्धारित किया गया इस प्रकार के प्रकरणों में अभियोक्त्री की साक्ष्य महत्वपूर्ण होती है और जब तक ऐसा बाध्यताकारी कारण न हो जिनमें उसके कथनों की पुष्टि आवश्यक हो या उसके कथनों को अमान्य करने के लिए बाध्यताकारी कारण हो, अन्यथा न्यायालय के द्वारा उसके कथन अमान्य करना न्याय संगत नहीं होगा।

Deepak v. State of Haryana

Judgment dated 10.03.2015 passed by the Supreme Court in Criminal Appeal No. 65 of 2012, reported in (2015) 4 SCC 762

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190. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 (1), 154 (3), 156 (3), 200, 202 and 397

(i) Power under section 156 (3) of the Code, exercise of – The duty cast on Magistrates cannot be marginalized – They must remain vigilant and diligent while exercising such power – Proper application of mind is *sine qua non*.

(ii) Abuse of provisions under section 156 (3) of the Code, prevention of – Application under section 156 (3) of the Code can only be filed after availing recourse to sections 154 (1) & (3) – The application must be supported by an affidavit containing details as to availing provisions of section 154 (1) & (3) – Magistrate must also verify the veracity of the affidavit filed along with the application.

(iii) Revisional power, exercise of – Opportunity of hearing, necessity of – In a case arising out of a compliant, when travels to a superior court and an adverse order is passed, an opportunity of hearing must be given to the respondent(s) although they were not accused persons.

दंड प्रक्रिया संहिता, 1973 – धाराएं 154 (1), 154 (3), 156 (3), 200, 202 और 397

(i) धारा 156 (3) दं.प्र.सं. की शक्ति का प्रयोग – मजिस्ट्रेट पर अधिरोपित कर्तव्य को किनारे पर नहीं रखा जा सकता – ऐसी शक्तियों का प्रयोग करते समय उन्हें सतर्क और जागरूक रहना चाहिए – मस्तिष्क का प्रयोग एक आवश्यक शर्त है।

(ii) धारा 156 (3) दं.प्र.सं. के प्रावधान के दुरूपयोग का निवारण – धारा 156 (3) के अधीन आवेदन धारा 154 (1) और (3) का आश्रय लेने के बाद ही प्रस्तुत किया जा सकता है – ऐसा आवेदन एक शपथ पत्र द्वारा समर्पित होना चाहिए जिसमें धारा 154 (1) और (3) के प्रावधान का आश्रय लेने के विवरण अंकित होना चाहिए – मजिस्ट्रेट को आवेदन के साथ प्रस्तुत शपथ पत्र की सत्यता को सत्यापित करना चाहिए।

(iii) पुनरीक्षण की शक्तियों का प्रयोग किया जाना – सुनवाई का अवसर देने की आवश्यकता – परिवाद से उत्पन्न प्रकरण जब वरिष्ठ न्यायालय में जाता है और एक विपरीत आदेश पारित किया जाता है तब प्रत्यर्थीगण को सुनवाई का अवसर दिया जाना चाहिए यद्यपि वे अभियुक्त व्यक्ति नहीं थे।

Mrs. Priyanka Srivastava and another v. State of U.P. and others

Judgment dated 19.03.2015 passed by the Supreme Court in Criminal Appeal No. 781 of 2012, reported in 2015 (2) Crimes 209 (SC)

Extracts from the Judgment:

Being grieved by the order, the respondent No.3 preferred a Revision

Petition No.460 of 2008, which was eventually heard by the learned Additional Sessions Judge, Varanasi, U.P. The learned Additional Sessions Judge after adumbrating the facts and taking note of the submissions of the revisionist, set aside the order dated 4th October, 2008 and remanded the matter to the trial Court with the direction that he shall hear the complaint again and pass a cognizance order according to law on the basis of merits according to the directions given in the said order. Be it noted, the learned Additional Sessions Judge heard the counsel for the respondent No.3 and the learned counsel for the State but no notice was issued to the accused persons therein. Ordinarily, we would not have adverted to the same because that lis is the subject matter in the appeal, but it has become imperative to do only to highlight how these kind of litigations are being dealt with and also to show the respondents had the unwarranted enthusiasm to move the courts. The order passed against the said accused persons at that time was an adverse order inasmuch as the matter was remitted. It was incumbent to hear the respondents though they had not become accused persons. A three-Judge Bench in ***Manharibhai Muljibhai Kakadia and Anr. v. Shaileshbhai Mohanbhai Patel and others, (2012) 10 SCC 517*** has opined that in a case arising out of a complaint petition, when travels to the superior Court and an adverse order is passed, an opportunity of hearing has to be given. The relevant passages are reproduced hereunder:

> 46. .....If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.
>
> xxxxx xxxxx xxxxx
>
> 48. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the ode either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under ection 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is

termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203-although it is at preliminary stage-nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

xxxxx xxxxx xxxxx

53. We are in complete agreement with the view expressed by this Court in ***P. Sundarrajan v. R. Vidhyasekar, (2004) 13 SCC 472, Raghu Raj Singh Rousha v. Shivam Sundaram Promoters (P) Ltd., (2009) 2 SCC 363*** and ***A.N. Santhanam v. K. Elangovan, (2012) 12 SCC 321***. We hold, as it must be, that in a revision petition preferred by the complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the Revisional Court. In other words, where the complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the

complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process."

Though the present controversy is different, we have dealt with the said facet as we intend to emphasize how the Courts have dealt with and addressed to such a matter so that a borrower with vengeance could ultimately exhibit his high-handedness.

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***191. CRIMINAL PROCEDURE CODE, 1973 – Section 167(2)(a)(i)**

Indefeasible right of accused to release him on bail – How to calculate period of 90/60 days ? Held:

(i) It shall be calculated from the date of remand and not from the date of arrest of accused as held in *Chaganti Satyanarayana and others v. State of A.P., AIR 1986 SC 2130*.

(ii) The day on which the accused was remanded to judicial custody should be excluded and the day on which the charge sheet was filed in the court,should be included as held in *State of M.P. v. Rustam and others, 1995 Supp (3) SCC 221*.

In this case accused surrendered before the court on 50.07.2013 and remanded to judicial custody – The charge sheet was filed on 03.10.2013 – Accused filed application under section 167(2) Cr.P.C. for releasing him on bail and the same was rejected by trial court as well as by ASJ and High Court – The Apex Court upheld the order because charge sheet as such was filed on the 90th day.

दण्ड प्रक्रिया संहिता, 1973 – धारा 167 (2) (ए) (i)

अभियुक्त का उसे जमानत पर रिहा करने का आलोप्य अधिकार – 90/60 दिनों की अवधि की गणना कैसे की जाये? अभिनिर्धारित किया गया :–

(i) इसकी गणना गिरफ्तारी की तारीख से न करके रिमांड देने की तारीख से की जायेगी जैसा कि छगंती सत्यनारायण और अन्य वि. स्टेट आफ ए.पी, ए.आई.आर 1986 एससी 2130 **में अभिनिर्धारित किया गया है।**

(ii) अभियुक्त को जिस दिन न्यायिक अभिरक्षा का रिमांड दिया जाता है उस दिन को गणना से अपवर्जित करना चाहिये और जिस दिन अभियोग पत्र प्रस्तुत होता है उस दिन को गणना में लेना चाहिये जैसा कि स्टेट आफ एम.पी. वि. रूस्तम और अन्य 1995 (सप्लीमेंट) 3 एससीसी 221 में अभिनिर्धारित किया गया है ।

इस मामले में अभियुक्त ने न्यायालय के समक्ष 05.07.2013 को समर्पण किया था और उसे न्यायिक अभिरक्षा का रिमांड दिया गया। अभियोग पत्र 03.10.2013 को प्रस्तुत हुआ था। अभियुक्त ने धारा 167 (2) दं.प्र.सं. के अधीन उसे जमानत पर रिहा करने का आवेदन प्रस्तुत किया इसे विचारण न्यायालय, अपर सत्र न्यायाधीश और उच्च न्यायालय द्वारा निरस्त किया गया। सर्वोच्च न्यायालय ने उक्त आदेश स्थिर रखा क्योंकि अभियोग पत्र 90 वे दिन प्रस्तुत हो चुका था।

Ravi Prakash Singh alias Arvind Singh v. State of Bihar

Judgment dated 20.02.2015 passed by the Supreme Court in Criminal Appeal No. 325 of 2015, reported in AIR 2015 SC 1294

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192. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2), Proviso (a) (ii)

Accused persons were taken into custody on 18.02.2013 for the offences under sections 399 and 402 of IPC – Charge-Sheet was filed on 22.04.2013 after expiry of sixteen days – Prior to the filing of charge sheet, accused filed application u/s 167 (2) Cr.P.C. seeking benefit of statutory bail – Trial Court allowed the application – Revisional Court set aside that order – High Court restored the order of trial Court because before filing charge sheet, accused had filed application u/s 167 (2) Cr.P.C.

दण्ड प्रक्रिया संहिता, 1973 – धारा 167 (2) परंतुक (ए)(ii)

अभियुक्तगण को धारा 399 और 402 भारतीय दंड संहिता के अपराध के लिए 18 फरवरी, 2013 को अभिरक्षा में लिया गया था – अभियोग पत्र 22.04.2013 को 60 दिन गुजर जाने के बाद प्रस्तुत किया गया था – अभियोग पत्र प्रस्तुत करने के पहले अभियुक्त ने धारा 167 (2) दं.प्र.सं. के अधीन वैधानिक जमानत का लाभ लेने के लिए आवेदन प्रस्तुत कर दिया था – विचारण न्यायालय ने आवेदन स्वीकार किया – पुनरीक्षण न्यायालय ने उस आदेश का अपास्त कर दिया – उच्च न्यायालय ने विचारण न्यायालय के आदेश को पुनः कायम किया क्योंकि अभियोग पत्र प्रस्तुत होने से पहले अभियुक्त धारा 167 (2) दं.प्र.सं. का आवेदन प्रस्तुत कर चुका था।

Babulal & ors. v. State of M.P.

Order dated 01.08.2013 passed by the High Court of M.P. in M.Cr.C. No. 3627 of 2013, reported in ILR (2014) MP 2481

Extracts from the Order:

On going through the facts of the case, it is clear that the applicants were taken into custody on 18.02.2013 itself for the offences under sections 399 and 402 of IPC read with section 25 of the Arms Act. For the said offences the

punishment, as prescribed may be extended upto 10 years. Thus the challan ought to be filed upto 19th of April, 2013 within the period of 60 days. Admittedly the challan in the present case has been filed on 22nd of April, 2013 but prior to filing of the challan, the accused filed the application under section 167 (2) of the Cr.P.C. seeking benefit of the statutory bail. The trial Court extended the benefit of bail to the applicants allowing their application, the said order was set aside by the revisional Court. In view of the analytical discussions of the language of Section 167 (2) Cr.P.C. proviso (a) (ii) and as per two the two judgements of the three Judges Bench in the case of ***Uday Mohanlal Acharya v. State of Maharashtra, AIR 2001 SC 1910*** and ***Sayed Mohd. Ahmed Kazmil v. State, GNCTD and ors, 2013 Cri.L.J. 200*** it is to be held that after exercising the right by moving an application seeking statutory bail by the accused, if the challan is filed later, it would not affect the indefeasible right accrues to the applicants to release them on bail. Thus the trial Court has rightly granted the benefit of bail to the applicants, and revisional Court without considering the aforesaid proposition of law passed the order impugned which is hereby set aside.

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***193. CRIMINAL PROCEDURE CODE, 1973 – Section 313**

Examination of accused, object and necessity of – The whole object of the examination is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him – Attention of the accused must be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give – A conviction based on the failure of the accused to explain what he was never asked to explain, is bad in law.

दंण्ड प्रक्रिया संहिता, 1973 – धारा 313

अभियुक्त की परीक्षा का उद्देश्य और आवश्यकता – परीक्षा का पूर्ण उद्देश्य अभियुक्त को एक ऋजु व उचित अवसर उसके विरूद्ध प्रकट हुई परिस्थितियों के बारे में स्पष्टीकरण करने के लिए उपलब्ध कराना है – अभियुक्त का ध्यान आरोप के उन विशिष्टि बिन्दुओं और साक्ष्य के बिन्दुओं की ओर आकर्षित करवाना चाहिए जिनके आधार पर अभियोजन यह दावा करता है कि अभियुक्त के विरूद्ध एक मामला बनता है। ऐसा ध्यान आकर्षित करवाने से अभियुक्त यदि चाहे तो स्पष्टीकरण देने के लिए सक्षम हो सकता है अभियुक्त से जिस संबंध में पूछा ही नहीं गया उस बारे में उसके स्पष्टीकरण देने में असफल रहने के आधार पर की गई दोषसिद्धि कानून के अनुसार गलत है।

Sukhjit Singh v. State of Punjab

Judgment dated 11.09.2014 passed by the Supreme Court in Criminal Appeal No. 263 of 2013, reported in 2015 (2) Crimes 265 (SC)

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194. CRIMINAL PROCEDURE CODE, 1973 – Section 313

Examination of accused under section 313 Cr.P.C. – Refusal to answer any question put to the accused by the court relating to any incriminating circumstances appear in prosecution evidence or the accused giving an evasive or unsatisfactory answer, would not justify the court to record a finding of guilt on this score – It is always upon prosecution to prove his case beyond reasonable doubt – Once this burden is met, the statement under section 313 Cr.P.C. assumes significance to the extent that the accused may cast some incredulity on the prosecution version – In our legal system, the accused is not required to establish his innocence – Difference between approach adopted in offence relating to section 304-B IPC and other offences in this regard by the court is also explained in para 15.

दंड प्रक्रिया संहिता, 1973 – धारा 313

अभियुक्त का धारा 313 दं.प्र.सं. के अधीन परीक्षण – अभियुक्त द्वारा अभियोजन साक्ष्य से प्रकट हुई अपराध में उसे लिप्त करने संबंधी परिस्थितियों के संबंध में किये गये प्रश्न का उत्तर देने से इंकार करना या अस्पष्ट या असंतोषजनक उत्तर देने के आधार पर न्यायालय के लिए यह न्यायसंगत नहीं होगा कि वह दोषसिद्धि का निष्कर्ष इस कारण अभिलिखित कर ले – यह हमेशा अभियोजन पर है कि वह उसका प्रकरण युक्तियुक्त संदेह से परे प्रमाणित करे – एक बार जब यह प्रमाण भार पूर्ण हो जाता है तब धारा 313 दं.प्र.सं. के अधीन कथन इस सीमा तक महात्वपूर्ण होते हैं कि अभियुक्त अभियोजन के कथानन पर कुछ संदेह उत्पन्न करे – हमारी न्यायप्रणाली में अभियुक्त के लिये आवश्यक नहीं होता है कि वह उसका निर्दोष होना स्थापित करे इस संबंध में न्यायालय द्वारा अपनाये जाने वाले दृष्टिकोण जो कि धारा 304–बी भा.दं.सं. और अन्य अपराधों में होते हैं उनका अंतर निर्णय चरण 15 में स्पष्ट किया गया है।

Nagraj v. State represented by Inspector of Police, Salem Town, Tamil Nadu

Judgment dated 10.03.2015 passed by the Supreme Court in Criminal Appeal No. 1311 of 2006, reported in (2015) 4 SCC 739

Extracts from the Judgment:

The impugned judgment has found the answers of the accused under Section 313 CrPC evasive and untrustworthy, and held this to be another factor indicating his guilt. Section 313 CrPC is of seminal importance in our criminal law jurisdiction and, therefore, justifies reiteration and elucidation by this Court. We shall start, with profit, by reproducing extracts from the 41st Report of the Law Commission made in the context of Section 342 of the old Criminal Procedure Code which corresponds to this section where the Commission observed, ***inter alia***, thus:

> ***"24.40. Section 342 - Introductory.*** – Section 342 is one of the most important sections in the Code. It requires that the Court must, at the close of prosecution evidence,

examine the accused 'for the purpose of enabling him to explain any circumstances appearing in the evidence against him. The section for a moment, brushes aside all counsel, all prosecutors, all witnesses, and all third persons. It seeks to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation. For a while the section was misunderstood and regarded as authorising an inquisitorial interrogation of the accused, which is not its object at all. The key to the section is contained in the first sixteen words of the section. Giving an opportunity to the accused to explain the circumstances appearing in the evidence is the only object of the examination. He may, if he chooses, keep his mouth shut or he may give a full explanation, or, he is so advised, he may explain only a part of the case against him.

* * *

24.45. Section 342 should be retained. – We have, after considering the various aspects of the matter as summarised above, come to the conclusion that Section 342 should not be deleted. In our opinion, the stage has not yet come for its being removed from the statute book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future."

"Clause 320.– The existing provision in Section 342(2) enabling a Court to draw an inference, whether adverse or not from an answer or a refusal to answer a question put to the accused during the examination, is being omitted as it may offend Article 20 (3) of the Constitution. - SOR"

In the context of this aspect of the law it has been held by this Court in ***Parsuram Pandey v. State of Bihar, (2004) 13 SCC 189*** that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. *audi alteram partem*, as explained in ***Asraf Ali v. State of Assam, (2008) 16 SCC 328.*** In ***Sher Singh v. State of Haryana, (2015) 3 SCC 724*** this Court has recently clarified that because of the language employed in Section 304-B IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304- B IPC that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this

clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the accused because of what he has stated or what he has failed to state in his examination under Section 313 CrPC.

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195. CRIMINAL PROCEDURE CODE, 1973 – Sections 468 and 472
INDIAN PENAL CODE, 1860 – Sections 406 and 407

(i) Gram crop was kept in the godown of the accused lastly on 27.05.2002 by the complainant – After four months, said crop was demanded for the first time – Complaint had to be lodged on or before 27.09.2005 but it was made on 10.09.2006 i.e. near about 9½ month belatedly – On perusal of written complaint, it appears that in the above period of 9½ months many times crop or its value was demanded by the complainant and every time accused persons used to promise the complainant to fulfill the said demand – Therefore it is a case of continuing offence committed under section 406 of IPC and whenever demand was made, from that date a fresh period of limitation began to run – It would be a continuing offence under section 472 of Cr.P.C.

(ii) Period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with more severe punishment.

दंड प्रक्रिया संहिता, 1973 – धाराएं 468 और 472

भारतीय साक्ष्य अधिनियम, 1860 – धाराएं 406 और 407

(i) चने की फसल अभियुक्त के गोदाम में अंतिम बार 27.05.2002 को परिवादी द्वारा रखी गई चार माह बाद पहली बार उक्त फसल की मांग की गई परिवादी को

27.09.2005 को या उसके पूर्व शिकायत दर्ज कर देना थी किन्तु उसने 10.09.2006 को अर्थात लगभग 9½ बाद विलंब से शिकायत दर्ज की। लिखित शिकायत से यह प्रतित होता है कि उक्त 9½ माह में कई बार फसल या उसकी कीमत की मांग परिवादी द्वारा की गई थी और हर बार अभियुक्तगण ने परिवादी की उक्त मांग पूर्ण करने का आश्वासन दिया था, अतः यह एक सत्त जारी रहने वाला धारा 406 भा.दं.सं. के अधीन कारित अपराध है और जब–जब मांग की गई उस तारीख से एक नया परिसीमाकाल लागू होता है। धारा 472 दं.प्र. सं. के अधीन यह एक सत्त अपराध होगा।

(ii) एक साथ विचारण किये जाने वाले अपराधों के बारे में परिसीमाकाल, उस अपराध के आधार पर निर्धारित होगा जो अपेक्षाकृत अधिक कठोर दंड से दंडनीय है।

Mukesh Kumar and others v. State of M.P. and another

Order dated 05.02.2015 passed by the High Court of M.P. In M.Cr.C. No. 2756 of 2010, reported in 2015 (2) JLJ 49

Extracts from the Order

As per the written complaint it is evident that Gram crop was kept in the dogown of the petitioners lastly on 27-05-2002. Then, after a period of four months said crop was demanded firstly meaning there in the end of September, 2002 and since then within three years complaint had to be lodged i.e. on or before 27.9.2005 whereas it was made on 10.9.2006 i.e. near about 9-1/2 months belatedly. But on perusal of FIR, it seems that in such period of nine and a half months many times crop or its value was demanded and always accused/persons used to promise the complainant to fulfil the demand. Therefore, prima facie, it is a case of continuing offence committed under section 406 of IPC and whenever demand was made, from that date a fresh period of limitation began to run and it would be a continuing offence under section 472 of CrPC. Same principal was laid own in the case of ***Bairo Prasad and another v. Smt. Laxmibai Pateria, 1991 CrLJ 2535***.

Apart that, more than three years' imprisonment is prescribed for the offence punishable under section 407 of IPC, therefore, as per the provisions contained under section 468(3) of Cr PC the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with more severe punishment. In this case, offence under section 407 of IPC is punishable up to the extent of seven years, therefore, cognizance also taken for the offence punishable under section 406 of IPC by the trial Court was valid and no illegality was committed in doing so.

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196. CRIMINAL TRIAL:

(i) Charge-sheet in respect of offences punishable under POCSO Act, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and IPC – Trial and jurisdiction of – Law explained.

It is a trite law that the function of a Court of Sessions may be discharged by the Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge – Court of Special Judge notified to try offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, therefore, being Court of Session, can try offences under POCSO Act and also offences under I.P.C. – Further held, the trial of such offences need not required to be split up.

(ii) Offences under POCSO Act, trial of – In exercise of powers conferred under section 28 of the POCSO Act, a Court of Sessions has been notified as a Special Court, therefore, Sessions Judges and Additional Sessions Judges posted in a Sessions Division may discharge the function of Special Court as "Children's Court".

(iii) Non-observance of section 193 Cr.P.C. in respect of an offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, effect of – Law explained.

Filing of charge sheet in the Court of Sessions directly in respect of an offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, without the case being committed for trial, would not amount to illegality and trial would not vitiate for the said reason unless and until the prejudice has been shown and established by the accused.

(*Rattiram & others v. State of M.P., (2012) 4 SCC 516* followed)

(iv) Conflict between two special enactments, which shall prevail – Law explained.

Later enactment shall prevail – Further held, in case of any inconsistency between POCSO Act and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the POCSO Act being later enactment shall prevail over the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

दाण्डिक विचारण :

(i) लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम और भारतीय दंड संहिता के अधीन दंडनीय अपराधों के बारे में आरोप पत्र – विचारण और क्षेत्राधिकार के बारे में – विधि समझाई गई।

(ii) पास्कों अधिनियम के अपराधों का विचारण – विधि समझाई गई।

(iii) धारा 193 दं.प्र.सं. के अपालन के बारे में विधि स्पष्ट की गई।

(iv) दो विशेष अधिनियमों में विरोधाभास होने पर कौन सा अधिनियम अधिभावी होगा इस बारे में विधि समझाई गई।

Mohammad Juned @ Zaved v. State of M.P.

Order dated 04.10.2014 passed by the High Court of M.P. in Criminal Revision No. 645 of 2013. (Unreported Order)

Extracts from the Order:

In the present case an offence was registered at crime No. 96/2013 by Police Station Industrial Area, Ratlam under Sections 363,366,342,506-B & 376-D of IPC and also under Sections 5 (g), 6 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act") and Sections 3(1)(xi) of the Prevention of Atrocities Act, wherein challan was filed in the Court of Sessions notified as "Children's Court".

The questions of general importance which are involved, that on registration of the offences under multiple Acts including offence of "POCSO Act", "Prevention of Atrocities Act" and also of the IPC, whether it is to be tried by the Court notified under Section 14 of the Prevention of Atrocities Act or by the Court notified under Section 28 of the "POCSO Act". It may also be seen that under both the Acts Courts have been separately notified, however, the trial shall be split up for trial by respective Courts or may continue in one Special Court. It is further required to be seen that in a case involving the offence of both the said enactments, if charge sheet is filed before the Court of Sessions notified as "Children's Court", the transfer of the said case before Special Court Prevention of Atrocities would vitiate the trial, as per the judgment of Hon'ble the Apex Court in the case of ***Gangula Ashok & another v. State of A.P., 2000 SCC (Cri) 488***.

It is apparent that the State Government in consultation with the Chief Justice of the High Court of the State and by notification in the official gazette shall designate for each district a Court of Sessions to be a Special Court to try the offences under "POCSO Act". It has further been made clear that if a Court of Sessions in notified as a "Children's Court" under the Act of 2005 or a Special Court designated for similar purposes under any other law for the time being in force, then such Court shall be deemed to be a Special Court under this Section. It further provides that while trying many offences under this Act the Special Court shall also try an offence with which the accused may under the Penal Code be charged at the same time. The said Court is having jurisdiction to try the offence under Section 67-B of the Information Technology Act, 2000 insofar it relates to the publication or transmission of sexual explicit material depicting children in any Act or conduct or manner or facilitate abuse of children mind. Thus, as per notification dated 7th January 2011 issued under the Act of 2005, a Court of Sessions division declared as "Children's Court" shall be deemed to a special Court for the purpose of POCSO Act.

As per Section 31 of the POCSO Act, it is clear, that if otherwise not provided, the Code of Criminal Procedure shall apply to the proceedings of special Court, which shall be the Court of Sessions and the person conducting the cases in the said Court shall be called as Special Public Prosecutor, and his appointment shall be as per Section 32 of the Act. Under Chapter VIII of the Act the procedure and power of special Court for recording the evidence has also specified. Thereby the special Court may take cognizance of offence without the accused being committed and also required to follow the procedure specified in Sections 33, 34, 35, 36, 37 and 38. Thus, except the said additional provision, the trial shall proceed as per code of criminal procedure. Section 42 A of the Act provides non obstante clause, which is relevant, however, reproduced as under:-

> ***"42A. Act not in derogation of any other law.*** – The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

As per Section 9 of the Code of Criminal Procedure Court of Sessions has been specified whereby the State Government shall establish a Court of Sessions. And every Court of Sessions shall be presided over by a Judge to be appointed by the High Court. It has further been clarified that the High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise the power of Sessions Court in every Court as Sessions. However, it is clear that the function of a Court of Sessions may be discharged by the Sessions Judge or the Additional Sessions Judges or the Assistant Sessions Judges, as the case may be, as per orders of the High Court. On the said issue guidance may be taken from the judgment of Hon'ble the Apex Court in the case of ***Abdul Mannan v. State of W.B., AIR 1996 SC 905*** wherein it is held that the Additional Sessions Judge posted under the Code by the High Court gets all the powers and jurisdiction of the Sessions Court to try the offences specified under the Code, However, it is clear that in one Sessions Division the Sessions Judge or Additional Sessions Judges posted may discharge the functions of a Court of Sessions. Thus, Additional Sessions Judge, therefore, is competent to proceed with the trial of the Prevention of Atrocities and also of juvenile offences under the said Acts. Thus, Additional Sessions Judge, therefore, is competent to proceed with the trial of the Prevention of Atrocities and also of juvenile offences under the said Acts. Thus, in realm of the statutory ***vindicta*** it is clear that a Court of Sessions may be notified either under the Prevention of Atrocities Act or under the POCSO Act; and the Additional Sessions Judge or Sessions Judge appointed by the High Court may discharge the function of a Court of Sessions in every court of Sessions in their Sessions Division or to exercise the powers conferred by the High Court for other Sessions Division.

As per Section 4 of the Cr.P.C., it is apparent that all the offences under the IPC shall be investigated, enquired into and tried and otherwise dealt with according to the provisions contained herein after. Sub-section (2) makes it clear that all the offences under any other law shall be investigate, enquired into and tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating manners or place of investigating, enquiring into, trying or otherwise dealing with such offences. Meaning thereby the Code of Criminal Procedure is having its application in general for the purpose of enquiry, trial or for other purposes subject to any procedure prescribed in the special enactment. In the said context and looking to the provisions of the Prevention of Atrocities Act and POCSO Act, no mode of trial except provided in the Code of Criminal Procedure has been specified there under. But under POCSO Act, the procedure specified in Sections 33,34,35,36 37 and 38 is in addition to the procedure prescribed in the Code of Criminal Procedure, which shall be followed by the said Court during trial.

In the context of the aforesaid, but looking to the language of Section 26(b) Cr. P.C., it appears that any offence under any other law shall be tried by such Court as provided by such law. However, whether it is incumbent to try this case involving the offences of both the Acts, by the respective special Court or may be tried by a Court of Sessions. In the said context the language of notifications notifying two special Courts under the different Acts in relevant. To found the answer that the offences registered under different Acts including the provisions of the IPC can be tried by a Court of Sessions notified in two different enactments. It may also be required to advert that which of the aforementioned enactments having overriding effect. In this regard, the guidance may be taken from the Principles of Statutory Interpretation by Justice G.P. Singh, 11th Edition, Page 361 whereby it is clear that sometime one find tow or more enactments operating in the same field and each containing a non obstante clause, in that event, the conflict in such cases may be resolved on consideration of purpose and policy underlying the enactment and the language used in them. The judgment of Hon'ble Apex Court in the case of ***Sarwan Singh v. Kasturi lal, AIR 1997 SC 2645***, is also relevant on this issue by which the Apex Court lay down the guidelines for resolving a conflict of two non obstante clauses contained in two different statutes. In the said case, the issue with respect to the applicability of the Delhi Rent Act was involved wherein it was held that when two or more laws operate in same field and each contained a non obstante clause indicating the provisions giving overriding effect to any other law, the cases to be decided in reference to the object and purpose of the law under consideration and applying a test that the later enactment must prevail over the earlier one.

In an another case of ***Jain Ink Mfg. & Co. v. LIC of India & another, AIR 1981 SC 670*** before the Apex Court, the question came for consideration that Public Premises Eviction of Unauthorized Occupants Act, 1971 would prevail to the Slums Area (Improvement & Clearance) Act, 1956 as the provisions in both the Acts were in direct conflict, wherein it was held that the Slums Act passed as

far back as 1956 and the Public Premises Eviction Act was subsequent to it and would, therefore, prevail over the Slums Act. In the case of ***Sanwarmal Kejriwal v. Vishwa Co-oplerative Housing Society Ltd. & others, AIR 1990 SC 1563***, the similar question arose before the Supreme Court wherein it was held that on having inconsistency in the two enactments, the later enactment would prevail. Thereafter before the Constitutional Bench of Hon'ble the Apex Court in the case of ***Ashoka Marketing Ltd. v. Punjab National Bank, AIR 1991 SC 855*** the question came for consideration, whether Public Premises (Eviction of Unauthorized Occupants) Act, 1971 is having overriding effect to Delhi Rent Control Act, 1958. The Apex Court, after considering the purpose to which the later enactment has been enacted and looking to the non obstante clause in the later enactment, the Court concluded that the later enactment would prevail over to the earlier. In the case of ***A.P. State Financial Corporation Vs. Official Liquidator, AIR 2000 SC 2642*** again the same question came for consideration before the Apex court in the context of the State Financial Corporation Act, 1951 and the Companies Act, 1956 wherein the proviso to Section 529-A was as inserted by amending the Act in 1985 and right of the Corporation to sell property of defaulting industrial concern cannot be exercised in ignorance of pari passu charge in favour of workmen created by proviso to Section 529 (1) of the Companies Act, by later amendment. It was held that as per non obstante clause later enactment in point of time would prevail.

Similarly, in the case of ***Allahabad Bank v. Canara Bank & another, 2000 (4) SCC 406,*** the Apex Court held that in case of conflict between two special laws, the later one prevails applying the maxim generalia specialibus non derogant. In the case of ***Maruti Udyog Ltd. v. Ramlal & others, (2005) 2 SCC 638*** and also in the case of ***Jay Engineering Works v. Industry Facilitation Council & another, AIR 2006 SC 3252,*** the Court held that ordinary rule of construction is that where there are two non obstante clauses in different enactments, the later shall prevail, but it is equally well settled that ultimate conclusion would depend upon object and purpose of law under consideration to the context of statute. In view of the foregoing legal position enunciated by various pronouncement of the Apex Court it is clear that in two special enactments, non obstante clauses have been specified then the later enactment would prevail to earlier, applying the maxim generalia specialibus non derogant. In addition thereto the object and purpose to which the enactments have been introduced by the legislature ought to be seen, while interpreting the said issue.

In the said context if the object of the Prevention of Atrocities Act as well as the POCSO Act has been visualized then it is clear that the first Act was introduced with a view to prevent the commission of the atrocities against the members of the Scheduled Castes and Scheduled Tribes by the members of unreserved category, to secure rehabilitation of the members of Scheduled Castes and Scheduled Tribes and to prevent the offences and to try the cases of the victims by the Special Courts notified under the Act. The later Act has been enacted to protect the children of all communities including Scheduled Castes and

Scheduled Tribes, OBC and unreserved category from offences of sexual assault, harassment, pornography and numerous safeguards have been specified in the Act with a view to prevent the exploitation of children and to protect them at various stages of investigation, enquiry and trial. Thus, it is clear that the interest of all the children, belonging to Scheduled Castes and Scheduled Tribes, other backward classes or unreserved category have been protected by introducing the said Act. Thus irrespective to race, caste and creed, the children of all the citizens were given protection by POCSO Act. Under both the Acts special Courts have been directed to be notified for the purpose of speedy trial, which are court of Sessions. However, in the matter of trial of the offences under both the enactments the case be tried before the Court of Sessions to which there is no conflict.

As discussed hereinabove, it is clear that a Court of Sessions under both the Acts is notified to try the offences, issuing separate notifications by the State Government after concurrence of the Chief Justice of the State. It is a trite law that the function of a Court of Sessions may be discharged by the Session Judge, Additional Session Judges or Assistant Session Judges appointed in this regard by the High Court. However, as per language employed in various notifications under the Prevention of Atrocities Act makes it clear that an Additional Sessions Judge posted in a Court of Sessions shall discharge the function of the Special Court under the Prevention of Atrocities Act would be a Special Court from the date of assuming the charge of the office. On the other hand, in exercise of powers conferred under Section 28 of the POCSO Act a Court of Sessions has been notified as a Special Court, and the Sessions Judges or Additional Sessions Judges posted in the Sessions Division may discharge the function of special Court as “Children’s Court”. As per the language of the notification issued under the Prevention of Atrocities Act, a Sessions Judge, from the date of assuming the office may discharge the function of the said Court, while as per notification of POCSO Act any of the Sessions Judge, who may discharge the function of the Court of Sessions may try the offences of POCSO Act. However, the special Judge Prevention of Atrocities is also a Court of Sessions who may try the offences of the Prevention of Atrocities Act as well as under POCSO Act. Thus, in such circumstances, by the aid of Section 9 of Cr.P.C. and giving harmonious interpretation to the Acts and Notifications issued the offence of the Prevention of Atrocities Act as well as POCSO Act and the IPC can be tried by a Court of Session notified under Prevention of Atrocities Act, and the trial may not required to be split up.

Now, to advert the other limb of the argument advanced by learned counsel for the applicant that under POCSO Act challan ought to be filed before the notified Court, while under the Prevention of Atrocities Act the Special Court may try the cases after committal by the Court of Judicial Magistrate First Class. In the present case, the challan has been filed before the Sessions Judge; therefore, it would affect the right of the applicant. In the said context Chapter-XIV of the Cr.P.C. is relevant. As per Section 193, it is clear that except as otherwise expressly provided by this Code or by any other law for the time being

in force no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code. In the present case, the offences of POCSO, Prevention of Atrocities Act and I.P.C. was found involved. However, the Challan was filed before the Court of Sessions, which cannot be said to be illegal and prejudicial to accused merely on asking by them. As per the judgment of the Apex Court in a recent case of ***Rattiram & Others v. State of M.P., (2012) 4 SCC 516*** the Court has re-considered the issue regarding filing of the challan before the Sessions Court in a case of Prevention of Atrocities Act wherein the High Court directed vitiation of trial due to non-observance of Section 193 of the Code. But the Apex Court considering the provisions of Chapter – XIV of Cr.P.C., applying the theory of prejudice held that until and unless the prejudice has been shown and established by the accused mere filing of the challan in the Court of Sessions would not amount to illegality and the trial would not vitiate for the said reason.

In view of the foregoing discussions and the interpretation of the provisions contained under the Prevention of Atrocities Act, POCSO Act as well as the notifications issued thereunder and also considering the provisions of the Cr.P.C., it is apparent that the offence registered under the POCSO Act shall be tried by the Court notified under Section 25 of the Commissions for Protection of Child Rights Act, 2005, which shall be deemed to be the "Children's Court" as per the proviso to Section 28 of the POCSO Act. Simultaneously, if the offences registered under the provisions of the preventions of Atrocities Act, then such offences shall be tried by the Special Court notified to try the said offence by Sessions Judge posted in the said Court from the date of assuming the office. If the offences of IPC are also involved with respect to the offences of the respective special enactments then those offences shall also be tried by the said special Court notified under the respective enactments. It is to be further held that in a same crime number if the offences have been registered under the provisions of Atrocities Act and POCSO Act then, such offences shall be tried by a Court of Sessions notified under the Prevention of Atrocities Act with the aid of Section 9 of Cr.P.C. and as per the language of the notifications. In such circumstances, trial of the offences involved under both the Acts are not required to be split up. It is to be further made clear here that the POCSO Act being later enactment shall prevail to the provisions of the Prevention Atrocities Act in case of any inconsistency. It is to be further held that mere filing of a challan before a Court of Sessions as appears in the present case would not vitiate the trial, ***ipso facto*** in the light of the recent judgment of the Apex Court in the case of ***Rattiram*** (supra) without showing and establishing prejudice to the accused.

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197. CRIMINAL TRIAL :

Offence of rape – Test identification parade – Non-significance of – T.I. parade *vis-a-vis* dock identification – Law explained.

Traumatic and tragic experience in the course of commission of

such heinous offence and close proximity with the offender affords sufficient time to imprint upon the mind of the prosecutrix the identity of the offender – Identification of the offender in court by her is the substantive evidence – Test identification parade is not a rule of law but only a rule of prudence – Identification of the accused in court can be relied upon even in the absence of test identification parade.

दाण्डिक विचारणः

बलात्संग का मामला – पहचान परेड – तात्विक या महत्वपूर्ण न होना – पहचान परेड की तुलना में न्यायालय कक्ष में पहचान – विधि समझाई गई।

अपराध के कारित होने के दौरान के मानसिक आघात पहुंचाने वाले और दुखद अनुभव तथा अपराधी से (अपराध कारित होने के दौरान) सामिप्य या निकटता, अभियोक्त्री के मस्तिष्क में अपराधी की पहचान अंकित करने के लिए पर्याप्त समय प्रदान करती है – अभियोक्त्री द्वारा अभियुक्त की न्यायालय में पहचान तात्विक साक्ष्य होती है – पहचान परेड (संचालित करवाना) विधि का नियम नहीं है बल्कि प्रज्ञा का नियम है – पहचान परेड के बिना भी न्यायालय में की गई अभियुक्त की पहचान पर भरोसा किया जा सकता है।

Satwantin Bai v. Sunil Kumar & anr.

Judgment dated 10.04.2015 passed by the Supreme Court in Criminal Appeal No. 1581 of 2009, reported in 2015 (2) Crimes 234 (SC)

Extracts from the Judgment:

In the present case the appellant was subjected to sexual intercourse during broad day light. The fact that she was so subjected at the time and in the manner stated by her, stands proved. Three witnesses had immediately come on the scene of occurrence and found that she was raped. The immediate reporting and the consequential medical examination further support her testimony. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon her mind the identity of the offender. In ***Malkhansingh v. State of M.P., (2003) 5 SCC 746*** in a similar situation where identification by prosecutrix for the first time in court was a matter in issue, this Court had observed:

> "She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity."

Furthermore, the appellant had gone to the extent of stating in her first reporting that she would be in a possition to identify the offender and had given

particulars regarding his identity. The clothes worn by the offender were identified by her when called upon to do so. In the circumstances there was nothing wrong or exceptional in identification by her of the accused in court. We find her testimony completely trustworthy and reliable. Consequently we hold that the case against Respondent No.1 stands proved. Since the trial court had found the age of the Appellant to be 10-13 years of age, we take the age to be on the maximum scale i.e. 13 years. In our considered view, the High Court was not justified in dismissing the revision. No other view was possible and the case therefore warrants interference by this Court. We accordingly allow the appeal and convict Respondent No.1 for having committed the offence under Section 376(1) IPC and sentence him to undergo imprisonment for seven years and also impose a fine of Rs.5,000/- which in its entirety shall be made over to the Appellant. In the event such fine is not deposited, Respondent No.1 shall undergo further sentence of simple imprisonment for six months. We, however, confirm the acquittal of Respondent No.1 for the offence under Section 3(2)(V) of the Act. Respondent No.1 shall be taken into custody forthwith to undergo the sentence as aforesaid.

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198. EVIDENCE ACT, 1872 – Sections 3, 11 and 32

(i) Plea of *alibi* – Burden of proof – The burden on the accused is rather heavy – He is required to prove it with certitude – When plea of alibi can succeed? Held, it can succeed only if it is proved with absolute certainty that the accused was so far away at the relevant time that he could not be present at the place of occurrence.

(ii) Dying declaration – 100% burn injury case – Plea of accused that deceased could not have made any statement to her brother due to 100% burns – Brother of the deceased had immediately rushed to the house of the deceased – She told him that her husband had poured kerosene on her – D.D. was found to be worthy of reliance – Plea of accused rejected.

साक्ष्य अधिनियम, 1872 – धाराएं 3, 11 और 32

(i) घटना स्थल से अनुपस्थिति – प्रमाण भार – अभियुक्त पर अपेक्षाकृत भारी प्रमाणभार होता है – उसके लिये इसे निश्चित रूप से प्रमाणित करना आवश्यक होता है – कब ऐसा बचाव सफल हो सकता है ? अभिनिर्धारित किया गया यह केवल तभी सफल हो सकता है जब यह निरपेक्ष निश्चितता से प्रमाणित होता हो कि अभियुक्त सुसंगत समय पर इतना दूर (घटना स्थल से) था कि उसका घटना स्थल पर उपस्थित रहना संभव नहीं हो सकता।

(ii) मृत्यु पूर्व कथन – 100 प्रतिशत जलने से आई चोटों का प्रकरण – अभियुक्त का बचाव कि मृतक 100 प्रतिशत जलने के कारण उसके भाई को कोई कथन करने की स्थिति में नहीं थी – मृतक का भाई तत्काल भाग कर मृतक के घर

पहुंचा था – मृतक ने उसे कहा था कि उसके पति ने उस पर कैरोसिन उड़ेला है – मृत्युकालिन कथन विश्वास योग्य पाया गया था – अभियुक्त का बचाव अमान्य किया गया।

Vijay Pal v. State (GNCT) of Delhi

Judgment dated 10.03.2015 passed by the Supreme Court in Criminal Appeal No. 2153 of 2011, reported in AIR 2015 SC 1495

Extracts from the Judgment:

It is contended by the learned counsel for the appellant when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in ***Mafabhai Nagarbhai Raval v. State of Gujarat, AIR 1992 SC 2186*** wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

In ***State of Madhya Pradesh v. Dal Singh and Others, AIR 2013 SC 2059,*** a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.

We may profitably reproduce a few paragraphs from ***Binay Kumar Singh v. State of Bihar, AIR 1997 SC 322***.

> We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:
>
> "The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."
>
> The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the

crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

The said principle has been reiterated in ***Gurpreet Singh v. State of Haryana, AIR 2002 SC 3217, S. K. Sattar v. State of Maharashtra AIR 2010 SC 3320*** and ***Jitender Kumar v. State of Haryana, AIR 2012 SC 2488.***

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***199. EVIDENCE ACT, 1872 – Section 27**

Disclosure statement, admissibility and significance of – What is admissible is the information leading to discovery and not any opinion formed on it by the prosecution – What is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused – In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence.

साक्ष्य अधिनियम, 1872 – धारा 27

प्रगटन कथन की ग्राह्यता और महत्व – वह सूचना जिससे तथ्य का पता लगा वह ग्राह्य होती है न की अभियोजन द्वारा उसके आधार पर बनाई गई राय – अभियुक्त के प्रगटन पर तात्विक वस्तु का पता लगना महत्वपूर्ण होता है किन्तु ऐसा प्रगटन मात्र

इस निष्कर्ष के लिए पर्याप्त नहीं है कि अपराध अभियुक्त द्वारा किया गया है – वास्तव में इसके पश्चात अभियोजन पर यह प्रमाण भार होता है कि वह यह साबित करे की तात्विक वस्तु का पता लगने और उसके अपराध के कारित करने के उपयोग के बीच संबंध है।

Vijay Thakur v. State of Himachal Pradesh

Judgment dated 19.09.2014 passed by the Supreme Court in Criminal Appeal No. 632 of 2011, reported in 2015 (2) Crimes 254 (SC)

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

Dying declaration – Reliability, test and requirement of – Reliability of dying declaration must be subjected to close scrutiny – Court must satisfy that declaration is truthful – While great solemnity and sanctity is attached to the words of a dying man because the person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet, the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination – The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify the accused and that he was making the statement without any influence or rancour – Truthful and reliable dying declaration, though uncorroborated, may form the sole basis of conviction.

साक्ष्य अधिनियम, 1872 – धारा 32 (1)

मृत्युकालिक कथन – विश्वसनीयता, जाँच और आवश्यकताएँ – मृत्युकालिक कथन की विश्वसनीयता गंभीर छानबीन पर निर्भर है – न्यायालय को संतुष्ट होना चाहिए कि कथन सत्य है मृत व्यक्ति के शब्दों से पवित्रता और पुनितता जुड़ी होती है क्योंकि जो व्यक्ति मृत्युशय्या पर होता है उसके झूठ बोलने की संभावना या एक मामला गढ़ने की संभावना और निर्दोष व्यक्ति को फंसाने की संभावना नहीं होती है इसके बावजूद न्यायालय को मृतक के कथनों में सिखाये जाने या कल्पना या प्रेरणा तो नहीं है इस बारे में सावधान रहना चाहिए – न्यायालय को इस बारे में संतुष्ट होना चाहिए की कथन देते समय मृतक स्वस्थ मानसिक अवस्था में था तथा उसे अभियुक्त को देखने और पहचानने का अवसर था उसने कथन बिना किसी प्रभाव में दिया – सत्य और विश्वसनीय मृत्युकालिक कथन चाहे उसकी पुष्टि न हुई हो दोषसिद्धि का एक मात्र आधार बनाया जा सकता है।

Prem Kumar Gulati & another v. State of Haryana & another

Judgment dated 23.09.2014 passed by the Supreme Court in Criminal Appeal No. 1422 of 2009, reported in 2015 (2) Crimes 247 (SC)

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201. EVIDENCE ACT, 1872 – Section 65 (f)

RIGHT TO INFORMATION ACT, 2005 – Section 2 (j)

Secondary evidence – Certified copy of documents obtained under Right to Information Act, admissibility of – Certified copies of documents obtained under Act of 2005 are admissible as secondary evidence – Not required to be compared with original documents.

साक्ष्य अधिनियम, 1872 – धारा 65 (एफ)

सूचना का अधिकार अधिनियम, 2005 – धारा 2 (जे)

द्वितीयक साक्ष्य – सूचना का अधिकार अधिनियम, 2005 के अधीन प्राप्त की गई दस्तावेजों की प्रमाणित प्रतिलिपि की ग्राह्यता – दस्तावेजों की प्रमाणित प्रतिलिपियाँ जो सूचना का अधिकार अधिनियम, 2005 के अधीन प्राप्त की गई वे द्वितीयक साक्ष्य के रूप में ग्राह्य होती है – इनकी मूल दस्तावेज से मिलान की आवश्यकता नहीं होती है।

Narayan Singh v. Kallaram @ Kalluram Kushwaha

Order dated 19.03.2015 passed by the High Court of M.P. in Writ Petition No. 7860 of 2014, reported in 2015 (2) MPLJ 337

Extracts from the Order:

Clause (f) of Section 65 of Evidence Act makes it crystal clear that a certified copy permitted under the Evidence Act or by any other law in force can be treated as secondary evidence. Right to Information Act, in my view, falls within the ambit of "by any other law in force in India". The definition of "right to information" makes it clear that certified copies of documents are given to the citizens under their right to obtain 3 WP No. 7860/2014 information. In my view, the court below has rightly opined that the documents can be admitted as secondary evidence. I do not see any merit in the contention that the documents obtained under the Act of 2005 are either true copies or attested copies. The definition aforesaid shows that the same are certified copies. Even otherwise, it is interesting to note that in Black Dictionary, the meaning of "certified copy" is as under:-

> "Certified copy" - a copy of a document or record, signed or certified as a true copy by the officer to whose custody original is entrusted."

Since the documents are covered under section 65 of the Evidence Act, there was no need to compare the same with the originals.

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202. EVIDENCE ACT, 1872 – Section 132

(i) Interpretation of proviso – The proviso to section 132 of the Evidence Act is a facet of rule against self-incrimination and the same is a statutory immunity against self-incrimination which deserves the most liberal construction – No prosecution can be launched against the maker of a statement falling within the sweep of section 132 on the basis of the 'answer' given by a person while deposing as a 'witness' before a Court.

(ii) The rule against self-incrimination can be seen in –

(i) Section 161 Cr.P.C, 1973;

(ii) Sections 25 and 26 of the Evidence Act; and

(iii) The proviso to section 132 of the Evidence Act.

साक्ष्य अधिनियम, 1872 – धारा 132

(i) परंतुक का अर्थान्वयन – धारा 132 साक्ष्य अधिनियम का परंतुक स्वदोषिता के विरूद्ध नियम का एक पक्ष है। यह स्वदोषिता के विरूद्ध एक वैधानिक उन्मुक्ति या बचाव है जिसे अत्यंत नर्म रूख के साथ लिया जाना चाहिए – एक व्यक्ति न्यायालय के सामने साक्षी के रूप में कथन देता है उसमें उसके द्वारा दिये गये उत्तर के आधार पर उसके विरूद्ध धारा 132 के प्रकाश में कोई अभियोजन संस्थित नहीं किया जा सकता।

(ii) स्वदोषिता के विरूद्ध नियम को

(i) धारा 161 दंड प्रक्रिया संहिता, 1973

(ii) धारा 25 एवं 26, साक्ष्य अधिनियम और

(iii) धारा 132, साक्ष्य अधिनियम के परंतुक में देखा जा सकता है।

R. Dineshkumar alias Deena v. State, Rep. by Inspector of Police & ors.

Judgment dated 16.03.2015 passed by the Supreme Court in Criminal Appeal No. 454 of 2015, reported in AIR 2015 SC 1816

Extracts from the Judgment:

The rule against self-incrimination found expression in Indian law much before advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in (i) Section 161 Cr.P.C., 1898. Sub-section (1) authorised a police officer investigating a case to examine any person "supposed to be acquainted with the facts and circumstances of the case". Subsection (2) exempted such person from answering the questions "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Subsections (2) of both the old and new Code are substantially identical. (ii) Another facet of the rule against self-incrimination finds expression in Sections 25 and 26 of the Evidence Act which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in ***The Queen v. Gopal Doss & another, ILR 3 Mad. 271,*** the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act.

The proviso to Section 132 of the Evidence Act is a facet of the rule against self incrimination and the same is statutory immunity against self incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court

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203. HINDU SUCCESSION ACT, 1956 – Section 8

(i) Succession– Self-acquired property of deceased, devolution of – Deceased died prior to commencement of the Hindu Succession Act, 1956 – Property being his self-acquired property, will devolve upon his sons in equal shares.

(ii) Principle of *res judicata*, applicability of – Finding that suit property is self-acquired property of the deceased was confirmed by the High Court as well as by the Apex Court – Deceased died before commencement of the Act of 1956 – Sons of the deceased inherited property – On attaining finality, plaintiff (daughter of deceased) cannot re-agitate the matter seeking share in the suit property.

हिन्दू उत्तराधिकारी अधिनियम, 1956 – धारा 8

(i) उत्तराधिकार – मृतक की स्वअर्जित संपत्ति का न्यागमन – हिन्दू उत्तराधिकारी अधिनियम, 1956 लागू होने से पहले मृत्यु हुई – संपत्ति मृतक की स्वअर्जित संपत्ति होने से उसके पुत्रों में समान अंश में न्यागत होगी (अर्थात पुत्रों को समान या बराबर अंश मिलेगा।)

(ii) पूर्व न्याय या रेस ज्यूडिकेटा के सिद्धांत का लागू होना – वादग्रस्त संपत्ति मृतक की स्वअर्जित संपत्ति है इस निष्कर्ष की पुष्टि उच्च न्यायालय ने व सर्वोच्च

न्यायालय ने कर दी – मृतक, हिन्दू उत्तराधिकारी अधिनियम, 1956 लागू होने के पूर्व मरा – मृतक के पुत्रों ने संपत्ति उत्तराधिकार में प्राप्त की – उक्त निष्कर्षों के अंतिम हो जाने के बाद मृतक की पुत्री (वादी) वादग्रस्त संपत्ति में उसके अंश की मांग करते हुए मामला पुनः नहीं उठा सकती।

Anand Sood v. Kanak Devi and others

Order dated 06.02.2015 passed by the High Court of M.P. in Writ Petition No. 7624 of 2014, reported in 2015 (2) MPLJ 317

Extracts from the Order:

The petitioner/intervenor though made a claim to have 1/4th share in the suit house being son of Shyamwati and grandson of Late Durgaprasad as Class-I heir, however, in his application under Order I Rule 10 CPC nowhere the applicant has stated the date of death of Late Durgaprasad relevant for the purpose of claiming share to the suit property under Section 8 of the Hindu Succession Act as Class-I heir. Defendant no.1 in his written statement has stated that Durgaprasad had died in the year 1955. In the plaint in para 8 the plaintiff has averred that Durgaprasad had died during 1955-56. Besides, in the affidavit filed by defendant no.2 grandson of Late Durgaprasad it is stated that Durgaprasad had died in the year 1955. However, in the teeth of the fact that in the earlier round of litigation the trial court as well as the first appellate court since recorded a finding that Late Durgaprasad had died prior to Hindu Succession Act came into force and the suit property being his self acquired property, therefore, had devolved upon both the sons having equal share. In fact the aforesaid question of exact date of death of Late Durgaprasad was found to be not of much consequence, therefore, the trial court held that after the death of Durgaprasad, since the suit property was succeeded by his sons only, now in the suit for partition and possession by subsequent purchaser buying part of share of Late Satyanarayan, predecessor-in-title of defendants no.5 and 6, in the light of directions issued by this Court in first appeal No.6/1993 confirmed by Supreme Court in civil appeal No.6548/2014, the petitioner/intervenor has no right for being added as a party, accordingly rejected his application filed under Order I Rule 10 CPC. The trial court even in the alternative has said that even if Durgaprasad had died after 1956, still his daughters or their successors have no right over the suit property as they were not born after 1956 and relied upon the judgment of ***Pushpalatha N. V. v. V. Padma, AIR 2010 Karnataka 124.*** Consequently, the application was dismissed with further observations that the suit is pending since 2005 and there is already an order passed by this Court on 9/8/2010 in Writ Petition No.3098/2009, wherein direction has been issued to decide the suit within six months, besides, there is another order of this Court dated 4/9/2014 in Writ Petition No.5309/2014 and an order of the Supreme Court dated 15/7/2014 in civil appeal No.6548/2014 for expeditious disposal of the suit.

Before adverting to rival submissions, it is considered apposite to refer to the views of the Supreme Court in the context of discretionary jurisdiction of the trial court under Order I Rule 10 CPC. Plaintiff in the suit is a dominus litus and he is always free to choose the persons against whom he intends to contest and seek relief. He cannot be compelled to make any person party to a suit against whom he does not intend to seek any relief. Therefore, a person, who is not a party to a suit, cannot claim right to be impleaded against wishes of the plaintiff. This is the general rule as regards impleadment of parties in a civil suit. However, this rule is subject to the provisions engrafted under Order I Rule 10 (2) CPC, which reads as under:-

> "10. Suit in name of wrong plaintiff.- (1) xxxxxxx
> (2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

A bare perusal thereof suggests that the trial court exercises discretionary jurisdiction in the matter of adding of parties and deleting the parties on such premise, as may appear to be just and proper in such stage of proceedings in a suit with due application of mind where any person, who ought to have been joined as plaintiff or defendant, but was not joined and where a person, whose presence is necessary before the Court to enable the Court to effectually and completely adjudicate upon and settle questions involved in the suit. The Apex Court while considering the scope, ambit and limit of Order I Rule 10 (2) CPC in the case of ***Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others, (2010) 7 SCC 417*** also explained the difference between the necessary party and proper party by reiterating the law that necessary party is a person, who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court, therefore, if a necessary party is not impleaded, the suit itself is liable to be dismissed. Proper party is a party, who though not necessary, but whose presence would enable the Court to completely, effectively and adequately adjudicate upon the matter at dispute in the suit though he need not be a person in favour of whom the decree is to be made. Relevant paras thereof read as under:

> "Let us consider the scope and ambit of Order I of Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo moto or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice.
>
> This Court in ***Ramji Dayawala & Sons (P) Ltd. v. Invest Import 1981 (1) SCC 80,*** reiterated the classic definition of 'discretion' by Lord Mansfield in ***R. v. Wilkes, 1770 (98) ER 327,*** that 'discretion'
>
> > "when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, `but legal and regular'."
>
> In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party."

Besides, the Hon'ble Supreme Court in the context of judgments rendered in ***Kasturi v. Iyyamperumal and others, (2005) 6 SCC 733*** and ***Sumtibai and others vs. Paras Finance Co., (2007) 10 SCC 82*** has observed in paras 21 and 26 as under:-

> "21. On a careful consideration, we find that there is no conflict between the two decisions. The two decisions were dealing with different situations requiring application of different facets of sub-rule (2) of Rule 10 of Order 1. This is made clear in Sumtibai (supra) itself. It was observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may

alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The decisions in ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524*** and ***Anil Kumar Singh v. Shivnath Mishra, (1995) 3 SCC 147*** also explain in what circumstances persons may be added as parties.

26. If the principles relating to impleadment, are kept in view, then the purported divergence in the two decisions will be found to be non- existent. The observations in ***Kasturi*** (supra) and ***Sumtibai*** (supra) are with reference to the facts and circumstances of the respective case. In ***Kasturi*** (supra), this Court held that in suits for specific performance, only the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In ***Sumtibai*** (supra), this Court held that a person having semblance of a title can be considered as a proper party. Sumtibai did not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did ***Kasturi*** (supra) lay down that no one, other than the parties to the contract and their legal representatives/ transferees, can be impleaded even as a proper party."

Learned counsel for the petitioner submits that the trial court has committed grave error of law and fact while dismissing the application. It is submitted that as the petitioner/intervener is the son of Late Shyamwati and grandson of Late Durgaprasad, therefore, he is entitled to succeed 1/4th share in the suit property and, therefore, the trial court ought to have allowed the application under Order I Rule 10 CPC in the suit for partition and possession filed by the purchaser of the share of Satyanarayan; one of the son of Late Durgaprasad, as the share is yet to be determined in a partition suit. Learned counsel relied upon following judgments of the Supreme Court to contend that in those cases even after passing of the preliminary decree in partition suits, applications for modification of preliminary decrees were ordered to be allowed to pass preliminary decree again if after passing of preliminary decree, events have taken place necessitating re-adjustment of share as declared in the preliminary decree, as there is no bar that once a preliminary decree is passed, the Court is precluded from passing preliminary decree subsequently:

> ***1. Prema v. Nanje Gowda and others, (2011) 6 SCC 462,***
> ***2. Ganduri Koteshwaramma and another v. Chakiri Yanadi and another, 2012 (1) MPLJ (S.C)333 = (2011) 9 SCC 788***

Learned counsel also submitted that the trial court has committed an error of law wherein in alternative it is held that even if Durgaprasad had died after 1956, his daughters had no share to the suit property, as they were not born after 1956 on the strength of the judgment in the case of ***Pushpalatha*** (supra) and further submits that the aforesaid judgment is subject matter of appeal before the Supreme Court and pending consideration. This Court does not intend to test the sustainability of the order of the trial court in the context of aforesaid justifiability of the impugned order.

Having perused the aforesaid judgments rendered by the Hon'ble Apex Court this Court finds that there is no dispute that in a partition suit after passing of the preliminary decree the trial court is competent to pass again a preliminary decree subsequently if in the interregnum period any party to the partition suit dies or any amendment of law governing the rights of the parties has undergone change, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. The law laid down by the Apex Court in that behalf is well explained in para 16 of the judgment in the case of ***Prema*** (supra), which reads as under:-

> "16. We may add that by virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order."

But, looking to the factual matrix in hand, the ratio laid down in aforesaid two judgments, in the opinion of this Court, cannot be of any help to the petitioner. Undisputedly the finding of the trial court confirmed by the High Court as well as the Supreme Court (supra) that the suit property is a self acquired property of Late Durgaprasad, who had died prior to Hindu Succession Act came into force and, therefore, both sons had inherited the property, has attained finality. The instant suit is filed with reference to and in the context of liberty granted by the first appellate court to file a suit for partition and possession to the extent he

had purchased the property from the share of Satyanarayan; one of the brothers, wherein the extent of the property purchased by the plaintiff is to be determined upon division of property between the two brothers or other predecessor-in-title (parties to the suit).

The submission of learned counsel for the petitioner that as the shares are yet to be determined, as observed by the first appellate court in para 13, therefore, the petitioner/intervenor has substantial and legitimate legal right to be a party to the partition suit being grandson of Late Durgaprasad cannot countenanced for the reason that first of all the finding of death of Durgaprasad is well explicit in the judgment of the High Court being prior to coming into force of Hindu Succession Act and devolution of property upon two brothers by force of law of survivorship, hence, determination as observed by the first appellate court in para 13 is in the context of the extent of property purchased by the plaintiff out of the share of Satyanarayan and no other meaning can be given thereto to enlarge the scope of the suit in ignorance of the judgment of the first appellate court and that of the Supreme Court. As a matter of fact, in the light of the judgments rendered by this Court in the first appeal No.6/1993 and by the Supreme Court in civil appeal No.6548/2014, plaintiff has no right to re-agitate the matter seeking claim in the suit property on the principles of res judicata. In the case of ***Dr. Subramanian Swamy v. State of Tamil Nadu & Ors., AIR 2014 SCW 6893*** the Apex Court held has under:-

> "23. The scope of application of doctrine of res judicata is in question. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments". "Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. 24. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari prouno et eadem causa" (no man should be vexed twice over for the same cause). Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide: ***Shah Shivraj Gopalji v. ED., Appakadh Ayiassa Bi & Ors., AIR 1949 PC 302; and Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors., AIR 1953 SC 65***)."

It may not be out of place to mention that the mother of the petitioner/intervenor herself has deposed in favour of the predecessor in title of defendant Jainarayan supporting his claim of having exclusive ownership on the suit property. As such, she had full knowledge of the litigation between the parties, which was decided vide civil suit No.36/1991, first appeal No.6/1993. She had died in the year 2004. Up-till her death no proceeding was ever initiated by Late Shyamwati for her claim in the suit property being daughter of Late Durgaprasad and the instant application by the son of Shyamwati is filed in the month of September, 2014. This itself shows lack of bonafides and an attempt to somehow subvert the course of justice. Except him none of the successor of his sister Late Bhagwati has come forward for such claim. As such, the facts suggests that the aforesaid application has been filed only to subvert the course of justice in the instant suit filed in compliance of the order passed by the first appellate court in first appeal No.6/1993. Application is devoid of substance and has rightly been dismissed by the trial court.

In the light of the fact that the suit is for declaration and possession and during pendency of the suit plaintiff was dispossessed, reference and reliance to Section 35 of the Specific Relief Act by the counsel for applicant/petitioner is of no assistance.

As such, there is no illegality committed by the trial court in the impugned order. The Writ Petition sans merit. Accordingly, dismissed.

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204. INDIAN PENAL CODE, 1860 – Sections 96 to 100, 149 and 302

Right of private defence, when not available? Held, in cases of free fights, the accused persons are to be fastened with individual liability taking into consideration the specific role assigned to each one of them and normally right of private defence is not available to either of the parties but that is not a rule without exception– In this case accused has been given 2cm x 2cm x 1.5cm deep knife-blow on his scapular region, has retorted by using licensed firearm, and killed one of his rivals in the same incident – He has taken plea of right to private defence right from beginning of the trial – A person faced with injury with a deadly weapon to his life cannot be expected to weigh in balance the precise force needed to avoid danger –The Apex Court has given him benefit of Exception 2 of Section 300 IPC.

भारतीय दण्ड संहिता, 1860 – धाराएं 96 से 100, 149 और 302

निजी प्रतिरक्षा का अधिकार – कब उपलब्ध नहीं होता है ? अभिनिर्धारित किया गया स्वच्छंद लड़ाई के प्रकरणों में अभियुक्तगण घटना में उनकी विशेष भूमिका को विचार में लेते हुए उनके व्यक्तिगत दायित्व के लिये बंधे होते हैं और सामान्यतः निजी प्रतिरक्षा का अधिकार दोनों में से किसी पक्ष को उपलब्ध नहीं होता है किंतु यह कोई बिना अपवाद का नियम नहीं है – इस प्रकरण में अभियुक्त पर उसके स्केपुलर रीजन

पर 2 सेमी गुणित 2 से.मी. गुणित 1.5 से.मी. आकार का चाकू से हमला किया गया जिससे उसने प्रत्युत्तर में उसकी अनुज्ञप्ति वाली फायर आर्म का उपयोग करके विपक्षी के एक व्यक्ति को उसी घटना में मार दिया – अभियुक्त ने निजी प्रतिरक्षा का बचाव विचारण के प्रारंभ से लिया था – एक व्यक्ति यदि घातक हथियार से चोटें पहुंचाकर उसके जीवन पर हमले का सामना करता है तब उससे यह आशा नहीं की जा सकती कि वह खतरे को टालने के लिये उपयोग में लाये जाने वाले बल को तौलेगा – सर्वोच्च न्यायायल ने अभियुक्त को धारा 302 भा.द.स. के अपवाद 2 का लाभ दिया।

Pathubha Govindji Rathod and anthor v. State of Gujarat

Judgment dated 21.01.2015 passed by the Supreme Court in Criminal Appeal No. 2282 of 2014, reported in (2015) 4 SCC 363

Extracts from the Judgment:

It is not disputed in the present case that there are cross versions of the incident, and cross complaints were lodged with the police. It is also not disputed that in both the cases police submitted charge sheets against both set of accused. It is also evident from the record that both Sessions Case No 85 of 2003 and Sessions Case No. 53 of 2004 resulted in conviction on conclusion of trial by Additional Sessions Judge, Junagarh. Considering the number of persons involved in the incident it can be safely said that it is a case of free fight between two groups of people. It is settled principle of law that in the cases of free fights accused are to be fastened with individual liability taking into consideration the specific role assigned to each one of them, and normally right of private defence is not available in such cases unless circumstances in a given case warrant so.

A person faced with injury with a deadly weapon to his life cannot be expected to weigh in balance the precise force needed to avoid danger. Referring to case of ***Bhanwar Singh v. State of M.P., (2008) 16 SCC 657*** this Court in ***State of Rajasthan v. Manoj Kumar, (2014) 5 SCC 744*** has observed as under:

> "In ***Bhanwar Singh*** (supra) it has been ruled to the effect that for a plea of right of private defence to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death; and if the court were to reject the said plea, there are two possible ways in which this may be done i.e. on one hand, it may be held that there existed a right to private defence of the body, however, more harm than necessary was caused or, alternatively, this right did not extend to causing death and in such a situation it would result in the application of Section 300 Exception 2 IPC."

In ***Mohd. Khalil Chisti v. State of Rajasthan, (2013) 2 SCC 541*** this court has observed in para 42 as follows:

> "42. The analysis of the materials clearly shows that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Though the accused would have the benefit of such situation and the counsel appearing for the appellants prayed for acquittal of the appellants of all the charges, in view of the principles which we have already discussed, we are of the view that each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In other words, both sides can be convicted for their individual acts and normally no right of private defence is available to either party and they will be guilty of their respective acts".

No doubt normally the right of private defence is not available to either of the parties in incidents of group fighting, but that is not a rule without exception. In the case at hand, we have a special circumstance where the injured person (appellant no.1) who was given 2cm x 2cm x 1.5cm deep knife blow on his back (scapular region) has retorted by using licensed firearm, and killed one of his rivals in the same incident. Accused/appellant Pathubha Govindji has taken plea of private defence right from beginning of the trial. From the judgment of the trial court also, it is clear that the plea of private defence was taken by the appellant no.1. Considering the facts and circumstances of the present case and evidence on record, it is evident that accused/appellant no.1 Pathubha Govindji Rathod who suffered knife injury in the incident has caused death of one of the deceased by firing several shots thereby exceeding right of private defence. Injuries suffered by both the sides are on record.

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205. INDIAN PENAL CODE, 1860 – Section 302

Murder Trial – Circumstantial evidence – Whether theory of last seen together itself is a conclusive proof for convicting the accused? Held, No, but along with other circumstances surrounding the incident, like relations between the accused and deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, time gap between death of the deceased and the time when he last seen with the accused may also be considered by the court and thereafter, reach to a conclusion.

भारतीय दण्ड संहिता, 1860 – धारा 302

हत्या का विचारण – परिस्थितिजन्य साक्ष्य – क्या अंतिम बार जीवित साथ देखे जाने का सिद्धांत अभियुक्त को दोषसिद्ध करने के लिये अपने आप में एक निश्चायक प्रमाण होता है? अभिनिर्धारित किया गया– नहीं, किंतु घटना से जुड़ी अन्य परिस्थितियों के साथ जैसे अभियुक्त और मृतक के बीच के संबंध, उनके बीच पूर्व वैमनस्य, पूर्व शत्रुता का इतिहास, अभियुक्त से हथियार की बरामदगी, अभियुक्त का मृतक के साथ अंतिम बार जीवित साथ देखा जाना और मृतक की मृत्यु के बीच के समय के अंतर को भी न्यायालय द्वारा विचार में लिया जा सकता है और उसके बाद एक निष्कर्ष पर पहुंचा जा सकता है ।

Ashok v. State of Maharashtra

Judgment dated 11.03.2015 passed by the Supreme Court in Criminal Appeal No. 2224 of 2011, reported in (2015) 4 SCC 393

Extracts from the Judgment:

The "last seen together" theory has been elucidated by this Court in ***Trimukh Marotiu Kirkan v. State of Maharashtra, (2006)10 SCC 106,*** in the following words:

> "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. Thus, the doctrine of last seen together Page 9 9 shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

In ***Ram Gulab Chaudhary v. State of Bihar, (2001) 8 SCC 311,*** the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

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 with a "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.

The latest judgment on the point is ***Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715.*** In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

Here another judgment in ***Harivadan Babubhai Patel v. State of Gujarat, (2013) 7 SCC 45,*** would be relevant. In this case, this Court found that the time gap between the death of the deceased and the time when he was last seen with the accused may also be relevant.

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***206. INDIAN PENAL CODE, 1860 – Section 304-A**

(i) Offence of causing death by rash or negligent driving, severity of – Law explained – Such an offence blights not only lives of the victims but of many others around them – Neither the law nor the court that implements the law should ever get oblivious of the fact that in such accidents precious lives are lost or the victims who survive are crippled for life which, in a way, is worse than death – Driving in a drunken state, in a rash and negligent manner or driving with youthful adventurous enthusiasm as if there are no traffic rules or no discipline of law has come to the centre stage – The protagonists have lost all respect for law – A man with means has, in possibility graduated himself to harbor the idea that he can escape from the substantive sentence by payment of compensation.

(ii) Sentencing Policy – Quantum of sentence, adequacy of – Law explained. Laws can never be enforced unless fear supports them – Young age cannot be a plea to be accepted in all circumstances – The principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case – There is a non-chalant attitude among the drivers – They feel they are the "Emperors of all they survey" – The law makers should scrutinize, re-look and revisit the sentencing policy in Section 304-A IPC, so with immense anguish – It is obligation on the court to constantly remind itself that the right of the victim, and on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised – It cannot be said as proposition of law that whenever an accused offers acceptable compensation for rehabilitation of a victim, regardless of the gravity of the crime under S.304-A IPC, there can be reduction of sentence.

भारतीय दण्ड संहिता, 1860 – धारा 304–ए

(i) तेजी या लापरवाही पूर्वक वाहन चालन द्वारा मृत्यु कारित करने संबंधी अपराध की गंभीरता – विधि समझाई गई।

(ii) दंड नीति – दंड की मात्रा की पर्याप्तता – विधि समझाई गई।

State of Punjab v. Saurabh Bakshi

Judgment dated 30.03.2015 passed by the Supreme Court in Criminal Appeal No. 520 of 2015, reported in (2015) 5 SCC 182

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207. INFORMATION TECHNOLOGY ACT, 2000 – Sections 66-A, 69-A and 79

(i) Section 66-A of I.T. Act, constitutional validity of – Being violative of Article 19 (1) (a) of the Constitution, is wholly unconstitutional and void.

(ii) Sections 69-A and 79 of I.T. Act and Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, constitutional validity of – Are constitutionally valid.

सूचना प्रौद्योगिकी अधिनियम, 2000 – धाराएं 66–ए 69–ए और 79

(i) धारा 66–ए सूचना प्रौद्योगिकी अधिनियम की संवैधानिक वैधता – भारतीय संविधान के अनुच्छेद 19 (1)(ए) के उल्लंघन में होने से यह प्रावधान पूरी तरह असंवैधानिक और शून्य हैं।

(ii) धारा 69–ए और 79 सूचना प्रौद्योगिकी अधिनियम और सूचना प्रौद्यागिकी (आम जन द्वारा सूचना तक पहुंच की रोक के लिए प्रक्रिया और रक्षा उपाय) नियम, 2009 की संवैधानिक वैधता – ये संवैधानिक रूप से वैध है।

Shreya Singhal v. Union of India

Judgment dated 24.03.2015 passed by the Supreme Court in Writ Petition (Criminal) No.167 of 2012, reported in AIR 2015 SC 1523

Extracts from the Judgment:

Information that may be grossly offensive or which causes annoyanceor inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside

the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

Incidentally, some of our judgments have recognized this chilling effect of free speech. In ***R. Rajagopal v. State of T.N., (1994) 6 SCC 632,*** this Court held:

> "The principle of Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] was carried forward - and this is relevant to the second question arising in this case - in ***Derbyshire County Council v. Times Newspapers Ltd. [(1993) 2 WLR 449 : (1993) 1 All ER 1011, HL]***, a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in ***Attorney General v. Guardian Newspapers Ltd. (No. 2)[(1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL]*** popularly known as "Spy catcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in ***New York Times v. Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)]***

and certain other decisions of American Courts and observed - and this is significant for our purposes-

"while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available."

Accordingly, it was held that the action was not maintainable in law."

Also in ***S. Khushboo v. Kanniammal, (2010) 5 SCC 600,*** this Court said:

"47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

That the content of the right under Article 19(1) (a) remains the same whatever the means of communication including internet communication is clearly established by ***Reno's case*** (supra) and by The Secretary, ***Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr., (1995) SCC 2 161*** at Para 78 already referred to. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, ***Kedar Nath Singh v. State of Bihar, [1962] Supp. 2 S.C.R. 769 at 808 -809***. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first Ram Manohar Lohia case, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the Section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the Section takes in the innocent as well as the guilty, bonafide and malafide advice and whether

the person be a legal adviser, a friend or a well wisher of the person instigated, he cannot escape the tentacles of the Section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

In ***Kameshwar Prasad & Ors. v. The State of Bihar & anr., [1962] Supp. 3 S.C.R. 369,*** Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The rule states "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

The aforesaid rule was challenged under Articles 19 (1) (a) and (b) of the Constitution. The Court followed the law laid down in ***Ram Manohar Lohia's case [1960] 2 S.C.R. 821*** and accepted the challenge. It first held that demonstrations are a form of speech and then held:

> "The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Art. 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent-State is that the rule is framed "in the interest of public order". A demonstration may be defined as "an expression of one's feelings by outward signs." A demonstration such as is prohibited by, the rule may be of the most innocent type - peaceful orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly say outside office hours - demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type - innocent as well as otherwise - and in consequence its validity cannot be upheld." (at page 374)

The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held:

> "The voice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration - be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result." (at page 384)

These two Constitution Bench decisions bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of over-breadth.

Possibility of an act being abused is not a ground to test its validity:

It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following ***K.A. Abbas' case*** (Supra) that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. Romesh Thappar's Case was distinguished in ***R.M.D. Chamarbaugwalla v. The Union of India, [1957] S.C.R. 930*** in the context of a right under Article 19(1)(g) as follows:

> "20. In ***Romesh Thappar v. State of Madras [(1950) SCR 594]***, the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the

> principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in ***Romesh Thappar v. State of Madras [(1950) SCR 594]*** was referred to in ***State of Bombay v. F.N. Balsara [(1951) SCR 682] and State of Bombay v. United Motors (India) Ltd., [(1953) SCR 1069 at 1098-99]*** and distinguished."

The present being a case of an Article 19(1)(a) violation, ***Romesh Thappar's*** (supra) judgment would apply on all fours. In an Article 19(1)(g) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject matters is clear. We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional.

Section 69A of the Information Technology Act has already been set out in paragraph 2 of the judgment. Under sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the official gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69A of the Act. Under Rule 4, every organization as defined under Rule 2(g), (which refers to the Government of India, State Governments, Union Territories and agencies of the Central Government as may be notified in the Official Gazette by the Central Government)- is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the concerned Organization for blocking, which complaint will then have to be examined by the concerned Organization regard being had to the parameters laid down in Section 69A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an Organization or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in 69A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The

Committee then examines the request and is to consider whether the request is covered by 69A (1) and is then to give a specific recommendation in writing to the Nodal Officer of the concerned Organization. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

It will be noticed that Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

The Rules further provide for a hearing before the Committee set up - which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69A.

Merely because certain additional safeguards such as those found in Section 95 and 96 Cr.P.C. are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011.

It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A. We have seen how under Section 69A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed - one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules.

Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

In conclusion, we may summarise what has been held by us above:

(a) Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).

(b) Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

(c) Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to becommitted then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology “Intermediary Guidelines” Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

(d) Section 118(d) of the Kerala Police Act is struck down being violative of Article 19(1)(a) and not saved by Article 19(2).

All the writ petitions are disposed in the above terms.

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***208. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 7**

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

Claim of juvenility – If a person was not entitled to the benefit of juvenility under the Old Act of 1986 or the present Act of 2000 prior to amendment under 2006, such benefit is available to a person undergoing sentence if he was found below the age of 18 years on the date of the incident – Such relief can be claimed even if the matter is finally decided.

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000 – धारा 7

किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007 – नियम 12

किशोरावस्था का दावा – यदि एक व्यक्ति किशोरावस्था का लाभ पाने के लिये पुराने अधिनियम, 1986 के अधीन अधिकारी नहीं था या नये अधिनियम, 2000 में 2006 के संशोधन के पूर्व भी अधिकारी नहीं था, ऐसा लाभ सजा भुगत रहे व्यक्ति को उपलब्ध होता है यदि वह घटना दिनांक को 18 वर्ष से कम उम्र का पाया जाता है – ऐसे अनुतोष का दावा मामले के अंतिम रूप से निराकृत हो जाने के बावजूद किया जा सकता है।

Abdul Razzaq v. State of U.P.

Judgment dated 16.03.2015 passed by the Supreme Court in Criminal Misc. Petition No. 17870 of 2014, reported in AIR 2015 SC 1770

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***209. LAND REVENUE CODE, 1959 (M.P.) – Section 165 (6), 170-B (1) and (2)**

Permission under section 165 (6) of M.P. Land Revenue Code – Obtained by playing fraud – Burden of proof – It is upon seller to prove that the permission was obtained by playing fraud.

When provisions of sub–section (1) and (2) of the section 170-B are not applicable? Held, where the land has been transferred by way of registered instrument and after due permission of Collector, the said provisions are not applicable.

भू राजस्व संहिता,1959 म.प्र. – धाराएं 165 (6), 170–बी (1) और (2)

धारा 165 (6) म.प्र. भूराजस्व संहिता के अधीन अनुमति – कपट द्वारा प्राप्त की गई – प्रमाण भार – यह (प्रमाण भार) विक्रेता पर है कि वह प्रमाणित करें कि अनुमति कपट द्वारा प्राप्त की गई है।

धारा 170 – बी (1) (2) के प्रावधान कब लागू नहीं होते हैं ? अभिनिर्धारित किया गया, जब भूमि पंजीकृत विलेख द्वारा, कलेक्टर की सम्यक अनुमति उक्त प्रावधान के तहत लेने के बाद, अंतरित की जा चुकी है वहां ये प्रावधान लागू नहीं होते है।

Sukra Bai v. Makhan Gir Mahant

Order dated 19.01.2015 passed by the High Court of M.P. in W.A. No. 575 of 2012, reported in 2015 (2) MPLJ 113 (D.B.)

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210. LAND REVENUE CODE, 1959 (M.P.) – Section 248

Unauthorizedly taking possession of land – Whether the provisions of section 248 are attracted in encroachment relating to land situated within the municipal area ? Held, Yes [Refer: *State of M.P. & anr v. Sind Mahajan Exchange Ltd., 1999 RN 329 (SC)]*.

भू राजस्व संहिता, 1959 (म.प्र.) – धारा 248

अप्राधिकृत रूप से भूमि पर कब्जा कर लेना – क्या धारा 248 के प्रावधान म्युनिसिपल क्षेत्र में स्थित भूमि के संबंध में अतिक्रमण के बारे में आकर्षित होते हैं ? अभिनिर्धारित किया गया हाँ – स्टेट ऑफ एम. पी. एण्ड अनादर विरूद्ध सिन्ध महाजन एक्सचेन्ज लिमिटेड, 1999 राजस्व निर्णय 329 (एससी) रेफर किया।

State of M.P. & ors. v. Rajendra Kumar Goyal & anr.

Order dated 08.01.2015 passed by the High Court of M.P. In S.A. No. 1130 of 2005, reported in 2014 (II) MPJR 34

Extracts from the Order:

It has been brought to our notice by the counsel for appellant/State that in a judgment passed by this Court in case of ***Rashid Khan & Another v. State of M.P. & others, 2011 RN 406,*** where it has been categorically held that Section 248 of M.P. Land Revenue Code is applicable even in municipal area, which is based upon the judgment of Hon'ble Apex Court where a Division Bench judgment of this Court was reversed. Para 10 of the judgment is reproduced herein:

> "10. So far as the contention of learned counsel for the appellants that since the land is in the Municipal area, the provisions of Section 248 of the Code are not applicable is concerned, the entire argument is based on the pivot of dictum laid down by the Division Bench of this Court in case of ***Sind Mahajan*** (Supra) which has been reversed by the Supreme Court in case of ***State of M.P. & another v. Sind Mahajan Exchange Ltd,. 1999 RN 328***. Hence this contention cannot be accepted that in the municipal area the provisions of Section 248 pf the Code are not attracted."

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211. LIMITATION ACT, 1963 – Section 5

Condonation of delay in filing of appeal – Sufficient cause – How to examine? Where there is an inordinate delay but explanation offered is found to be bona fide and satisfactory, same can be condoned – Where the delay is of a short period but explanation offered is found to be lacking in *bona fides* same can not be condoned.

परिसीमा अधिनियम, 1963 – धारा 5

अपील प्रस्तुत करने में हुए विलंब को क्षमा करना – पर्याप्त कारण – कैसे परीक्षित किया जाये – जहां अत्यधिक विलंब है लेकिन दिया गया स्पष्टीकरण सद्भाविक और संतोषजनक है वहां विलंब क्षमा किया जा सकता है – जहां विलंब अल्प अवधि का है किंतु स्पष्टीकरण में सदभावना का अभाव है वहां विलंब क्षमा नहीं किया जा सकता।

Hari Singh & ors. v. Kailash & anr.

Order dated 25.08.2014 passed by the High Court of M.P. in S.A .No. 50 of 2010, reported in ILR 2014 M.P. 2168

Extracts from the Order:

Nature and scope of jurisdiction under Section 5 of Limitation Act have been succinctly explained and laid down by the Apex Court in catena of decisions. For ready reference some of the judgments since year 1962 are being referred, to support the view being taken by this Court in the instant case. In the case of ***Ramlal v. Rewa Coalfields Ltd. AIR 1962 SC 361,*** Hon. Supreme Court in para 7 has held as under:-

> "7. In construing Section 5 (of the Limitation Act) it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay in shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice."

Hon'ble Supreme Court in the case of ***P. K. Ramachandran v. State of Kerala, (1997) 7 SCC 556,*** has held in para 6 as under:

"6. law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds."

Hon'ble Supreme Court in a recent decision ***Maniben Devraj Shah v. Municipal Corporation of Brihan, Mumbai, (2012) 5 SCC 157*** has held in para 24 as under:-

"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

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212. LIMITATION ACT, 1963 – Article 55

STATE FINANCIAL CORPORATIONS ACT, 1951 – Section 29

Whether limitation for filing suit for recovery of balance amount would start from the date of sending recall notice for outstanding amount or when the assets of the company were sold and the balance amount payable was ascertained ? Held, limitation starts when the assets of the company were sold and the balance amount payable was ascertained.

परिसीमा अधिनियम, 1963 – अनुच्छेद 55

राज्य वित्त निगम अधिनियम, 1951 – धारा 29

क्या अवशेष राशि की वसूली के वाद दायर करने के लिये परिसीमा बकाया राशि के लिये रिकाल नोटिस भेजने की तारीख से प्रारम्भ होगी या जब कंपनी की संपत्ति बेची गई और अवशेष राशि जो देय थी वह अभिनिश्चित की गई उस तारीख से प्रारम्भ होगी? अभिनिर्धारित किया गया, जब कंपनी की संपत्ति बेची गई और देय अवशेष राशि अभिनिर्धारित की गई तब से प्रारम्भ होगी ।

Deepak Bhandari v. Himachal Pradesh State Industrial Development Corporation Limited

Judgment dated 29.01.2014 passed by the Supreme Court of India in Civil Appeal No. 1019 of 2014, reported in (2015) 5 SCC 518

Extracts from the Judgment:

Before the learned Single Judge of the High Court a plea was taken by the defendants, including the appellant herein, that the suit was time barred as it was filed beyond the period of 3 years from the date of commencement of limitation period. To appreciate this plea we recapitulate some relevant dates:

Date	Event
21.5.1990	Recall notice sent by the Corporation, recalling the outstanding amount.
10.7.1992	Mortgage/ hypothecated assets of the Company taken over by the Corporation.
31.3.1994	The Mortgage/ hypothecated assets of the Company sold by the Corporation.
21.5.1994	Notice issued to all the three Directors of the Company for payment of outstanding amount.
26.12.1994	Suit for recovery of the balance outstanding filed by the Corp

When the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised, only after the sale of the mortgage/ hypothecated assets. This is clear from the language of sub-Section (1) of Section 29 which makes the position abundantly clear and is quoted below:

> ***"29. Rights of Financial Corporation in case of default.–*** (1) Where nay industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract.

It may be that only the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/ guarantee would arise when the contract is broken.

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213. MOTOR VEHICLES ACT, 1988 – Sections 147 and 149

(i) Claimant was travelling in a transport vehicle alongwith his cattle after paying fare for cattle – Insurance company, held liable.

(ii) Want of valid D.L. – Burden of proof – It is upon insurance company to prove that driver did not possess valid D.L. at the time of accident.

मोटर यान अधिनियम, 1988 – धाराएं 147 एवं 149

(i) दावेदार परिवहन यान में अपने मवेशी के साथ मवेशी का भाड़ा देने के बाद यात्रा कर रहा था – बीमा कंपनी का उत्तरदायी (प्रतिकर के लिए) होना अभिनिर्धारित किया गया।

(ii) चालन अनुज्ञप्ति का अभाव – प्रमाण भार – यह (प्रमाण भार) बीमा कंपनी पर है कि वह प्रमाणित करे कि दुर्घटना के समय चालक के पास वैध चालन अनुज्ञप्ति नहीं थी।

Mahesh Chandra v. Anokhilal & ors..

Order dated 25.10.2013 passed by the High Court of M.P. in M.A. No. 2062 of 2009, reported in ILR 2014 M.P. 2156

Extracts from the Order:

From perusal of the impugned award, it is evident that the case of each of the appellant has been rejected against the respondent No.3 on two grounds firstly since the offending vehicle was transport vehicle, therefore, no body, was permitted to travel in the goods vehicle and secondly the offending vehicle was being driven in violation of terms of the policy. Whether the appellant in all the appeals are entitled for compensation as they were traveling for the safety of goods as owner or representative of owner has not been considered by the learned tribunal. Ample evidence is on record to demonstrate that at the relevant time the offending vehicle was carrying number of she buffaloes and except appellant/Ramesh in MA No. 1287/2010 who was traveling as Cleaner, other persons were either owner or the representative of owner. News paper “Dainik Bhaskar” of the relevant dated 30/09/2008. Ujjain Edition is on record which goes to show that the appellant in all the appeals were travelling with she

buffaloes and because of bad condition of road the accident occurred in which they sustained injuries. Record of criminal case is also filed which also contains the statement recorded under Section 161 of Cr.P.C. on 30/09/2007 which are annexed as Ex. P/10, P/107, P/153, P/175, P/201, P/239 which speaks in volume that the appellant in all the appeals except Ramesh were traveling in the goods vehicle for the safety of goods. Respondents No. 1 and 2 though contested the case before the learned tribunal and also before this Court but neither preferred any appeal nor bothered to adduce evidence to demonstrate that respondent No.1 was possessing the valid driving license. In the matter of ***National Insurance Co. Ltd. v. Swaran Singh, 2004 ACJ 1*** the Hon'ble Apex Court has observed that Insurance Company in order to avoid its liability towards insured has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling conditions of the policy regarding driving of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant time. In the matter of ***Timariya v. Devendra, 2012 ACJ 250*** wherein passenger traveling in a transport vehicle alongwith his cattle after paying fare for cattle, this Court held that Insurance Company is liable.

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

If claimant himself was found negligent, he is not entitled to claim compensation on the principle of no fault liability under section 163-A of M.V. Act.

मोटर यान अधिनियम, 1988 – धारा 163–ए

यदि दावेदार स्वयं उपेक्षावान पाया गया था तब वह धारा 163–ए मोटर यान अधिनियम के अधीन त्रुटि के बिना दायित्व के सिद्धांत के आधार पर प्रतिकर प्राप्त करने का हकदार नहीं होता है।

Mahipal Singh Bhati v. Nisar Mohd. & ors.

Order dated 02.04.2013 passed by the High Court of M.P. in M.A .No. 776 of 2006, reported in ILR 2014 M.P. 2125

Extracts from the Order :

Relying upon a judgment of the Apex Court, learned counsel for the respondent/Insurance Company has submitted that in a case under Section 163-A of the Motor Vehicles Act once it is established that the claimant himself was negligent then he is not entitled to claim compensation on the principle of no fault liability because Section 163-A of the Act does not deal with no fault liability and in that case evidence is available which may establish that the claimant himself was negligent then claim can be defeated. This is the view laid down by the Apex Court in the case of ***National Insurance Company Limited v. Sinitha and others, 2012 ACJ 1***. The relevant observations are in paragraphs 15 and 16 which are reproduced hereunder:

"15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, 31 without reference to the "fault" grounds. When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the

judgment of this Court in ***Oriental Insurance Company Limited v. Hansrajbhai V. Kodala, (2001) 5 SCC 175*** as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading 32 of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a"fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect,we accept the contention advanced at the hands of the learned counsel for the petitioner."

In view of the aforesaid the appellant himself being negligent and even does not prove his negligence in the accident claim case filed under Section 163-A of the Motor Vehicles Act, if the other party showed that it was the claimant who was himself negligent, then he is not entitled to any compensation.

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

(i) Assessment of compensation in death case – Choice of multiplier – Deceased was bachelor – Claimants are parents – Whose age is material for choice of multiplier? Held, the multiplier as per the age of the deceased or as per the age of the parents, whichever is higher, would be material or applicable.

(ii) Assessment of compensation in death case – Personal expenses of a bachelor deceased – Claimants are parents – It may be one-half of his annual income but in exceptional cases

the tribunal may consider the facts and circumstances of individual case.

मोटर यान अधिनियम, 1988 – धाराएँ 166 और 168

(i) मृत्यु प्रकरण में प्रतिकर का निर्धारण – गुणक का चयन – मृतक अविवाहित था – दावेदार माता पिता हैं – गुणक के चयन में किसकी उम्र तात्विक है? अभिनिर्धारित किया गया, मृतक की उम्र या माता पिता की उम्र, जो भी अधिक हो, वह तात्विक होगी या लागू होगी।

(ii) मृत्यु प्रकरण में प्रतिकर का निर्धारण – अविवाहित मृतक का व्यक्तिगत निर्वाह खर्च – दावेदार माता पिता हैं – यह (जीवन निर्वाह खर्च) मृतक की वार्षिक आय का आधा होगा किंतु अधिकरण अपवाद स्वरूप प्रकरणों में उस प्रकरण विशेष के तथ्यों और परिस्थितियों को विचार में ले सकते है।

Jakir Hussein and others v. Dinesh and others

Judgment dated 07.02.2013 passed by the High Court of M.P. in M.A. No. 69 of 2011, reported in 2015 ACJ 961 (M.P.)

Extracts from the Judgment

The principle of law applicable in India recognized the principle as specified in ***Davies v. Powel Duffryn Associated Collieries Ltd., (1942) AC 601***. In ***Davies' case*** (supra) on the point of applicability of the multiplier, it should be applicable either on the age of the deceased or on the age of the claimant whichever is higher. Therefore, in the considered opinion of this court the multiplier on the age of the claimants would be applicable if their age is more than the age of the deceased. In such circumstances, the two judgments of the learned single Judge of this court in the case of ***Kamlabai v. Ashish, 3 (2011) ACC 848*** and ***Narsingh v. Ghashiram, M.A. No. 2754 of 2007*** decided on ***11.12.2012 (MP),*** are hereby explained. Thus, as per the aforesaid discussion, now it is apparent that in the case of a bachelor's death one-half deduction for personal expenses may be made from the earnings of deceased to capitalise the loss of dependency, applying the multiplier either on the age of the deceased or as per the age of the claimant whichever is higher.

In view of the foregoing discussion, it is to be held that in a case of bachelor's death, where mother and father are claimants, the deduction of one-half may be made. In exceptional case, the court may look into facts and circumstances of the individual case. It is to be further observed that as per the Motor Vehicles Act in the Second Schedule, multiplier at the age of the deceased would be applicable. But where the dependants are the mother and father, who are old/aged, in such case looking to the expectancy of life of dependants, the suitable multiplier may be made applicable, applying the principle of the ***Davies' case,*** (supra), that while calculating the compensation, the multiplier as per the age of the deceased or as per the age of the claimants, whichever is higher, would be applicable.

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

Assessment of compensation in injury case – Claimant aged 33 years, a driver – Tribunal determined his income Rs.3,000 p.m. and permanent disability at 30 % and awarded Rs. 4,38,000 – Apex Court held that looking to the injuries, claimant will never be able to work as a driver and assessed his income as Rs. 4,500 and permanent disability at 100% – Awarded total Amount Rs. 17,60,500 in different heads.

मोटर यान अधिनियम, 1988 – धाराएं 166 और 168

चोट के प्रकरण में प्रतिकर का निर्धारण – दावेदार 33 वर्ष का एक चालक– अधिकरण ने उसकी आय 3000 रूपये प्रतिमाह और स्थाई अयोग्यता 30 प्रतिशत निर्धारित की तथा 4,38,000 रूपये अवार्ड पारित किया – सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि चोटों को देखते हुए दावेदार अब एक चालक के रूप में कार्य करने के लिये समर्थ नहीं है और उसकी आमदनी 4500 रूपये और स्थाई अयोग्यता 100 प्रतिशत निर्धारित की – कुल 17,60,500 रूपये विभिन्न शीर्षों में अवार्ड किए।

Jakir Hussein v. Sabir and others

Judgment dated 18.02.2015 passed by the Supreme Court in C.A. No. 2006 of 2015, reported in 2015 ACJ 721

Extracts from the Judgment:

We have carefully examined the facts of the case and material evidence on record in the light of the rival legal contentions urged before us by both the learned counsel on behalf of the parties to find out as to whether the appellant is entitled for further enhancement of compensation? We have perused the impugned judgment and order of the High Court and the award of the Tribunal. After careful examination of the facts and legal evidence on record, it is not in dispute that the appellant was working as a driver at the time of the accident and no doubt, he could be earning Rs.4,500/- per month. As per the notification issued by the State Government of Madhya Pradesh under Section 3 of the Minimum Wages Act, 1948, a person employed as a driver earns Rs.128/- per day, however the wage rate as per the minimum wage notification is only a yardstick and not an absolute factor to be taken to determine the compensation under the future loss of income. Minimum wage, as per State Government Notification alone may at times fail to meet the requirements that are needed to maintain the basic quality of life since it is not inclusive of factors of cost of living index. Therefore, we are of the view that it would be just and reasonable to consider the appellant's daily wage at Rs.150/- per day (Rs.4,500/- per month i.e. Rs.54,000/- per annum) as he was a driver of the motor vehicle which is a skilled job. Further, the Tribunal has wrongly determined the loss of income during the course of his treatment at Rs.51,000/- for a period of one year and five months. We have to enhance the same to Rs.76,500/- (Rs.4,500 X 17 months).

Further, with respect to the permanent disablement suffered by the appellant, the learned amicus curiae, has rightly submitted that the appellant was examined by Dr. P. K. Upadhyay in order to prove his medical condition and the percentage of permanent disability. The doctor who has treated him stated that the appellant has one long injury from his arm up to the wrist. Due to this injury, the doctor has stated that the appellant had great difficulty to move his shoulder, wrist and elbow and pus was coming out of the injury even two years after the accident and the treatment taken by him. The doctor further stated in his evidence that the appellant got delayed joined fracture in the humerus bone of his right hand with wiring and nailing and that he had suffered 55% disability and cannot drive any motor vehicle in future due to the same. He was once again operated upon during the pendency of the appeal before the High Court and he was hospitalised for 10 days. The appellant was present in person in the High Court and it was observed and noticed by the High Court that the right hand of the appellant was completely crushed and deformed. In view of the doctor's evidence in this case, the Tribunal and the High Court have erroneously taken the extent of permanent disability at 30% and 55% respectively for the calculation of amount towards the loss of future earning capacity. No doubt, the doctor has assessed the permanent disability of the appellant at 55%. However, it is important to consider the relevant fact namely that the appellant is a driver and driving the motor vehicle is the only means of livelihood for himself as well as the members of his family. Further, it is very crucial to note that the High Court has clearly observed that his right hand was completely crushed and deformed. In the case of ***Raj Kumar, v. Ajay Kumar, 2011 ACJ 1 (SC),*** this Court specifically gave the illustration of a driver who has permanent disablement of hand and stated that the loss of future earnings capacity would be virtually 100%. Therefore, clearly when it comes to loss of earning due to permanent disability, the same may be treated as 100% loss caused to the appellant since he will never be able to work as a driver again. The contention of the respondent Insurance Company that the appellant could take up any other alternative employment is no justification to avoid their vicarious liability. Hence, the loss of earning is determined by us at Rs.54,000/- per annum. Thus, by applying the appropriate multiplier as per the principles laid down by this Court in the case of ***Sarla Verma & ors. v. Delhi Transport Corporation, 2009 ACJ 1298 (SC)*** the total loss of future earnings of the appellant will be at Rs.54,000 X 16 = Rs.8,64,000/-.

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217. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 143 to 147 CRIMINAL PROCEDURE CODE, 1973 – Sections 326 (1) & (3) and 386

(i) Distinction between 'speedy trial' and 'fair trial' – There is qualitative difference between the right to speedy trial and that of fair trial – Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not *per se* prejudice the accused in

defending himself – Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case – Directions regarding procedure to be followed for speedy trial and expeditious disposal, issued.

(ii) Offence under section 138 of the Act of 1881, procedure for trial of – Law explained.

(a) There cannot be any strait jacket formula to try the cases under Negotiable Instruments Act, 1881 – The law provided therefor is so flexible that it is upto the prudent judicial mind to try the case summarily or otherwise.

(b) If a case in substance was not tried in a summary way though it was summarily triable, and was tried as a summons case, it need not be heard *de novo* and the succeeding Magistrate can follow the procedure contemplated u/s 326 (1) of the Code – Even in a case that can be tried summarily, if the Court records the evidence elaborately and in verbatim and defence was given full scope to cross examine, then such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate can rely upon the evidence on record and *de novo* enquiry need not be conducted.

(iii) *De novo* trial, when can be resorted to? Can be resorted to in exceptional and rare cases only when such a course becomes desperately indispensable.

पराक्रम्य लिखित अधिनियम, 1881 – धाराएं 138 और 143 से 147

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 326 (1) & (3) और 386

(i) 'त्वरित विचारण और' ऋजु विचारण का अंतर स्पष्ट किया गया। शीघ्र विचारण और शीघ्र निराकरण के लिए पालन की जाने वाली प्रक्रिया के बारे में निर्देश जारी किये गये।

(ii) धारा 138 अधिनियम, 1881 के अपराध के विचारण के लिए प्रक्रिया के बारे में विधि समझाई गई।

(iii) पुनः विचारण का आदेश कब किया जा सकता है ? अपवाद स्वरूप परिस्थितियों में एवं विरले मामले में जहाँ पुनः विचारण से बचने का कोई मार्ग न हो वहाँ पुनः विचारण का आदेश दिया जा सकता है।

J.V. Baharuni and another v. State of Gujarat and another

Judgment dated 16.10.2014 passed by the Supreme Court in Criminal Appeal No. 2221 of 2014, reported in 2015 (2) MPLJ 490 (SC)

Extracts from the Judgment:

The Legislature, having noticed that the prevailing sections 138 to 142 of the N.I. Act could not completely achieve the desired results, has chosen to insert sections 143 to 147 with an avowed object of speedy disposal of cases relating to dishonor of cheques. To achieve the purpose of "speedy disposal", the Legislature has recommended a simplified procedure for trial of the offences under the N.I. Act i.e. 'summary trial'. The amendment to the Act also made the offence 'compoundable' as the punishment provided in the unamended Act was inadequate and the procedure was found to be cumbersome. Thus, incorporation of sections 143 to 147 was especially aimed at early disposal of cases in a simplified procedure and are particularly, to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising with the right of the accused for a fair trial. This results in overcoming the huge docket of Courts with matters pertaining to dishonor of cheques as their prolonged trials became a serious matter of concern.

Sub-section (1) of section 143 of the N.I. Act makes it clear that all offences under Chapter XVII of the N.I. Act shall be tried by the Magistrate 'summarily' applying, as far as may be, provisions of sections 262 to 265 of Criminal Procedure Code. It further provides that incase of conviction in a summary trial, the Magistratre may pass a sentence of imprisonment for a term not exceeding one year and a fine exceeding Rs. 5,000/-. Sub-section (1) of section 143 of the N.I. Act further provides that during the course of a summary trial, if the Magistrate is of the opinion that the nature of the case requires a sentence for a term exceeding one year or for any other reason, it is undesirable to try the case summarily, the Magistrate shall, after hearing the parties, record an order to that effect and thereafter recall any witness whom he had examined, or proceed to rehear the case. Sub-section (2) mandates that so far as practicable, the trial has to be conducted on a day to day basis until its conclusion.

An analysis of section 143 brings out that the Magistrate, initially should try the case 'summarily' if he is of the opinion that he is not going to pass sentence of imprisonment not exceeding one year and fine of Rs. 5,000/-. In case during the course of trial, if the Magistrate forms a different opinion that in the circumstances of the case, he may order a sentence of term exceeding one year, or for any other reason it is undesirable to try the case summarily, he must record the reasons for doing so and go for a 'regular trial'. Thereafter, Magistrate can also recall any witness who has been examined and proceed to hear or rehear the case. So, the second proviso to sub-section (1) of section 143, gives discretion to the Magistrate to conduct the case other than in summary manner.

A case under section 138 of the N.I. Act, which requires to be tried in a summary way as contemplated under section 143 of the Act, when in fact, was tried as regular summons case it would not come within the purview of section 326(3) of the Code. In other words, if the case in substance was not tried in a summary way, though was triable summarily, and was tried as a summons case, it need not be heard de novo and the succeeding Magistrate can follow the procedure contemplated under section 326 (1) of the Code [See ***Ramilaben Trikamlal Shah v. Tube and Allied Products and ors., 2007 (2) Mh.L.J. 834 = 2007 (1) Mh.L.J. (Cri.) 376 = 2007 ALLMR (Cri) 1637 (Bom)]***.

But where even in a case than can be tried summarily, the Court records the evidence elaborately and in verbatim and defence was given full scope to cross-examine, such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate can rely upon the evidence on record and ne novo enquiry need not be conducted [See ***A. Krishna Reddy v. State and anr., 1999 (6) ALD 279***]

There is no straitjacket formula to try the cases falling under the N.I. Act. The law provided therefor is so flexible that it is up to the prudent judicial mind to try the case 'summarily' or otherwise. No doubt, the second proviso to section 143 of the Act specifies that in case the Magistrate does not deem the case fit to try summarily, he shall record an order to that effect after hearing the parties. Just because this directive is not followed scrupulously by the trial Court would itself not vitiate the entire trial and the Appellate Court should not direct for a de novo trial merely on the ground that the trial Court had not recorded the order for not trying the case summarily.

This Court in ***Bharati Tamang v. Union of India and ors., 2014 Cri.L.J. 156*** observed that at times of need where this Court finds that an extraordinary or exceptional circumstance arise and the necessity for reinvestigation would be imperative in such extraordinary cases even de novo investigation can be ordered.

In ***Babubhai v. State of Gujarat and ors., (2010) 12 SCC 254,*** this Court observed:

> "Thus, it is evident that in exceptional circumstances, the Court in order to prevent the miscarriage of criminal justice, if considers necessary, may direct for investigation de novo wherein the case presents exceptional circumstance."

The de novo trial of entire matter which should be ordered in exceptional and rare cases only when such course of fresh trial becomes indispensable to overt failure of justice. [See ***Mohd. Hussain alias Julfikar v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408, State of M.P. v. Bhuraji and ors., (2001) 7 SCC 679*** and ***Ganesha v. Sharanappa and anr., 2014 (1) MPLJ 319 (SC) (Cri.) = (2014) 1 SCC 87***]. Hence, de novo trial is only for exceptional cases when the finding of acquittal is on a total misreading and perverse appreciation of evidence.

'Special trial' and 'fair trial' to a person accused of a crime are integral part of Article 21 of the Constitution of India. There is, however qualitative difference between the right to speedy trial and the accused's right to fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of the such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the Appellate Court is confronted with the question whether or not retrial of an accused should be ordered (See ***Mohd. Hussai @ Julfikar Ali v. State of Delhi, AIR 2013 SC 3860***).

The Constitution Bench of this Court in ***Adul Rehman Antulay and ors. v. R.S. Nayak and anr., (1992) 1 SCC 225*** considered right of an accused for speedy trial in the light of Article 21 of the Constitution and various provisions of the Code. The Constitution Bench also extensively referred to the earlier decision of this Court in ***Hussainara Khatoon and ors. (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81, Hussainara Khatoon and ors. (III) v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 93, Hussainara Khatoon and ors. (IV) v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 98 and Raghubir Singh and ors. v. State of Bihar, (1986) 4 SCC 481*** and noted that the provisions of the Code are consistent with the constitutional guarantee of speedy trial emanating from Article 21.

In ***Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408,*** this Court observed:

> "A denovo trial or retrial of the accused should be ordered by the Appellate Court in exceptional and rare cases and only when in the opinion of the Appellate Court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same

prosecution....the appeal Court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

This Court in ***Mehsana Nagrik Sahkari Bank Ltd. v. Shreeji Cab Co. and ors., etc., 2014 Cr.LJ 1953*** observed that where evidence in case is recorded in full and not in a summary manner, it is not fit to direct de novo trial on transfer of Magistrate.

In ***Satyajit Banerjee v. State of W.B., (2005) 1 SCC 115,*** a two Judge Bench of this Court was concerned with an appeal by special leave wherein the appellant-accused were charged for the offences punishable under section 498-A and 306 of the Penal Code. The trial Court acquitted the accused persons. In revision preferred by the complainant, the High Court set aside the order of acquittal and directed a de novo trial of the accused. While dealing with the revisional jurisdiction of the High Court in a matter against the order of acquittal, the Court observed that such jurisdiction was exercisable by the High Court only in exceptional cases where the High Court finds defect of procedure or manifest error of law resulting in flagrant miscarriage of justice. In the facts of the case, this Court held that the High Court ought not to have directed the trial Court to hold de nove trial.

The procedure being followed presently by learned Magistrates dealing cases under section 138 of N.I. Act is not commensurate with the summary trial provisions of Criminal Procedure Code and N.I. Act due to which the cases under section 138 of N.I. Act are taking unnecessary long time and the complaints remain pending for years together. [See ***Rajesh Agarwal v. State and anr., 171 (2010) DLT 51***].

A de novo trial should the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect eh core of the case is not a ground for ordering a de novo trial. This is because the Appellate Court has got the plenary powers to revaluate and reappraise the evidence and to take additional evidence on record or to direct such additional evidence to be collected by the trial Court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings by bringing down all the persons to the Court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes imperative for the purpose of averting "failure of justice" The superior Court which order a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial Courts

which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the Court and deposed their versions in the very same case. The re-enactment of the whole labour might give the impression to the litigant and the common man that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation. [See ***State of M.P. v. Bhooraji, (2001) 7 SCC 679***].

Thus, in summation, we are of the considered opinion that the exercise of remitting the matter to trial Court for de novo trial should be done only when the Appellate Court is satisfied after thorough scrutiny of records and then recording reason for the same that the trial is not summons trial but summary trial. The non-exhaustive list which may indicate the difference between both modes of trial is framing of charges, recording of statement under section 313 of the Code, whether trial has been done in the manner prescribed under sections 262-265 of Cr.P.C., how elaborately evidence has been adduced and taken on record, the length of trial etc. In summary trial, the accused is summoned, his plea is recorded under section 263(g) of Criminal Procedure Code and finding thereof is given by the Magistrate under section 263(h) of Criminal Procedure Code of his examination.

The ratio in ***Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal, AIR 2011 SC 3076*** must not be followed mechanically to remand matters to trial Courts for de novo trial. There should be proper application of judicial mind and evidence on record must be thoroughly perused before arriving at any conclusion with regard to mode of trial.

However, to summarise and answer the issues raised herein, following directions are issued for the Courts seized off with similar cases:

1. All the subordinate Courts must make an endeavour to expedite the hearing of cases in a time bound manner which in turn will restore the confidence of the common man in the justice delivery system. When law expects something to be done within prescribed tie limit, some efforts are required to be made to obey the mandate of law.
2. The learned Magistrate has the discretion under section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner provided under the second proviso to section 143 of the N.I. Act. Such reasons should necessarily be recorded by the trial Court so that further litigation arraigning the mode of trial can be avoided.
3. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In

a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.

4. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of trials and speedy disposal of cases.
5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The Appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial.
6. While examining the nature of the trial conducted by the trial Court for the purpose of determining whether it was summary trial or summons trial, the primary and predominant test to be adopted by the Appellate Court should be whether it was only the substance of the evidence that was recorded or whether the complete record of the deposition of the witness in their chief examination, cross-examination and re-examination in verbatim was faithfully placed on record. The Appellate Court has to go through each and every minute detail of the trial Court record and then examine the same independently and thoroughly to reach at a just and reasonable conclusion.

We, therefore, direct all the Criminal Courts in the country dealing with cases falling under section 138 of the N.I. Act to follow the abovementioned procedure discussed in the preceding paragraphs for speedy and expeditious disposal of cases as per the purport of the Act.

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***218. PREVENTION OF CORRUPTION ACT, 1988 – Sections 19 and 20**

(i) Where it is proved that the amount was recovered from the possession of the accused, the burden of proof lies on him to prove that he received the same *bona fidely* or for some other purpose.

(ii) Mere error, omission or irregularity in sanction for prosecution is not considered fatal for the prosecution unless it has resulted in the failure of justice – Accused failed to prove that failure of justice has occasioned – Conviction held proper.

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 19 और 20

(i) जहाँ यह प्रमाणित हो जाता है कि अभियुक्त के आधिपत्य से राशि बरामद हुई, अभियुक्त पर यह प्रमाण भार होता है कि वह यह प्रमाणित करे कि उसने राशि सद्भावना पूर्वक ली है या किसी अन्य उद्देश्य से ली है।

(ii) अभियोजन चलाने की अनुमति में किसी त्रुटि, लोप या अनियमितता अभियोजन के लिए घातक नहीं होती है जब तक कि उसके परिणाम स्वरूप न्याय की हानि न हुई हो – अभियुक्त यह दर्शाने में असफल रहा कि न्याय की हानि हुई है। दोषसिद्धि उचित होना अभिनिर्धारित किया गया।

Karanveer Rana v. State of M.P.

Judgment dated 25.09.2014 passed by the High Court of M.P. in Criminal Appeal No. 367 of 2006, reported in ILR (2014) MP 2418 (DB)

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219. PROPERTY LAW :

TRANSFER OF PROPERTY ACT, 1882 – Sections 7, 8, 58, 60, 62, 72, 76 (a) and 111(c)

(i) Lease by mortgagee – Redemption of mortgage, effect of – law explained.

Normal rule is that on redemption of mortgage, the lease granted by mortgagee stands terminated.

Exceptions to the normal rule are:

a. Lease of agricultural land (not being urban land) granted by mortgagee bona fide and prudently in the ordinary course of management, may bind mortgagor even after the termination of the title of the mortgagee in possession; and

b. Lease of agricultural or urban land granted by mortgagee will continue to bind the mortgagor if the mortgagor had concurred to grant it – However, such concurrence must be by express words in the mortgage deed showing an intention to that effect.

(ii) Doctrine of Bar against Clogs on Redemption, connotation and applicability of – Law explained.

The doctrine of Bars against Clogs on redemption means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage transaction or, in other words, as a part of the loan would be valid if it is in substance and effect prevents the mortgagor from getting back his property on payment of what is due on his security – Any such bargain which has that effect is invalid – A mortgagee continuing in possession as a tenant after redemption is ordinarily a Clog on redemption and is invalid as it prevents the mortgagor from getting back the property in the same condition as he gave it when the mortgage was executed.

संपत्ति विधि :

संपत्ति अंतरण अधिनियम, 1882 – धाराएँ 7, 8, 58, 60, 62, 72, 76 (ए) और 111 (सी)

(i) बंधक ग्रहिता द्वारा पट्टा – बंधक के विमोचन हो जाने पर प्रभाव – विधि समझाई गई।

(ii) विमोचन में अवरोध के बारे में – विधि समझाई गई।

Thakar Singh (Dead) by Legal Representatives and another v. Mula Singh (Dead) Through Legal Representative and others

Judgment dated 14.10.2014 passed by the Supreme Court in Civil Appeal No. 1740 of 2007, reported in (2015) 5 SCC 209

Extracts from the Judgment:

The right of a mortgagor to redeem is dealt with by Section 60 of the Transfer of Property Act. Section 60 reads as follows:

> ***"60. Right of mortgagor to redeem*** – At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:
>
> Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.
>
> The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.
>
> Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such

time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

Section 62 also recognizes the right of a usufructuary mortgagor to recover possession under certain circumstances. Further, the rights of a mortgagee in possession are dealt with by Section 72 of the Transfer of Property Act. Suffice it to say that the right to create tenancies is not one of the rights enumerated in this section. Section 76 (a) deals with a usufructuary mortgagee managing the property as a person of ordinary prudence would manage if it were his own. Section 111(c) of the Transfer of Property Act states:

> ***111 Determination of lease.*** – A lease of immovable property determines –
>
> (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event – by the happening of such event;"

In ***All Indian Film Corporation Ltd. & Ors. v. Sri Raja Gyan Nath & Ors. [1969 (3) SCC 79],*** a similar question arose before this Court. In the facts of that case, the mortgage was redeemed on 19th April 1958 after which the respondent No.1 filed a suit for possession of the property from the head lessee and his sublessees. The sub-lessees claimed the benefit of the East Punjab Urban Restriction Act. In repelling the contention of the sub lessees that they were protected tenants as against the mortgagor, this Court stated:

> "7. The first question to consider is this: Did the tenancy created by the mortgagee in possession survive the termination of the mortgagee interest so as to be binding on the purchaser? A general proposition of law is that no person can confer on another a better title than he himself has. A mortgage is a transfer of an interest in specific immovable property for the purpose of securing -repayment of a loan. A mortgagee's interest lasts only as long as the mortgage has not been paid off. Therefore on redemption of the mortgage the title of the mortgagee comes to an end. A derivative title from him must ordinarily come to an end with the termination of the mortgagee's title. The mortgagee by creating a tenancy becomes the lessor of the property but his interest as lessor is co-terminous with his mortgagee interest. Section 111(c) of the Transfer of Property Act provides that a lease of immovable property determines where the

interest of the lessor in the property terminates on, or his power to dispose of the same, extends only to the happening of any event-by the happening of such event. The duration of the mortgagee's interest determines his position as the lessor. The relationship of lessor and lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any rights beyond the term of his original lessor's interest. These propositions are wellunderstood and find support in two rulings of this Court in ***Mahabir Gope v. Harbans Narain Singh, AIR 1952 SC 205*** and ***Asaram v. Mst. Ram Kali, AIR 1958 SC 183***. To the above propositions there is, however, one exception. That flows from Section 76(a) which lays down liabilities of a mortgagee in possession. It is provided there that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must manage the property as a person of ordinary prudence would manage it if it were his own. From this it is inferred that acts done bona fide and prudently in the ordinary course of management, may bind even after the termination of the title of the mortgagee in possession. This principle applies ordinarily to the management of agricultural lands and has seldom been extended to urban property so as to tie it up in the hands of lessees or to confer on them rights under special statutes. To this again there is an exception. The lease will continue to bind the mortgagor or persons deriving interest from him if the mortgagor had concurred to grant it." This judgment was followed in ***M/s. Sachalmal Parasam v. Smt. Ratnabai, AIR 1972 SC 637.***

In ***Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors. [1989 (1) SCC 458]***, this Court dealt with the same question and arrived at two basic conclusions. The first is that a clog on the equity of redemption will be disregarded by a Court of law and secondly that a lease created by a mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of a mortgage even assuming such lease is as a prudent owner of property would have granted in the usual course of management. This Court held:

"32. It is a settled law in England and in India that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just, and unless there is anything to the contrary in the statute, court must take cognisance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged. 33. In the facts and the circumstances and in view of the long period for redemption, the provision for interest @ ½ per cent per annum payable on the principal amount at the end of the long period, the clause regarding the repairs etc., and the mortgagor's financial condition, all these suggest that there was clog on equity. The submissions made by Mr. Sachar and Mr. Mehta are, therefore, unacceptable. 35. Before we dispose of the contentions on the second aspect, we must deal with some of the decisions of the Gujarat High Court to which reference had been made and some of which was also referred before us. We have noticed the decision of the Gujarat High Court in ***Khatubai Nathu Sumra v. Rajgo Mulji Nanji, AIR 1979 Guj 171.*** In ***Maganlal Chhotalal Chhatrapati v. Bhalchandra Chhaganlal Shah, (1974) 15 Guj LR 193,*** P.D. Desai, J. as the learned Chief Justice then was, held that the doctrine of clog on the equity of redemption means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage transaction or, in other words, as a part of the loan, would be valid if it in substance and effect prevents the mortgagor from getting back his property on payment of what is due on his security. Any such bargain which has that effect is invalid. The learned Judge reiterated that whether in a particular case long term amounted to a clog on the equity of redemption had to be decided on the evidence on record which brings out the attending circumstances or might arise by necessary implication on a combined reading of all the terms of the mortgage. The learned Judge found that this long term of lease along with the cost of repairing or reconstruction to be paid at the time of redemption by the mortgagor indicated that there was clog on equity of redemption. The learned Judge

referred to certain observations of Mr. Justice Macklin of the Bombay High Court where Justice Macklin had observed that anything which does have the appearance of clogging redemption must be examined critically, and that if the conditions in the mortgage taken as a whole and added together do create unnecessary difficulties in the way of redemption it seems that is a greater or less clog upon the equity of redemption within the ordinary meaning of the term. In our opinion, such observations will apply with greater force in the present inflationary market. The other decision to which reference may be made is the decision of the Gujarat High Court in ***Soni Motiben v. Hiralal Lakhamshi, (1981) 22 Guj LR 473***. This also reiterates the same principle. In ***Vadilal Chhaganlal Soni v. Gokaldas Mansukh, AIR 1953 Bom 408*** also, the same principle was reiterated. In that case, it was held by Gajendragadkar, J., as the learned Chief Justice then was, that the agreement between the mortgagor and mortgagee was that the mortgagor was to redeem the mortgage 99 years after its execution and the mortgagee was given full authority to build any structure on the plot mortgaged after spending any amount he liked. It was held that the two terms of the mortgage were so unreasonable and oppressive that these amounted to clog on the equity of redemption. Similar was the position in the case of ***Sarjug Mahto v. Devrup Devi, AIR 1963 Pat 114***, where also the mortgage was for 99 years. In ***Chhedi Lal v. Babu Nandan AIR 1944 AII 204,*** the court reiterated that freedom of contract unless it is vitiated by undue influence or pressure of poverty should be given a free play. In the inflationary world, long term for redemption would prima facie raise a presumption of clog on the equity of redemption. See also the observations in Rashbehary Ghose's 'Law of Mortgage' 6th Edn. pages 227 and 228. 39. On the second aspect of the question whether the right of the tenants of the mortgagees are protected after the redemption of mortgage, reliance was placed by the First Appellate Court on the decision of the Full Bench of the Gujarat High Court in ***Lalji Purshottam v. Thacker Madhavji Meghaji, (1976) 17 Guj LR 497***. There urban immovable property was mortgaged with possession, mortgagee creating lease during the subsistence of the mortgage. The question was whether after redemption of mortgage such

lease is binding on the mortgagor. It was held that Section 76(a) of the Transfer of Property Act would not apply to such cases. There must be express words showing an intention if tenancy was to be created beyond the term of the mortgage. Mere reference that mortgagee is entitled to lease property does not create a binding tenancy on the mortgagor. After the redemption of the mortgage the relationship of landlord and tenant does not exist. Such tenant, therefore, does not get any protection under Section 12 of the Bombay Rent Control Act, it was held. The Gujarat High Court had referred to several decisions of this Court. In ***Mahabir Gope*** (supra) which was a decision dealing with a lease created by a mortgagee with possession under the Bihar Tenancy Act, this Court reiterated that the general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further the mortgagee, who takes possession of the mortgaged property, must manage it as person of ordinary prudence would manage if it were his own; and he must not commit any act which is destructive or permanently injurious to the property. Reliance maybe placed for this purpose on Section 76, clauses (a) and (e) of the Transfer of Property Act, 1882. It was held that the provisions of Sections 20 and 21 of the Bihar Tenancy Act, did not apply to the lessees since they were not 'settled raiyats' and the lessees could not claim to have secured under the statute occupancy rights in the land. It was further held that the mortgagor was entitled to the possession of the land upon redemption of the mortgage. In a slightly different context in ***Harihar Prasad Singh v. Deonarain Prasad, AIR 1956 SC 305***, this Court was concerned with a mortgage with possession effected on agricultural land. This Court had to consider in that decision whether under the provisions of the Bihar Tenancy Act the tenant inducted on the mortgaged property during the pendency of the mortgage could claim right to remain in possession after the redemption. Venkatarama Ayyar, J., speaking for the Court pointed out that if the tenant could not resist the suit for ejectment either by reason of Section 76(a) of the Transfer of Property Act or Section 21 of the Bihar Tenancy Act, the tenant could not get such a right as a result of the interaction

of both those sections. This Court ultimately held that the tenants inducted by the mortgagee with possession had failed to establish that they had any right of occupancy over the suit lands and that the plaintiffs were entitled to a decree in ejectment, with future mesne profits as claimed in the plaint. Thus a right claimable under Section 76(a) of the Transfer of Property Act because of a lease created in the course of prudent management of the property was put on a different footing altogether from a right created by a special statute. 46. We have noted hereinbefore the ratio and the basis of the decision of this Court in ***Jadavji Purshottam v. Dhami Navnitbhai Amaratlal, (1987) 4 SCC 223***. Shri Mehta submitted that there was no clear finding as to when the tenants were inducted whether before or after the Rent Restriction Act and therefore, he pleaded that the matter should be referred to the larger Bench. In view of the facts found in this case which were similar to the facts mentioned in ***Jadavji Purshottam's case*** (supra) there is no specific authority in the lease which stated that the lease would continue beyond the period of mortgage. There is no extended authority as contemplated in Jadavji Purshottam case found in this case. The submission was that the matter should be considered by a larger Bench in the light of the Jadavji Purshottam case. We are unable to accept the said submission. In this case the words in the mortgage deed, as we are taken through, did not clearly allow creation of tenancy beyond the period of mortgage. That, in any event, would not have been prudent management, hence, there is no finding that the mortgage deed permitted, either expressly or impliedly, creation of tenancy beyond the period. We think that the tenants were not entitled to protection after redemption of mortgage. Furthermore, in all these cases the authority of the mortgagees to lease out the property, expressed or implied, was circumscribed by a stipulation that the mortgagee should redeliver the possession of the property when the mortgage was redeemed. In that context, we are of the opinion that the submissions on behalf of the tenants cannot be entertained."

On the facts of this case, it will be seen that the mortgagees were entitled to create tenancies by virtue of the mortgage deed dated 9th March 1942. However, there is nothing in the language of the mortgage deed to indicate clearly that the tenancies created by the mortgagees would be binding on the

mortgagors. At the highest, after redemption, and after possession is taken, the mortgagor or mortgagors will also be entitled to receive rent in future. It will be seen that the mortgagor's right to get back possession is expressly recognised by the mortgage deed without any clear and unambiguous language entitling tenants created by the mortgagees to become tenants of the mortgagors. The entitlement to receive rent in future can by no stretch be held to create a tenancy between the mortgagor and the tenants of the mortgagees. This phrase has to be reconciled with the expression immediately preceding it namely "on taking possession". It is clear that taking of possession from the mortgagees and his tenants is completely antithetical to recognizing the mortgagees' tenants as the mortgagors' tenants. If the clause is to be read in the manner that the High Court has read it, the mortgagors would not be able to get back possession on redemption which would in fact be a serious interference with their right to redeem the property inasmuch as the mortgagors would have to evict such tenants after making out a ground for eviction under the Rent Act. Such ground can only be bonafide requirement of the landlord or some ground based on a fault committed by the tenant such as non-payment of rent or unlawful subletting etc. Further, such ground may never become available to the mortgagor/landlord or may become available only after many years. It has already been seen that a mortgagee continuing in possession after redemption as tenant of the mortgagor is regarded as a clog on redemption. The position is not different if the mortgagee's tenants continue in possession after redemption. This would necessarily have to be disregarded as a clog on redemption as the right to redeem would in substance be rendered illusory.

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220. SPECIFIC RELIEF ACT, 1963 – Sections 9, 13(b), 16(b) and 17
HINDU SUCCESSION ACT, 1956 – Section 8

(i) Suit for specific performance of agreement for sale of immovable property – Such property devolved in equal shares amongst number of co-sharers under section 8 of the Act of 1956 – Agreement for sale executed by some of the co-sharers of property without concurrence of the remaining co-sharers – Held, since defendant-vendors are not having complete title over the suit property and agreement having not been executed by all co-sharers, same cannot be enforced in favour of plaintiff-vendee.

(ii) Discretionary relief of specific performance, entitlement of – He who seeks such relief must approach court with clean hands and there must not be any breach of the contract on his part.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 9, 13 (बी), 16 (बी) और 17
हिन्दू उत्ताधिकारी अधिनियम, 1956 – धारा 8

(i) अचल संपत्ति के विक्रय के अनुबंध के विनिर्दिष्ट पालन के लिए वाद – धारा 8 अधिनियम, 1956 के तहत संपत्ति कई सह अंशधारियों में समान रूप से न्यागत हुई – विक्रय अनुबंध का निष्पादन संपत्ति के कुछ अंशधारियों ने अन्य अंशधारियों की सहमति के बिना किया – अभिनिर्धारित किया गया चूंकि प्रतिवादी विक्रेता को वादग्रस्त संपत्ति पर पूर्ण स्वत्व नहीं है और सभी सह अंशधारियों द्वारा अनुबंध निष्पादित नहीं किया गया है इस कारण ऐसे अनुबंध का वादी क्रेता के पक्ष में प्रवर्तन नहीं कराया जा सकता।

(ii) विनिर्दिष्ट पालन के वैवेकिय अनुतोष का अधिकार – वह जो ऐसा अनुतोष चाहता है उसे न्यायालय में स्वच्छ हाथों से आना चाहिए और उसके भाग पर संविदा का कोई भंग नहीं होना चाहिए।

Pemmada Prabhakar and others v. Youngmen's Vysya Association and others

Judgment dated 20.08.2014 passed by the Supreme Court in Civil Appeal No. 7835 of 2014, reported in (2015) 5 SCC 355

Extracts from the Judgment:

It is an undisputed fact that the suit schedule property is self acquired property by late Pemmada Venkateswara Rao as he had purchased the said property vide Sale-Deed Document No.5174 of 1970 dated 24.11.1970 from his vendors. It is also an undisputed fact that the said property is intestate property. He is survived by his wife, 3 sons and 3 daughters. The said property devolved upon them in view of Section 8 of Chapter 2 of the Hindu Succession Act as the defendants are class I legal heirs in the suit schedule property. Undisputedly, the Agreement of Sale-Ex.-A1 is executed only by defendant Nos. 1 and 2. The 3 rd son, mother and 3 sisters who have got equal shares in the property have not executed the Agreement of Sale. In view of the matter, the Agreement of Sale executed by defendant Nos. 1 and 2 who have no absolute right to property in question cannot confer any right whatsoever upon the plaintiffs for grant of decree of specific performance of Agreement of Sale in their favour. The said agreement is not enforceable in law in view of Section 17 of the Specific Relief Act in view of right accrued in favour of defendant Nos. 3 to 6 under Section 8 of the Hindu Succession Act.

The provisions of Section 17 of the Specific Relief Act in categorical term expressly state that a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have absolute title and right upon the party. It is worthwhile to extract Section 17 of the Specific Relief Act, 1963 here :

> ***"17.Contract to sell or let property by one who has no title, not specifically enforceable.*** A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor; (a) who, knowing not to have any title to the property, has contracted to sell or let the property (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt."

In view of the aforesaid provisions of the Specific Relief Act, the Agreement of Sale entered between the plaintiffs and some of the co-sharers who do not have the absolute title to the suit schedule property is not enforceable in law. This aspect of the matter has not been properly appreciated and considered by both the First Appellate Court and the Second Appellate Court. Therefore, the impugned judgment is vitiated in law.

Even assuming for the sake of argument that the agreement is valid, the names of three sons are mentioned in Agreement of Sale, out of whom the agreement is executed by defendant Nos. 1 and 2 and they assured that they would get the signatures of the 3 rd brother namely, Srinivasa Rao and also the remaining 3 sisters. At the time of execution of this agreement signatures were not obtained. Therefore, the agreement is not executed by all the co-sharers of the property which fact is evident from the recitals of the document itself. Hence, the plaintiffs are not entitled for specific performance decree. This vital factual and legal aspect has been ignored by both the First Appellate Court and the Second Appellate Court. Therefore, the impugned judgment is vitiated both on facts and law. Accordingly, the point No. 1 is answered in favour of the defendants.

It is an undisputed fact that the plaintiffs have not approached the trial court with clean hands. It is evident from the pleadings of the agreement of sale which is produced for the decree for specific performance of agreement of sale as the plaintiffs did not obtain the signatures of all the co-sharers of the property, namely, the mother of the defendants, the third brother and three sisters. Therefore, the agreement is not enforceable in law as the persons who have executed the sale deed, did not have the absolute title of the property. Apart from the said legal lacuna, the terms and conditions of the agreement of sale for payment of sale consideration agreed to be paid by the first plaintiff in installments within the period stipulated as indicated above were not paid.

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221. SUCCESSION ACT, 1925 – Sections 371 and 372

Jurisdiction of the Succession Court – Claimant is required to satisfy the Court that the deceased at the time of his death was residing permanently/ordinarily within the local jurisdiction of the Court or that the Court would have jurisdiction because the property of the deceased is situated within the local jurisdiction of that court and the deceased at the time of his death had no fixed place of residence.

उत्तराधिकार अधिनियम, 1925 – धाराएँ 371 एवं 372

उत्तराधिकार (प्रमाण पत्र देने वाले) न्यायालय का क्षेत्राधिकार – आवेदक के लिए यह आवश्यक है कि वह न्यायालय को संतुष्ट करावे की मृतक उसकी मृत्यु के समय स्थायी रूप से/सामान्यतः न्यायालय के स्थानीय क्षेत्राधिकार में निवास करता था या न्यायालय को इसलिए क्षेत्राधिकार है कि मृतक की संपत्ति न्यायालय के स्थानीय क्षेत्राधिकार में स्थित है और मृत्यु के समय मृतक के निवास का निश्चित स्थान नहीं था।

Jag Mohan Tripathi v. Babaannapurna Das Katthiya Baba

Order dated 03.09.2013 passed by the High Court of M.P. in W.P. No. 11535 of 2013, reported in ILR (2014) MP 2311

Extracts from the Order:

So far as the case law cited on behalf of the petitioner in the matter of ***Chandrakala Doble (Smt.) and others v. Shyam Rao Doble and others, 1999 (2) JLJ 51*** is concerned, I do not have any dispute regarding principles laid down in such case but in view of the aforesaid discussion this citation is also not helping the applicant to allow the application or to allow the petition for setting aside the impugned order because in such citation taking into consideration Section 371 of the Indian Succession Act it was held that in view of such specific provision of such enactment the provision of section 20 CPC is not applicable and pursuant to it in view of the provision aforesaid section 371 it was held that for conferring jurisdiction upon a Succession Court, a claimant is required to satisfy the Court that the deceased at the time of his death was residing permanently/ordinarily within the local jurisdiction of the Court or that the Court would have jurisdiction because the property of the deceased is situated within the local jurisdiction of that court and the deceased at the time of his death had no fixed place of residence. As per the aforesaid discussion, it is apparent from the case at hand that the deceased was found to be resident of both the places and the properties are also found to be at both places that is District Umaria as well as Jabalpur, so the approach of the trial Court is also in accordance with the approach of the cited case.

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PART - III
CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 20.03.2015 OF MINISTRY OF LAW & JUSTICE (DEPARTMENT OF JUSTICE) REGARDING INCREASE IN THE LIMIT OF VALUE OF THE PROPERTY IN DISPUTE FOR THE PURPOSE OF DETERMINING JURISDICTION OF PERMANENT LOK ADALAT

S.O. 803 (E) – In exercise of the powers conferred by the third proviso to sub-section (1) of Section 22C of the Legal Services Authorities Act, 1987 (39 of 1987) and in supersession of the Government of India, Ministry of Law and Justice (Department of Legal Affairs) notification number S.O.2083 (E), Dated the 15th September, 2011 published in the Gazette of India, Extraordinary , Pat II, Section 3, Sub-section (ii), dated the 15th September, 2011, the Central Government, in consultation with the Central Authority, hereby increases the limit of the value of the property in dispute for the purpose of determining the jurisdiction of Permament Lok Adalat to "one crore rupees" with effect from the date of publication of this notification in the Official Gazette.

[F. No. A-60011/37/2004 - Admn.-III (LAP)-JUS]
Praveen Garg, Jt. Secy.

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NOTIFICATION DATED 13.04.2015 OF MINISTRY OF LAW & JUSTICE (DEPARTMENT OF JUSTICE) REGARDING THE DATE OF ENFORCEMENT OF THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014

Ministry of Law and Justice (Department of Justice) Notification No. S.O. 1001 (E) dated the 13th April, 2015. Published in Gazette of India (Extraordinary) Part II Section 3 (ii) dated 13-4-2015 Page 1.

In exercise of the powers conferred by sub-section (2) of Section 1 of the ***National Judicial Appointments Commission Act, 2014 (40 of 2014),*** the Central Government hereby appoints the 13th day of April, 2015, as the date on which the provisions of the said Act shall come into force.

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NOTIFICATION DATED 02.01.2015 REGARDING REDUCTION/ REMMINTTING STAMP DUTY ON DOCUMENTS

Notification No. F B-4-29-2014-2-V(01) dated the 2nd January, 2015 – In exercise of the powers conferred by clause (a) of sub-section (1) of Section 9 of the Indian Stamp Act, 1899 (No. II of 1899) and in supersession of all previous notifications issued in this behalf, the State Government, hereby, reduce/remit stamp duty on documents mentioned in column (3) of the table below on the articles mentioned in column (2) of Schedule 1-A of the said Act, namely :-

TABLE

S.No. (1)	Article (2)	Reductions/Remissions
1.	Article 5-Affidavit	1 On affidavit affirmed by a member of a Scheduled Castes or Scheduled Tribes. 2 On affidavit sworn or affirmed by a member of the Other Backward Classes, as specified in the State Government notification No. F-8-5-25-4-84, dated the 26th December, 1984 as amended from time to time. 3 On affidavit submitted before a Commission of Inquiry appointed by the Government of India or the State Government under the Commission of Inquiry Act, 1952 (60 of 1952). 4 On affidavit submitted under Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (21 of 1985). 5 On affidavit made as a condition of enrollment under the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950). 6 On affidavit made for the sole purpose of being filed or used in any Court or before the officer of any Court. 7 On affidavit made for the sole purpose of enabling any person to receive any pension or charitable allowance.

2.	Aticle 6-Agreement or Memorandum of an agreement	1 On instruments executed by units under Madhya or Memorandum Pradesh Khadi and Gramodyog Board for of an agreement obtaining assistance from the Board. 2 On instruments of agreement required to be executed by eligible users belonging to the Scheduled Castes and Scheduled Tribes living below the poverty line with the 'Madhya Pradesh Vidyut Vitaran Company Jabalpur, Bhopal, and Indore for obtaining single-point metered electricity connection 3 On instruments executed by agriculturists in favour of Banks for securing loans under the Kisan Credit Card Scheme. 4 On instrument executed by Self Help Groups in favour of banks for securing loans upto Ten Lakh Rupees for economic development of group members under the NABARD sponsored schemes. 5 Stamp duty is exempted on instruments executed by herbal or ayurved based industry in favour of any financial institution, to secure repayment of loans obtained for industrial purposes only til1 the Madhya Pradesh Industrial Promotion Policy, 2010, as amended in 2012 or the Madhya Pradesh Industrial Promotion Policy, 2014 and its work-plan remains in operation subject to the conditions, that :- (a) the industrial unit is situated in an industrial area or industrial growth center developed by the Government of Madhya Pradesh or Madhya Pradesh Audyogik Kendra Vikas Nigam; and (b) a certificate of eligibility to the effect that the industry is eligible for remission of stamp duty under this order, is issued by the Commissioner of Industry, Government of Madhya Pradesh. 6 On instruments of agreement related to

		development of Government land executed by the Tourism Department of the State for tourism projects. 7 Stamp duty is reduced to Rupees Five Hundred only on instruments of agreement relating to repayment of education loan. 8 Stamp duty is reduced to Rupees Five Hundred only on loan related instruments to be executed with Banks for establishment of technical educational institutions. 9 On Agreement or memorandum of an agreement- (a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under article 46. (b) made iri the form of tenders to the Central Government for or relating to any loan
3.	Article 7- Agreement relating to deposit of title deeds, pawn, pledge or hypothecation	1 On instruments executed by units under Madhya Pradesh Khadi and Gramodyog Board for obtaining assistance from the Board. 2 On agreements relating to deposit of title deeds executed by industrialists or.industrial undertakings in the State in connection with obtaining loans or advances for industrial purposes from Khadi and Village Industries Commission and Madhya' Pradesh Khadi and Gramodyog Board. 3 On instruments executed by agriculturists in favour of Banks for securing loans under the Kisan Credit Card Scheme. 4 On instruments executed by Self Help Groups in favour of banks for securing loans for economic development of group members to the limit of 10 Lakh Rupees under the NABARD sponsored schemes 5 On instruments of hypothecation executed in

		favour of banks for securing loan upto Ten Lakh Rupees for agricultural purposes by any Bhumiswami or a pattadhari holding land under Revenue Book Circular-IV-3-10. Also, no stamp duty shall be chargeable for this purpose upto any limit in case of a person belonging to Scheduled Castes and Scheduled Tribes. 6 On instruments executed by herbal orayurved based industries in favour of any financial institution, to secure repayment of loans obtained for industrial purpose only till the Madhya Pradesh Industrial Promotion Policy, 2010 as amended in 2012 or Madhya Pradesh Industrial Promotion Policy, 2014 and its work plan remains in operation subject to the conditions, that :- (a) the industrial unit is situated in an industrial area or industrial growth centre developed by the Government of Madhya Pradesh or Madhya Pradesh Audyogik Kendra Vikas Nigam; and (b) a certificate of eligibility to the effect that the industry is eligible for remission of stamp duty under this order, is issued by the Commissioner of Industry, Government of Madhya Pradesh. 7 On instruments of equitable mortgage/ hypothecation executed by a new unit/expanded unit/modernized unit of an Information Technology/ Business Process Outsourcing company for obtaining loans from banks/financial institutions in Information Technology investment area, subject to the condition that the new unit/expanded unit/ modernized unit is certified to be an information technology/Business Process Outsourcing outfit by Information Technology Department or any designated agency notified by them under the Madhya Pradesh Information Technology Investment Policy, 2012, as amended 2014 or

		Madhya Pradesh Business Process Outsourcing Business Process Management (Business Process Outsourcing Business Process Management) Industry Investment Policy, 2014 of the State of Madhya Pradesh. **Note-** This exemption shall be applicable only till the Madhya Pradesh Information Technology Investment Policy, 2012, as amended in 2014 or Madhya Pradesh Business Process Outsourcing/ Business Process Management (BPO/BPM) Industry Investment Policy, 2014 remains in operation. 8 Stamp duty is reduced to 0.125 percent of the amount of loan secured on instruments of agreement relating to deposit of title deeds for securing loans upto rupees ten crore in case of micro and small scale industries and on loans for residential purposes. 9 On instruments relating to deposit of title deeds, executed by beneficiary in favour of any bank or financial institution for securing repayment of loan or advance upto Rs. One Lakh to be received by him for the purpose of construction of house under the Mukhyamantri Gramin Awas Yojna, subject to the condition that a certificate of eligibility to the effect that the beneficiary is eligible for the remission of stamp duty is issued by the Collector of the concerned district. 10 On letter of hypothecation accompanying a Bill of Exchange. 11 On instrument of pawn or pledge or agriculture produce, if unattested.
4.	Article 9-Appraisement or valuation	1 On Appraisement or valuation made for the information of one party only; and not being in any manner obligatory between parties either by agreement or operation of law. 2 On Appraisement of crops for the purpose of

		ascertaining the amount to be given to a landlord as rent.
5.	Article10-Apprenticeship deed	1 On contracts executed by an adult apprentice or by the guardian of a minor apprentice in favour of an employer under the Apprentices Act, 1961 (52 of 1961). 2 On instruments of apprenticeship by which a person is apprenticed by or at the charge of any public charity.
6.	Article 14-Bond	On Bond when executed by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem.
7.	Article 14-Cancellation	On instrument of cancellation of a will.
8.	Article 25-Conveyance	1 On the instruments of sale executed by Madhya Pradesh Housing Board, Nagar Vikas Pradhikarans, Primary Co-operative Housing Societies and Madhya Pradesh State Co-operative Housing Federation, in relation to house/ apartment to the extent of the value of the house/ apartment (excluding value of plot) constructed under self financing scheme, with the money received from the purchaser, subject to following conditions, namely :- (a) the chargeable stamp duty shall be exempted/ reduced to the extent of 100 percent, 50 percent and 25 percent for the categories of house/apartment of Economically Weaker Section, Low Income Group and Middle Income Group respectively, but no exemption/ reduction shall be granted in cases of High Income Group houses/apartments; (b) this exemption/reduction shall be limited only to original allottees under the Self Financing Scheme.

		(c) economically Weaker Sections, Low Income Group and Middle Income Group shall be as defined and specified by the Department of Urban Development and Environment from time to time : Provided that this remission shall not be available in case of partly constructed house/ apartment. 2 On all kinds of deeds of transfers of agricultural land executed by a person belonging to a Scheduled Tribes in favour of his legal heir/heirs during his life time. 3 On instruments of sale relating to plot or built up space executed by or on behalf of State Government or any Semi Government Organization or any Government Undertaking, in favour of Information Technology/ Business Process Outsourcing Industries to be established in the State of Madhya Pradesh. 4 On instruments of conveyance of industrial units as a going concern, the rate of duty on the value of plant, machinery and other movables conveyed by the instrument shall be one percent, and also the duty chargeable on a single instrument shall not exceed rupees ten crore. 5 On instruments of sale executed by or on behalf of financial institutions, Government Agencies or Private Sector by which space/premises in an Information Technology investment area is transferred in favour of a new unit/expanded unit/ modernized unit of an IT/Business Process Outsourcing company, subject to the condition that it is certified to be an information technology/ Business Process Outsourcing outfit by Information Technology Department or any designated agency notified by them under the Madhya Pradesh Information Technology Investment Policy, 2012, as amended in 2014 or

		the Madhya Pradesh Business Process Outsourcing/Business Process Management (Business Process Outsourcing/ Business Process Management) Industry Investment Policy, 2014 of the State of Madhya Pradesh. **Note-**This exemption shall only be applicable till the Madhya Pradesh Information Technology Investment Policy, 2012, as amended in 2014 or Madhya Pradesh Business Process Outsourcing/ Business Process Management (BPO/BPM) Industry Investment Policy, 2014 remains in operations. 6 On instruments of sale of land executed in favour of persons, whose land has been acquired for Auto Testing Track Project, Pithampur, District Dhar, the chargeable stamp duty shall be remitted subject to the following conditions, namely :- (a) a certificate in the enclosed format from the Collector of Dhar District is obtained, in which the amount of compensation as well as special rehabilitation grant paid for acquisition of land for Auto Testing Track Project, Pithampur is mentioned; (b) the position in clause (a) above, is expressed in the instrument of sale itself; and (c) the eligibility of exemption shall be limited to the amount of stamp duty chargeable on the amount of compensation and special rehabilitation grant. (d) the stamp duty chargeable on such instrument in accordance with the provisions of the Indian Stamp Act, 1899 (II of 1899) shall be reimbursed by the Commerce, Industry and Employment Department to the Commercial Taxes Department within one month from the date of registration of the instrument. **CERTIFICATE**

		No..... Dated ..... Certified that land having area ..... hectare of Shri..... R/o Village ..... Tehsil..... District Dhar has been acquired for Auto Testing Track Project, Peethampur, District Dhar, for which the amount of compensation and special rehabilitation grant paid is as under :- Compensation Amount ——— Amount of Special Rehabilitation grant ——— Total ———— This certificate shall be applicable for granting exemption of stamp duty on deed of sale of land having area ..... hectare situated at Village ..... executed by Shri..... S/o Shri..... in favour of Shri ..... S/o Shri..... After this registry, the eligibility of exemption of stamp duty shall be available only to the extent of duty chargeable on Rs..... the balance amount of compensation and special rehabilitation grant. But in no case the amount of duty exempted shall exceed the amount of duty chargeable on the sum of amount of compensation and special rehabilitation grant obtained by Shri ..... S/o Shri ..... **Collector** **Dhar**
		7 Stamp duty shall be reduced to half on instrument of sale executed by private persons in favour of a Unit established to generate electricity from non-conventional energy resources subject to the following conditions, namely ;-

		(a) a Bank Guarantee of the sum equal to the amount of stamp duty remitted shall be given the unit in favour of the State Government for a period of 21 months in case of Wind Energy or Solar Energy Projects and for a period of 36 months in case of Bio-gas or Municipal Waste projects; and (b) the unit shall be liable to pay the amount of stamp duty remitted to the State Government, if the project is not established within the given period of Bank Guarantee. It shall also be the responsibility of the unit to produce before the District Registrar of the concerned district in which the land purchased is situated, a certificate from the Competent Authority appointed by the Energy Department in this behalf, that the unit has been established before the prescribed period of Bank Guarantee. In case of default, the amount of duty remitted shall be recoverable from the Bank Guarantee tendered by the unit for the purpose. 8 On instruments of transfer of developed land in a Food Park executed by the developer of the park in favour of a Food Processing Unit, the remission shall be granted subject to the following conditions, namely ;- (a) the duty charged on the instrument of purchase of the said land shall be adjusted in proportion to the part of land transferred; and (b) if on adjustment no duty is required to be paid, then the minimum duty for the transfer shall be rupees five Hundred only. 9 On instruments of sale of land executed in favour of a Goshala registered by the Madhya Pradesh Gopalan Evam Pashudhan Samwardhan Board, Bhopal. 10 On instruments of sale executed by the Madhya

		Pradesh Housing Board, Nagar Vikas Pradhikarans, Madhya Pradesh State Co-operative Housing Federation or any Urban Local Body in Madhya Pradesh in favour of a person of economically weaker section. "Economically Weaker Section" shall be as defined and specified by the Department of Urban Development and Environment from time to time. A certificate from the District Collector to this effect shall have to be produced. The remission of stamp duty shall also be available where the instruments of lease of residential house is executed under the Basic Service For Urban Poor (B.S.U.P.)/ Integrated Housing and Development Program (LH.S.D.P.) in favour of a person, who surrenders the lease already held by him under the Madhya Pradesh Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, 1984 from the Government on the sites under construction by the said agencies. 11 Instruments of conveyance relating to conversion of lease hold rights into freehold rights or private or nazul land executed by or on behalf of the Government or a Semi-Government Organisation or any Government undertaking or Housing Co-operative Society established or registered under any law for the time being in force, shall be chargeable in reduction to the extent only on the amount of consideration paid for the conversion, as set-forth in the instrument, but in no case shall the amount of duty chargeable be less than rupees Five Hundred. 12 On the instrument of sale of sick/closed industrial units which are referred to the Board of Industrial Finance and Reconstruction (B.I.F.R.) or a liquidator or acquired by financial institutions or banks or which fall in the category of sick industry

		as defined by the Reserve Bank of India, subject to the conditions that,- (i) the remission shall be granted only once. On conveyance of unit/assets on which exemption under this notification has been granted once, no exemption in any case shall be granted again; (ii) the remission shall be granted only to such closed and sick units in which the high power committee headed by the Chief Secretary of the State of Madhya Pradesh or the Empowered Committee headed by the Collector of the District, as the case may be, constituted under the provisions of the Madhya Pradesh Industrial Promotion Policy, 2010, as amended 2012 or Madhya Pradesh Industrial Promotion Policy, 2014 and its work plan has taken a decision to remit the stamp duty; (iii) to obtain remission the purchaser of unit will have to produce a scheme for revival of the unit before the competent authority explaining his financial position. Also the purchaser shall give an undertaking before the Competent Authority that he will revive the industry within eighteen months and in case of violation pay the amount of stamp duty remitted along with an interest at the simple rate of 0.75 percent for every month or part thereof from the date of execution of the instrument. For revival he shall be entitled to sue the option of diversification of the product; and (iv) the remission shall be subject to the certificate of Competent Authority to the effect that the instrument is eligible for remission under this notification. The competent authority authorized to issue the said certificate shall be as under :- **Value/Market value of the unit** — **Competent Authority** (i) Where it does not exceed one crore rupees — Collector of the concerned District

		(ii) Where it exceeds one crore rupees — Divisional Commissioner of the concerned Division. **Note-** This exemption shall be applicable only till the operation of the Madhya Pradesh Industrial Promotion Policy, 2010, as amended 2012 or Madhya Pradesh Industrial Promotion Policy, 2014 and its work-plan. 13 On instruments of sale or merger or amalgamation of industrial units as a going concern stamp duty shall be reduced to a maximum of Ten Lakhs rupees when the amount chargeable exceeds that amount. This reduction in duty shall be applicable subject to the conditions that- (a) the said instrument is executed for better capacity utilization of the industry, (b) the production of the industry in any three of the immediately preceding five years has not exceeded 50 percent of the installed capacity, (c) any bank or financial institution which has extended loan to the industry has considered its loan as non-performing asset for immediately preceding two years, (d) the net worth of the industry has been reduced to less than one half of its net worth immediately preceding five years ago; and (e) a certificate to the effect that the instrument is eligible for concession under this notification is issued by the Collector of the concerned District in cases where the sale price of the industry does not exceed rupees One Crore and by the Commissioner of the concerned division in other cases. **Note-**The exemption under this notification shall be applicable only till the Madhya Pradesh Industrial Promotion Policy, 2010 as amended 2012 or Madhya Pradesh Industrial Promotion Policy, 2014 and its work-plan remains in operation.

		14 On instruments of conveyance of 12.713 acre land in the campus of former Higher Secondary Technical School, Shahdol and 8 hectare land of Government Survey No. 55611 of Village Kalyanpura in Jhabua District in favour of Rajeev Gandhi Technical University, Bhopal for establishment of University Institute of Technology, a constituent institution of Rajeev Gandhi Technical University, Bhopal. 15 On instruments of conveyance of 12.120 hectare (25 acres) of total land of four survey numbers i.e. area 7.422 hectare out of 8.359 hectare of survey number 108/3, area 0.063 hectare of survey number 116, area 2.023 hectare of survey number 117/1, and area of 0.612 hectare out of 1.517 hectare of survey number 138, of Village Malsipur in Tehsil Sironj, executed in favour of Rajeev Gandhi Technology University, Bhopal for establishment of University Institute of Technology, Sironj, Vidisha District, a constituent institution of Rajeev Gandhi Technology University, Bhopal. 16 On instruments of purchase of land by displaced/ effected families, to the extent of payable compensation and special rehabilitation grant according to award in cases of land acquisition for establishing Thermal Power Project by M/s. New Zone India Private Limited in District Anuppur, subject to the following conditions, namely:- (a) the formal sanction shall be issued after the essential amount of expected compensation of stamp duty of rehabilitation package for this project is deposited in designated revenue head of public account by District Collector; (b) a certificate in favour of every displaced family under rehabilitation package of this project shall be issued by the District

		Collector, in which the amount of compensation alongwith amount of special rehabilitation grant payable to displaced person shall be mentioned, and the entitlement of exemption of amount of stamp duty shall also be certified in it. This certificate shall be submitted by the displaced person at the time of registration of deed of acquired land before Registering Officer. The eligibility of exemption of payable stamp duty shall be limited to the extent of amount of compensation and special rehabilitation grant; (c) the demand for reimbursement of stamp duty on the basis of registered deeds under this project shall be submitted every month by District Registrar to District Collector, and District Collector shall deposit the amount of reimbursement in account head "0030 Stamps and Registration" within one month from the date of receipt of demand; and (d) the exemption on stamp duty shall be valid only for two years from the date of payment of compensation and rehabilitation grant. 17 On instruments of sale executed to acquire land in favour of member of a family displaced on account of. the Narmada Valley Projects subject to the following conditions, namely :- (a) a certificate from the Land Acquisition Officer of the project area is obtained in which the total amount including the amount of compensation item wise of his land other immovable properties, special rehabilitation grant, But the amount of transport fee paid for self transportation of goods shall not be included; (b) the agricultural land and/or other immovable property is purchased by the displaced person any where in the State of Madhya Pradesh during

		the process of rehabilitation; (c) the position in clause' (a) and (b) above is expressed in the instrument of transfer itself; (d) the eligibility of exemption shall be li'mited to the amount of Stamp duty chargeable on the value of land and/or immovable property or the total amount of consideration paid to the said displaced person as compensation, special rehabilitation grant, rehabilitation grant, financial assistance etc., whichever is less; (e) the Stamp duty chargeable on the instrument will be reimbursed by the Narmada Valley Development Authority to Commercial Tax Department on the basis of demand letter produced by the Sub-Registrar; (f) only a displaced family as defined in the Rehabilitation Policy shall be entitled for exemption; and (g) such landless displaced person and adult son, who want to purchase agricultural land and/ or other immovable property from various amounts such as rehabilitation grant, financial assistance given to purchase productive assets, financial assistance given for developed residential plot at the rehabilitation place, shall also be entitled for the said exemption. 18 On instruments executed for,- (a) transfer of land acquired by the Commerce, Industry and Employment Department of the State Government, to the Special Purpose Vehicle (SPV) Company constituted for establishment of Vikram Udyogpuri Project in District Ujjain under Delhi-Mumbai Industrial Corridor sub-region in the State of Madhya Pradesh; (b) for first transfer of a parcel of land by Special Purpose Vehicle to any developer, tenderer, construction company or joint venture in the course of execution of the Master Plan of the

		above mentioned Vikram Udyogpuri Project. It is clarified that for this purpose, certificate from Managing Director, TRIF AC or any other officer authorised in this behalf shall be required. 19 On Assignment of copyright under the Copyright Act, 1957 (14 of 1957).
9.	Article 26-Copy or Extract	1 On copy of any paper which a public officer is expressly required by law to make or furnish for record in any public office or for any public purpose. 2 On copy of extract from any register relating to births, baptisms, namings, dedications, marriages, divorces, death and burials.
10.	Article 27-or Counterpart duplicate	On counterpart of any lease granted to a cultivator when such a lease is exempted from duty.
11.	Article 34-Exchange Of Property	Stamp duty chargeable on deeds of exchange of agricultural land upto two hectare is remitted under following conditions, namely :- (a) the lands being exchanged are agricultural; (b) the lands being exchanged are approximately of equal market value; (c) the lands being exchanged shall not be Nazul or extra-Nazul agricultural lands; (d) the lands being exchanged are situated within the same Revenue Inspector Circle; and (e) provision shall not be misused for evading Ceiling on agricultural land.
12.	Article 35-Further charge	1 On instruments of further charge without possession executed in favour of banks for securing loan upto ten lakh rupees for agricultural purposes by any Bhumiswami or a pattadhari holding land under Revenue Book Circular-IV-3-10. Also, no stamp duty shall be chargeable for this purpose up to any limit in case of a person

		belonging to Scheduled Castes and Scheduled Tribes. 2 On instruments executed by agriculturists in favour of Banks for securing loans under the Kisan Credit Card Scheme.
13.	Article 36-Gift	1 On instrument of gift executed in favour of the State Government. 2 On instruments of gift of land executed in favour of a Goshala registered by the Madhya Pradesh Gopalan Evam Pashudhan Samwardhan Board, Bhopal. 3 On instruments of gift of Agricultural land executed by a person belonging to Scheduled Tribe in favour of his legal heir/heirs during his life time.
14.	Article 37-Indemnity Bond	1 On indemnity bonds to be executed by the guardians of minor dependents of deceased members of the Coal Mines Provident Fund for the purpose of obtaining refund of the fund accumulations.
15.	Article 38 -Lease	1 On lease deeds executed in relation to the constructed sheds and land allotted to unemployed engineers in notified industrial area by the Commerce, Industries and Employment Department for running their own industry stamp duty shall be remitted subject to the following conditions, namely ;- (a) the applicant or all the partners of the firm are either degree or diploma holder engineer; (b) his total income or the income of his partners from all sources shall not exceed One Thousand rupees per month. 2 On instruments of lease executed by Government in favour of Madhya Pradesh State Tourism Corporation in relation to the land on which the units of the said corporation are situated.

		3	On instruments of lease of the Government land executed by the Tourism Department of State of Madhya Pradesh for tourism projects.
		4	On instruments of Lease relating to plot or built up space executed by or on behalf of State Government or any Semi Government Organization or any Government Undertaking, in favour of the Information Technology Industries to be established in the State of Madhya Pradesh.
		5	On lease deed executed in favour of a Fisherman Co-operative Society registered or deemed to be registered under the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961) relating to catch fishes from a reservoir and measuring not more than two thousand hectares in area.
		6	On instruments of lease executed by a Gram Panchayat in favour of fishermen to catch fishes from the reservoir.
		7	On instrument of lease executed by or on behalf of Financial Institutions, Government Agencies, or Private Sector by which space/premises in an Information Technology investment area is transferred in favour of a new unit/expanded unit/ modernized unit of an Information Technology/ Business Process Outsourcing company and is certified to be an Information Technology/Business Process Outsourcing outfit by Information Technology Department or any designated agency notified by them under the Madhya Pradesh Information Technology Investment Policy, 2012 as amended in 2014 or the Madhya Pradesh Business Process Outsourcing/Business Process Management (Business Process Outsourcing/ Business Process Management) Industry Investment Policy, 2014 of the State of Madhya Pradesh.

		Note- This exemption shall be applicable only till the operation of the Madhya Pradesh Information Technology Investment Policy, 2012, as amended in 2014 or the Madhya Pradesh Business Process Outsourcing/Business Process Management (Business Process Outsourcing/ Business Process Management) Industry Investment Policy, 2014 remains. 8 On instruments of amendment of lease executed by the Commerce, Industries and Employment Department of Madhya Pradesh or Madhya Pradesh Audyogik Kendra Vikas Nigam in favour of herbal or ayurved based industry due to change of name of the industry, addition of a partner/ partners, collaboration or its reconstruction, subject to the following conditions, namely :- (a) the industrial unit is situated in an industrial area or industrial growth centre developed by the Government or Madhya Pradesh or Madhya Pradesh Audyogik Kendra Vikas Nigam; and (b) a certificate of eligibility to the effect that the industry is eligible for remission of stamp duty is issued by the Commissioner of Commerce, Industries and Employment Department, Government of Madhya Pradesh. **Note-**This exemption shall be applicable only till the operation of the Madhya Pradesh Industrial Promotion Policy, 2010, as amended in 2012 or the Madhya Pradesh Industrial Promotion Policy, 2014 and its work-plan remains. 9 On instruments of lease executed by the Madhya Pradesh Housing Board, Nagar Vikas Pradhikarans, Madhya Pradesh State Co-operative Housing Federation or any urban Local Body in Madhya Pradesh in favour of a person of Economically Weaker Section as defined and

		specified by the Urban Development and Environment Department from time to time. A certificate from the District Collector to this effect shall have to be produced. The remission of stamp duty shall also be available where the instrument of lease of residential house is executed under the Basic Service For Urban Poor (B.S.U.P.)/ Integrated Housing and Development Program (I.H.S.D.P.) in favour of a person, who surrenders the lease already held by him under the Madhya Pradesh Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam,1984 (No. 15 of 1984) from the Government on the sites under construction by the said agencies. 10 On instrument of amendment of lease of land and sheds in the Industrial Areas and Industrial Growth Centers, executed by or on behalf of the State Government or any undertaking of the State Government, chargeable in reduction to the extent of only the amount of transfer fees set-fourth in the instrument treating it as the amount of market value for the lease: Provided that in each case certificate shall be produced by the parties from the Collector of Stamps of the concerned District, where the land is situated, to the effect that the proper duty has been paid on the instruments on the basis of which the amendment in the lease was permitted by the Government or the concerned undertaking of the Government. **Note-** This exemption shall be applicable only till the operation of the Madhya Pradesh Industrial Promotion Policy, 2010 as amended ill 2012 or the Madhya Pradesh Industrial Promotion Policy, 2014 and its work-plan remains.