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

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Respected Judges,

Madhya Pradesh State Judicial Academy is privileged to have two great legal luminaries at the end of this year.

Shri Justice DipakMisra, Hon'ble Chief Justice of India laid down the foundation stone for the new edifice of Judicial Education – Madhya Pradesh State Judicial Academy at Village Gadheri on 02.12.2017. His Lordship also addressed the entire District Judiciary through video-linkage.

Hon'ble the Chief Justice of India stressed on timely dispensation of justice and guided the Judges on controlling the menace of adjournments. Expressing anguish over the hardship to the litigants due to adjournment sought and granted at the drop of the hat, His Lordship emphasized on the pro-active role of Judges in Justice Dispensation. His Lordship fondly mentioned an incident of a lecture during his Lordship's tenure as Hon'ble Judge Incharge of the MPSJA. The audience was amazed and spellbound, when His Lordship succinctly remembered the incident and the relevant case with exact para number and the citation. The Academy shall remain ever indebted to Hon'ble the Chief Justice of India for continuous blessings, support and encouragement.

Hon'bleShri Justice Dr. M. Rama Jois, Former Chief Justice of Punjab & Haryana High Court and Former Governor of States of Jharkhand and Bihar visited the Academy to deliver address on the subject – ***Necessity of evolving a Swadeshi System of Administration of Justice***. Hon'ble Justice Dr. Rama Jois is an accomplished Jurist and distinguished writer in the field of literature and ancient Indian Jurisprudence, *Dharma* and *Nyaya*. His Lordship's address was webcasted to all the Judges of District Judiciary. Justice Dr. Rama Jois outlined the ancient Indian Jurisprudence and its relevance in present day scenario. We are publishing excerpts of the masterly speech encompassing various aspects of *Dharma, Nyaya*and ancient Indian Jurisprudence.

In the recent past, the offence of adultery u/s 497 of IPC has been a matter of discussion for various reasons. In fact, the adultery, as defined, prevents a married woman from suing her spouse as well as the other woman with whom he has indulged in sexual intercourse. Further, it says that such adulterous woman shall not be punishable as abettor.

In this rapidly changing socio-economic scenario and technology facilitating real time communication, interaction between man and woman has changed dramatically. In a matrimonial relationship "cheating on wife" is growing. When the husband indulges in adulterous relationship with an unmarried or widowed woman, the adultery law has no provision to punish him for such adulterous relationship. Similarly, a woman consenting and involving in such adulterous relationship has complete immunity. A large section of society considers this provision as discriminatory in today's world of equality, equal rights and equal protection by law. Whereas, the other viewpoint considers it positive discrimination in favour of women.

The offence of Adultery is per se an offence against the institution of marriage or the aggrieved husband to be more precise. Justice Dr. M. Rama Jois explained the adultery as defined in ancient Indian Jurisprudence as follows: ***Punishment on both indulging in adultery:***

> स्त्रीपुसयोमिर्थनिभावः सङग्रहणम्।
>
> "Unlawful coming together of a man and women for sexual enjoyment constitutes the offence of Strisangrhana [adultery]. [Mitakshara on Yajnavalkya II-283, Narada Vide SmritiChandrika P-16]
>
> ग्रहमागत्य या नारी प्रलोभ्य स्पर्शनादिना।
> कामयेत्तत्र सा दण्ड्या नरस्यार्धदमः स्मृतः।।
>
> When a woman comes to a man's house and excites his concupiscence by touching him or by like acts, she shall be punished with half the punishment prescribed for men. [Brihaspati P-367-15 (p. 191.16.S)]

Justice Dr. Rama Jois deprecated the adultery law in strong words that it gives a free license to indulge in sexual intercourse outside the wedlock with another woman who is unmarried or a widow and even with a woman whose husband is alive with the consent of the husband. Section 497 of IPC instead of protecting the marriage, permits extra marital relations. Justice Dr. Rama Jois suggested that the constitutional validity of Section 497 IPC needs to be reconsidered.

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

In case of ***Pankajbhai Ramesh bhaiZalavadiya***, explaining the convergence between Order 22 Rule 4 and Order 1 Rule 10 of CPC, the Supreme Court held that in case of death of defendant prior to filing of the suit, his legal representatives can be added as parties under Order 1 Rule 10. Parties should not suffer for non-mentioning of the correct provision of law. Technical rules of procedures cannot be given precedence over substantial justice.

In case of ***Jose Maria Albert Vales,*** the Supreme Court laid down that preliminary inquiry under Section 34 Cr.P.C. is not obligatory. But in cases, where a preliminary inquiry has been made, the same shall be tried as warrant trial instituted on police report.

In case of ***DinubhaiBoghabhaiSolanki,*** the Supreme Court explained the scope of cancellation of bail and denovo trial in detail.

The Supreme Court in the case of ***Mohammed Abdulla Khan*** considered the liability of owner for alleged defamatory content published in the newspaper and held that to constitute an offence u/s 500 of IPC, the owner must be the person who has either made or published the defamatory imputation. Similarly, to constitute an offence u/s 502 of IPC, it must be established that he is not only the owner of news paper but also sold or offered the news papers for sale.

In case of ***Hem Raj,*** the Apex Court clarified that addition on account of future prospect is permissible even in the cases where minimum income is determined on guess work in absence of proof of income.

In this issue, an attempt is also being made to explain the ratio of the judgment in case of ***Selvi J. Jayalalitha***.

In the past two months, the Academy conducted Workshops on – Claim Cases under Motor Vehicles Act, 1988, Negotiable Instruments Act, 1881, Key Issues under Anti-Corruption Laws and Key Issues on recent laws relating to women and children and POCSO Act, 2012 for the Judges of District Judiciary dealing with cases under the said laws. The Academy also conducted two Educational Programmesfor the Advocates.

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

Keep blessing our pursuit for judicial excellence.

I wish all the readers a 'Very Happy New Year'. May the forthcoming year bring all joy and happiness in your lives.

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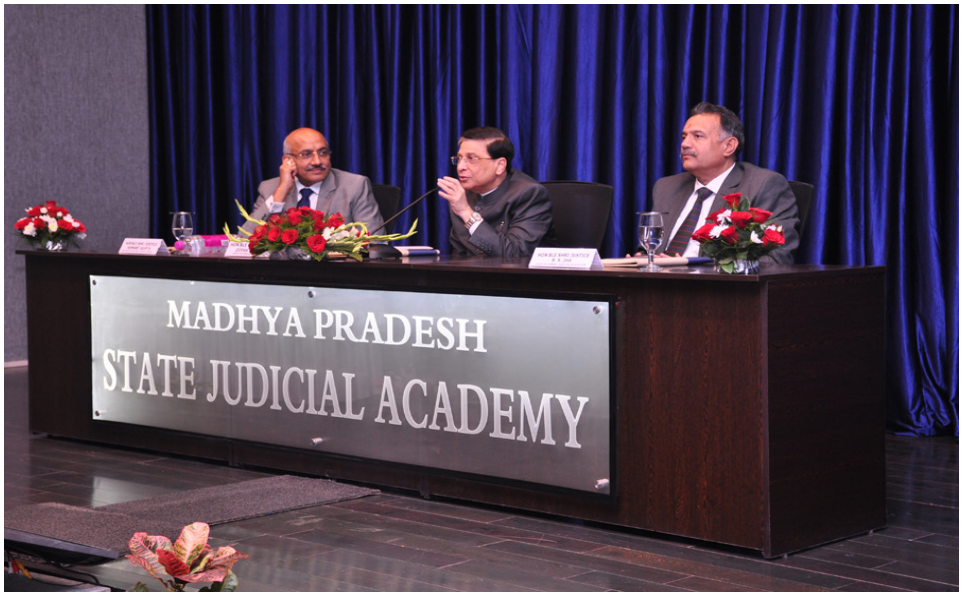
MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Glimpases of Foundation Stone Laying ceremony of MPSJA on 2nd December, 2017 at proposed site by
Hon'ble Mr. Justice Dipak Misra, the Chief Justice of India

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



Address of Hon'ble Mr. Justice Dipak Misra, the Chief Justice of India to the Judges of District Judiciary on the subject – "Role and Responsibilities of Judges" on 2nd December, 2017

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

"iustum talk" on the subject – "Necessity of evolving a Swadeshi System of Administration in Justice" by Hon'ble Shri Justice Dr. Rama Jois, Former Chief Justice of Punjab & Haryana High Court and Former Governor of State of Jharkhand and Bihar.

Workshop on – Claim cases under Motor Vehicles Act, 1988
24.11.2017 & 25.11.2017

HON'BLE SHRI JUSTICE ALOK VERMA DEMITS OFFICE

Hon'ble Shri Justice Alok Verma demitted office on attaining the superannuation.

Born on 28th November, 1955 at Chhindwara, Madhya Pradesh. After obtaining degrees of B.Sc. in the year 1975 from Motilal Vigyan Mahavidhyalaya, Bhopal, M.A. (History) in the year 1977 and LL.B in the year 1978 from Hamidia Arts, Commerce & Law College, Bhopal, joined Madhya Pradesh Judicial Services as Civil Judge Class II on 22nd September, 1981. Was promoted to the post of Additional District & Sessions Judge in the year 1994.

Worked as Competent Authority, M.P. Housing Board, Deputy Secretary, Law & Legislative Affairs Department, Government of M.P., Deputy Registrar, National Judicial Academy, President, District Consumer Forum, Seoni & Balaghat, Commissioner, Departmental Enquiry and also Director Public Prosecution, Bhopal. Also worked in different capacities at Mhow, Narsinghpur, Sehore and Ujjain. Served as District & Sessions Judge, Sheopur and Satna. Was Director, Public Prosecution, Bhopal prior to elevation.

While working as Judge of District Judiciary, passed intermediate level examination conducted by the Institute of Company Secretaries of India, New Delhi (ACS, inter) in the year 1986, obtained degree of LL.M. in 2004 and Diploma on “Star: A Systematic Approach to Mediation Strategies” from Pepperdine University, Malibu, State of California, U.S.A. in 2012 with permission of the High Court.

Took oath as Additional Judge, High Court of Madhya Pradesh on 30.06.2014 and as Permanent Judge on 24.04.2017.

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

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PART – I

SALIENT ASPECTS OF BHARATIYA CULTURAL VALUES AND LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM

[VYAVAHARA DHARMA AND RAJA DHARMA]

*(Extracts from the lecture delivered by **Hon'ble Shri Justice M. Rama Jois,** Former Chief Justice, High Court of Punjab & Haryana, Former Governor of the States of Jharkhand & Bihar and Former Member of Parliament (Rajya Sabha) on 11th November, 2017 in the Conference Hall, High Court of Madhya Pradesh.)*

I commence this lecture by quoting the important statement made by Bhagwati, J of the Supreme Court in his judgment in ***Pradeep Kumar Jain Vs. Union of India*** which reads :-

> "It is an interesting fact of history that India was forged into a nation neither on account of common language nor on account of the continued existence of a single political regime over its territories but on account of a ***common culture evolved over the centuries.*** It is cultural unity something more fundamental and enduring than any other bond which may unite the people of a ***country together which has welded the people of this country into a nation [AIR 1984 SC 1420]***."

The freedom struggle was so strong, turbulent and countrywide that it was no longer possible for the Britishers to continue to rule. Therefore, Constituent Assembly was formed for the purpose of declaring Indian independence. Dr. Rajendra Prasad was elected as permanent Chairman. Jawaharlal Nehru moved the objective resolution on 13th December 1946 for transferring the power to Indians and was passed. Significant portion of the resolution reads :-

> 8. "This ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind".

Pursuant to the resolution, India became independent and sovereign State with effect from 15th August 1947.

ORIGIN OF STATE AND ITS PURPOSE

The origin of the State (*Rajya*) as well as the office of the king and the evolving of *Raja Dharma* - the law conferring power on the king to maintain the rule of law and the directives for the exercise of power has been explained as early as in Shantiparva of the Mahabharata.

The Shanthiparva of Mahabharata incorporates Bhishma's authoritative exposition of the origin and purpose of the state, the rule of law, the institution of

kingship and the duties and the powers of the king. Great stress is laid on the personal character and qualities which a king in whom vast political power is vested must possess for the proper and effective discharge of his functions. Rajadharma, so clearly laid out is vast like an ocean, consists of invaluable and eternal principles worthy of emulation under any system of polity and by all persons exercising political power. The Mahabharata discourse on the topic of Rajadharma discloses that in the very early periods of civilization in this country great importance was attached to Dharma and it was self-imposed by individuals. Consequently, everyone was acting according to Dharma and there was no necessity of any authority to compel obedience to the laws. The existence of such an ideal 'Stateless society' is graphically described in the following Samskritshloka:

नैवराज्यं न राजा सीन्नदण्डोन चदाण्डिकः।
धर्मेणैवप्रजाः सर्वारक्षन्ति स्म परस्परम्।।

There was neither kingdom nor the king, neither punishment nor the guilty to be punished. People were acting according to Dharma and thereby protecting one another. [*Mahabharata Shanti Parva 54-14*]

HIGHEST PRIORITY FOR EDUCATION

It is a matter of fact of our excellent history from times immemorial that highest importance was given to ***Vidya*** [Education].

However, it so happened that when our Constitution was drafted and approved by the Constituent Assembly, though several fundamental rights were included in Part-III of the Constitution, education did not find a place there, though it was included in the Directive Principles of State Policy. However, the question whether the education constitutes a fundamental right under the Constitution came up for consideration before a Constitution Bench of the Supreme Court. When large number of Writ Petitions were filed on this aspect, the matters were referred to a Constitution Bench of five judges in ***Unnikrishnan's case*** *[1993 (1) SCC 645]*. I had the opportunity of arguing for the petitioners in the said case. To the question asked by the Court that on what basis I was saying that education was a fundamental right, I submitted that one Samskritshloka of Bhartruhari who flourished around 7th century would be sufficient to declare that education was a fundamental right. In support of my submission I referred to the following SamskritShloka of Bhartruhari, king of Ujjain in NeetiShataka authored by him, which reads :-

विद्यानामनरस्य रूपमधिकंप्रचछन्नपुसं धनं
विद्याभोगकरी यशस्सुखकरीविद्यागुरूणांगुरूः।
विद्याबंधुजनोंविदेशगमनेविद्यापरादेवता
विद्याराजसुपूजिता न तु धनंविद्याविहीनः पशुः।।

Education is the special manifestation of man;
Education is the treasure which can be preserved without fear of loss;

Education secures material pleasure, happiness and fame;
Education is the teacher of the teacher;
Education is one's friend when one goes abroad
Education is God incarnate;
Education secures honour at the hands of the State, not money;
A man without education is equal to animal.

The Constitution Bench of the Supreme Court held after quoting the above Samskritshloka that what more was necessary to say that education was a fundamental right. Pursuant to the said judgment, education has become a fundamental right and Article 21-A was subsequently added by the Parliament making education a fundamental right by inserting Article 21-A by 86th amendment Act of the Constitution as one of the fundamental rights.

In fact as that Samskritshloka written by Birthruhari in 7th Century indicates that *"Vidya"* [Education] has been given the highest place in Bharat from times immemorial.

Subject of National curriculum frame work for school education came up for consideration before the Supreme Court of India in ***Aruna Roy case*** *[2002 (7) SCC 368, at pages 388 and 389]*. In the said judgment the Supreme Court has referred to the report of S.B. Chawan Committee at para 29 of the judgment. Relevant portion is at page 389, para 10 of the recommendations of S.B. Chawan Committee which reads :-

> "In ancient times in gurukulas, emphasis used to be primarily on building the character of a student. Today, right from the schools up to the professional colleges, emphasis is on acquiring techniques and not values. We seem to have forgotten that skills acquired on computers tend to become outdated after some time but values remain forever. In other words, the present-day education is nothing but an information transmission process. Our educational system aims at only information based knowledge and the holistic views turning the student into a perfect human being and a useful member of society has been completely set aside."
>
> "Truth (*Satya*), righteous conduct (*Dharma*), peace (*Shanti*), love (*Prem*) and non-violence (*Ahimsa*) are the core universal values which can be identified as the foundation stone on which the value based education programme can be built up. These five are indeed universal values and respectively represent the five domains of human personality- intellectual, physical, emotional, psychological and spiritual. They also are correspondingly correlated with the five major

Objectives of education namely, knowledge, skill, balance, vision and identity."

[para-7 and 8]

Important aspect of education in the real sense of the term means providing good Samskara to wit building of character. The expression Samskara has been explained by SabaraBhashyathus :-

संस्कारोनाम स भवति यस्मिन् जातेपदार्थिभवति योग्यः कस्यचिदर्थस्य।।

"Samskara is that process undergoing which a person or thing becomes fit for the purpose for which he or it is meant". [*SabaraBhasya on Jaimini-III, Vol.I, p 338*].

DISCUSSION ON MORAL DEGRADATION

In order to impress upon every individual as to how he should conduct himself in life is given in Taittiriyopanishad at the end of Shikshavalli, (Ch. 1, Lesson-11). Excerpts from it are reproduced below, which give an idea about the good conduct expected from educated persons throughout their life.

सत्यंवद। धर्मंचर।

सत्यान्नप्रमदितव्यम्। धर्मान्नप्रमदितव्यम्।

मातदेवोभव। पितदेवोभव। आचार्यदेवोभव। अतिथिदेवोभव।

यान्यनवद्यानिकर्माणि। तानिसेवितव्यानि। नोइतराणि।

एष आदेशः। एष उपदेशः एतदनुशासनम्।

Speak the truth; follow the prescribed conduct;
Do not fail to pay attention to truth;
Never fail to perform duty;
Do not disregard what is proper and good;
Treat your Mother, Father and Teacher as equal to God;
So also, treat your guest as God;
Those acts that are irreproachable alone are to be performed,
and not those that are forbidden;
This is the directive. This is the advice. This is the discipline
to be observed throughout life.

A reading of every one of the directive given to students form inseparable part of Dharma and is highly inspiring and it concludes with the statement that it is the advice (*Upadehsa*) and it is the directive (*Adesha*). It is not only a specific injunction to an outgoing student but also a direction to every human being. The observance of these directives is the duty of every human being, obedience to which protects the Human Rights of all. This is the concept and purpose of *Bharatiya Education.*

DUTY TOWARDS OTHERS

The unique method evolved by the great thinkers who moulded the civilization and culture of this land was to secure the rights to every individuals by creating a corresponding duty in other individuals. This was for the reason that they considered that sense of right always emanates from selfishness whereas the sense of duty always proceeds from selflessness. In our culture and civilization, primary importance attached was to duty. Our ancestors established a duty based society in which the right given to an individual was the right to perform his duty. This position is declared in the following verse of the Hairsbreadths :-

कर्मण्येवाधिकारस्ते।

Your right (Adhikara) is to perform your duty

Therefore, instead of making right as the foundation of social life and establishing a right based society, the ancient philosophers of this land preferred to establish a duty-based society, where the right given to an individual is the right to perform his duty.

SUPREMACY OF DHARMA

'Dharma is a Sanskrit expression of the widest import. There is no corresponding word in any other language. It would also be futile to attempt to give any definition of the word. It can only be explained. It has a wide variety of meanings. A few of them would enable us to understand the range of that expression. For instance, the word 'Dharma' is used to mean Justice (Nyaya), what is right in a given circumstance, moral values of life, pious obligations of individuals, righteous conduct in every sphere of activity, being helpful to other living beings, giving charity to individuals in need of it or to a public cause or alms to the needy, natural qualities or characteristics or properties of living beings and things, duty and law as also constitutional law. The supreme position assigned to Dharma is incorporated in Taittiriyopanishad as follows :-

धर्मोविश्वस्य जगतः प्रतिष्ठा
लेके धर्मिष्ठंप्रजाउपसर्पन्ति।
धर्मेणपापमपनुदति।
धर्मेसर्वंप्रतिष्ठितम्।
तस्माद्धर्मंपरमंवदन्ति।

Dharma constitutes the foundation of all affairs in the World. People respect those who adhere to Dharma. Dharma insulates (Man) against sinful thoughts. Everything in this world is founded on Dharma. Dharma therefore, is considered supreme. [Taittiriyopanishad – Jnanasandhana Nirupanam – vide SasvaraVedamantra p. 128]

तदेतत्-क्षत्रस्य क्षत्रं यद्धर्मः।

तस्माद्धर्मात्परंनास्ति।

अथोअबलीयान् बलीयांसमाशंसते धर्मेण।

यथाराज्ञा एवम्।।

The law (Dharma) is the king of kings. No one is superior to the law (Dharma) ; The law (Dharma) aided by the power of the king enables the weak to prevail over the strong. [Brihadaranyakopanishad 1-4-14] [Courts of India, p-27]

The Vedas, the Smritis, good conduct or approved usage, what is agreeable to conscience proceeding from good intention, are the sources of law. [Yajnavalkya 1-7].

FIVE FUNDAMENTAL DUTIES OF THE STATE

Having realized that existence of an authority to compel obedience to Dharma by the People was essential, ours the most ancient Nation evolved and developed the oldest legal, judicial and constitutional system in the World to wit *Vyavahara Dharma* and *Raja Dharma.* Fundamental duties of the State (Rajya) headed by a King, Raja Dharma which is equal to our present Constitution is very meaningfully incorporated in Atrisamhita :-

दुष्टस्य दण्डः सुजनस्य पूजान्यायेनकोषस्य च संप्रवृद्धिः।

अपक्षपातो ऽर्थिषुराष्ट्ररक्षापश्चैव यज्ञाः कथितानृपाणाम्।।

To punish the wicked, to honour (protect) the good, to enrich the treasury by just methods, to be impartial towards the litigants and to protect the kingdom -these are the five yajnas (selfless duties) to be performed by a king (State). [L & CH p. 601]

WELFARE OF PEOPLE THE HIGHEST CONCERN OF THE STATE

प्रजासुखेसुखंराज्ञः प्रजानां च हितेहितम्।

नात्मप्रियंहितंराज्ञः प्रजानांतुप्रियंहितम्।।

In the happiness of the subjects lies the king's happiness, in their welfare his welfare; what pleases himself the king shall not consider good but whatever pleases his subjects the king shall consider good. [Kautilya p. 39 (p. 428). [L & CH 607].

PROTECTION OF PEOPLE, HIGHEST DHARMA OF KINGS

नपस्य परमो धर्मः प्रजानांपरिपालनम्।

दुष्टिनिग्रहणंनित्यं न नीत्यातेविनाह्यमे।।

The highest Dharma of a king is the protection and welfare of the subjects and putting down the wicked. [Shukraniti 27-28]. [L & CH 609].

This shloka clearly indicates the important role of the Government in the administration of State.

SAMANATA (EQUALITY)

The *Vedas* constituted the primordial source of Dharma. The Charter of Equality (*Samanata*) incorporated in the Rigveda, the most ancient of the Vedas, and in the Atharvanaveda are worth quoting:

अज्येष्ठासोअकनिष्ठास एते

संभ्रातरोवावृधुः सौभगाय।।

No one is superior (Ajyestaso) or inferior (Akanishtasa). All are brothers (EteBhrataraha). All should strive for the interest of all and should progress collectively.

> Article 1 of the Universal Declaration of human rights reads thus:
> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

In view of the above Vedic declarations, the various discriminatory provisions in the *Smritis* and other customs have to be regarded as invalid being opposed to the *Shruti* and set aside as inconsistent with *Dharma*, which alone is of eternal value, just as in modern constitutional law, provisions of laws enacted by legislatures are set aside if they are inconsistent with the Constitution. In fact expressly provided as follows:-

श्रृतिस्मृतिपुराणानांविरोधो यत्र दृश्यते।

तत्र श्रौतंप्रमाणन्तुतयोद्र्वैधेस्मतिर्त्वरा

*Whenever there is conflict between the provisions in the Vedas (**shruti**) and those in **smritis or puranas** (including custom or usage) what is stated in the veda alone should be taken as authority.*

Our constitution has discarded undesirable customs and practices and has re-established Dharma in the real sense of that expression by tabooing the aforesaid social evils and conferring the right to equality (vide Articles 14, 15 and 16) and abolishes untouchability (vide Article 17).

It is therefore, the duty or Dharma of every individual to obey these provisions in letter and spirit in thought, word and deed which will strengthen the feeling of fraternity and ensure the dignity of individuals.

Administration of State according to law including judicial system [***Raja Dharma***] was one of the most important and obligatory functions of a King [***State***]. The ancient texts on the topic stressed that the very object with which the institution of 'Kingship' was conceived and brought into existence was for the enforcement of Dharma by the use of the might of the King [State] and also to punish individuals for contravention of Dharma and to give protection and relief to those who were subjected to injury and in whose favour Dharma [law] lay. The

smritis greatly emphasized that it was the responsibility of the King to protect the people through proper and impartial administration of justice and that alone could bring peace, happiness and prosperity to the King as well to the people. Any indifference towards this important function of the king, the Smritis cautioned, would bring calamity to the State and to the King himself and to the people as well.

Ancient India bestowed great attention in evolving a sound administrative system of State including constitution of legal, judicial and constitutional system and administration of justice. The provisions made on the topic including institution of kingship, council of ministers, the description of the highest court to be located at the capital city, of lower courts under royal authority, and of people's courts recognised as having the power to decide cases, the qualifications of as well as quality of judges and other officers of the Court were prescribed. Appointment of experts as assessors to assist the court on technical questions, whenever necessary, was provided for. Law of procedure and of evidence were laid down. A code of conduct for judges and others concerned in the administration of justice and provisions for punishment of officers committing offences in the course of the administration of justice, had also been provided.

The plea that we should incorporate our concepts in the sphere of judicial, constitutional and legal system, does not mean that we should not enrich our knowledge by the legal, judicial and constitutional system of other countries. In fact from ancient times our slogan has been:-

''आनोभद्राः क्रतवो यन्तुविश्रवतः।''

"Let noble thoughts come to us from every side". [Rigveda 1-879-i].

Justice S.S. Dhavan, a former Judge of Allahabad High Court in his enlightening paper entitled "WHY STUDY INDIAN JURISPRUDENCE AT ALL" [1966] has forcefully broughtforth this aspect. I consider it appropriate to quote what he has stated on this aspect. The relevant portion of the article reads:-

> "I consider that the teaching of Indian jurisprudence in our law faculties is essential for the healthy development of our judicial process ..... Today, a law student in India is virtually ignorant of Indian jurisprudence. He does not know as I did not know – that the Indian Juridical system and the Indian judiciary have the oldest pedigree of any existing judicial system in the World, that the "dharmasthiyam" part of Kautilya'sArthasastra is, in the words of present Chief Justice of India, "one of the earliest secular codes of law in the World", and the high level at which legal and judicial principles were discussed, the precision with which statements of law are made, and the absolutely secular atmosphere which it breathes throughout, give it a place of

pride in the history of legal literature". [Excerpts from the paper presented by him on "Secularism: its implication for law and life in India at a Symposium organized by the Indian Law Institute, New Delhi in November 1965]."

Similarly, for historical reasons, I like others did not know anything about the existence of an established legal, judicial and constitutional system in Bharat. It is only after I became a Professor in Law at BMS Law College, Bangalure in 1969 at the instance of E.S. Venkataramaiah, who was then the Principal of that Private Law College, who later became a High Court Judge, Supreme Court Judge and also the Chief Justice of India and I became a Judge of the High Court of Mysore redesignated as the High Court of Karnataka, I secured the benefit of the library comprising of vast literature on our ancient legal and judicial system.

ORIGIN OF VYAVAHARA [LAW SUITS]

धर्मैकतानाः पुरूषास्तदासन् सत्यवादिनः।

तदा न व्यवहारोभून्न द्वेषोनापिमत्सरः।।

नष्टे धर्मेमनुश्याणांव्यवहारः प्रवर्तते।

द्रष्टा च व्यवहाराणांराजादण्डधरः स्मृतः।।

*"When people were of Dharma abiding nature and truthful there existed neither hatred nor envy nor any legal disputes. Practice of Dharma having declined in mankind, law-suits [**Vyavahara**] were invented and the king was entrusted with the power to decide law-suits as he had the sanction of Dharma to enforce obedience to, and to order punishment for disobedience of, Dharma. [Nar.P-5 1-2, Dharmakosa p-3].*

In the above verses of Narada, the cause for the coming into existence of law-suits has been explained. They indicate that as the tendency to obey rules of Dharma voluntarily, which is said to have been in existence at an earlier point of time, no longer continued to prevail among individuals and violations became frequent, the society invented the machinery and procedure for enforcement of law. This situation lead to the necessity of codification. Consequently law regulating to civil rights and liabilities and law declaring offences and prescribing penalties on all important matters were codified and arranged topicwise from time to time by eminent authors.

MEANING OF VYAVAHARA

Vyavahara means proceedings in a court of law between two parties in which the violation of Dharma is established by effort.

The word *Vyavahara* also came to be used to mean a 'legal proceeding'. This term is popular and in vogue even to this day at common parlance. The branch or division of law which regulated the rights and liabilities of parties in a legal proceeding was therefore called ***Vyavaharapad.***

INSTITUTION OF SUIT OR LODGING OF COMPLAINT

स्वधनस्य यथाप्राप्तिः परधर्मस्य वर्जनम्।

न्यायेनक्रियते यत्र व्यवहारः स उच्यते।।

Vyavahara is a proceeding in which the taking away of one's wealth by another and the avoidance of Dharma by individuals is prevented by means of truth. [Harita Smriti Chandrika p-1-2]

CLASSIFICATION INTO CIVIL AND CRIMINAL

In most of the ancient jurisprudences, there was no demarcation between civil and criminal wrongs. The criminal offences were treated as tort. As a result, a person could be punished for criminal offences committed by him, if only some one related to him lodged a complaint. But it was not so in ancient India. As regards a civil wrong, only the injured party could lodge a plaint i.e., one who had locus standi. As regards offences any private informant or an officer of the State could initiate. In either case, it was the duty of the State to hold trial and punish the accused found guilty.

'' द्विपदोव्यवहारः स्यात् धनहिंसासमुद्भवः ।

द्विससकोऽर्थमूलस्तुहिंसामूलच्श्रतुर्विधः ।। '

"There are two branches of Vyavahara – one arising out of wealth and another out of violence. [Brihaspati Smriti P. 283-4 (p.2.S)]

EXCELLENT GUIDANCE FOR AN IDEAL JUDICIARY IN ANCIENT BHARATIYA LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM

In Rajadharma, the king was advised to appoint suitable persons as judges, indicating therein the qualities and the qualification of a person to be appointed as a judge.

QUALIFICATION AND APPOINTMENT OF JUDGES

व्यवहारेषु धर्मषु योक्तव्याश्चबहुश्रताः।

प्रमाणज्ञामहीपालन्यायशास्त्रावलम्बिनः।।

वेदार्थतत्त्वविद् राजन् तर्कशास्त्रबहुश्रुताः।।

मन्त्रे च व्यवहारे च नियोक्तव्याविजानता।।

*"A person who is (i) well versed in **Vyavahara** [laws regulating judicial proceedings] and Dharma [law on all topics], (ii) a Bahushruta [**profound scholar**] (iii) a **Pramanajna** [well versed in the law of evidence], (iv) **Nyayasastravalambinah** [law abiding] and (v) has fully studied the vedas and **Tarka** [logic] should be appointed to carry on the administration of justice. [**Mahabharata Shanti Parva 24-18**]. [Courts of India, p-40].*

The judges were cautioned that they should avoid five causes which would constitute the basis for attributing reasonable likelihood of bias against them.

''पक्षपाताधिरोपस्य कारणानि च पञ्चवै।
रागलोभभयद्वेषावादिनोश्चरह१श्रुतिः।।''

There are five causes which give rise to the charge of partiality [against the judge]. They are:

[i] ***Raga*** *– Exhibiting affection in favour of a party to a litigation by speech or conduct in the Court or outside.*

[ii] ***Lobha*** *– Being greedy, which creates an impression in the mind of the litigant public that he is amenable to receive bribes, pecuniary or otherwise.*

[iii] ***Bhaya*** *– [Fear] Afraid to deliver judgment against powerful parties or Government.*

[iv] ***Dwesha*** *– [Ill-will] Giving an impression that he has enmity against one of the party to the litigation by his conduct in the Court or outside.*

[v] ***Vadinoscharahashruthi*** *– A judge meeting and hearing a party to a case secretly, which in the present day context includes meeting of their Advocates secretly. [Shukraniti IV-5-14,15]*

Every one of the above circumstances or causes indicated in Shukraniti which would furnish a valid ground to level charges of partiality against a Judge, were intended to warn the judges not to give room for these causes which would destroy the faith of the people on the independent and impartial judiciary. This warning is worthy to be borne in mind by all judges and members of Tribunals who are conferred with power to decide cases.

The King and Judges were also cautioned against the delay in disposal of cases. *Katyayana Smriti* [339-40] incorporated its importance in the following verse:-

नकालहरणंकार्यराज्ञासाक्षिप्रभाषणे।
महान् दोषोभवेत्कालाद् धर्मव्यावृतिलक्षणः।।

"The king should not delay in hearing cases and examining the witnesses. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses. [Katyayana-339-340]. [Courts of India , p-40]

MANNER OF WRITING JUDGMENT [JAYAPATRA]

नपस्य सकलंपूर्ववादं च सोत्तरंसक्रिय तथा।
सावधारणकंचैवतज्ज्ञेयंजयपत्रकम्।।

"A document which incorporates the contents of the plaint, the answer, the gist of the trial, the consideration given to them and the decision thereon, is called Jayapatra. [Narada Smriti-307-19; Dharmakosa-357].

CONTENTS OF JAYAPATRA

पूर्वोत्तरेक्रियापादंप्रकाणंतत्वरीक्षणम्।

निगदंस्मृतिवाक्यं च यथासभ्यंविनिश्चितम्

एतत्सर्वंसमासेनजयपत्रेऽभिलेखयेत्।।

***"Jayapatra** [document of victory] is one which incorporates (I) a brief statement of the plaint and the answer (ii) the evidence adduced by the parties; (iii) the discussions on the issues involved; (iv) the consideration of the arguments advanced by the parties; (v) the law applicable to the case; (vi) the opinion of Sabhyas (vii) the decision given by the Chief Jutice and other judges; and (viii) the royal seal". [Vyasa, Dharmakosa -376]. [Brihaspati Sutra, 298, 34 (p. 64-26 S).*

NO OFFENDER SHOULD REMAIN UNPUNISHED

Another most important guideline regarding the imposition of penalty on wrong doers was to the following effect.

पिताचार्यः सुहृन्माताभार्यापुत्रः पुरोहितः।

नादण्ड्योनामराज्ञोऽस्तियः स्वधर्मे न तिष्ठति।।

*"In criminal cases, the ruler should not leave an offender unpunished, whether the guilty is father, or a teacher, or a friend, or mother, or wife, or a son, or a domestic priest. If the guilty are not punished there will be no rule of law." [**Manu Smriti VIII-335**]*

In view of the definition of law given in ***Brihadaranyakopanishad,*** which declared that the law is the king of kings and no one is superior to law [Dharma], even the king was liable to be punished for any offence committed by him.

The idealism placed before the judges in the provisions of ***'Dharma Shastras'*** regarding administration of justice are such which are of eternal value and it is only by keeping those ideals uppermost in the minds of judges and acting in conformity with it, they would be able to sustain the implicit faith and confidence of the people in the judiciary which constitutes one of the main pillars of the Constitution of India and fulfill the role assigned to the judiciary by the Constitution.

SPECIAL PROVISION FOR PROTECTION OF WOMEN

Undoubtedly the right to equality and all other human rights are all applicable to men and women, equally. However, the ancient Bharatiya thinkers considered that having due regard to the special attributes of womanhood, they require special protection for it is undisputable that women are vulnerable to attack by men with evil propensities, the cultural value evolved was to treat mother as God and to treat every woman, except in her relationship to a man as wife, as equal to mother.

Hitopadesha of Narayana is a compilation of code of conduct. In that in his inimitable style, Narayana lays down the following directive.

मातृवत्परदारेषुपरद्रव्येषुलोष्टवत्।

आत्मवत्सर्वभूतेषु यः पश्यति स पण्डितः।।

A person who treats every woman other than his wife as equal to his own mother, regards wealth or money belonging to another person as equal to lump of mud, regards all living beings as his own atma, can be regarded as really educated person.

Exception to women's property from law of adverse possession

The provision of ancient Indian law regarding perfecting title to an immovable property by adverse possession was very strict, but was made inapplicable in respect of property belonging to women, State and Temple.

नभोगंकल्पयेत्स्त्रीषुदेवराजधनेषुच।

"No plea of adverse possession is tenable in respect of property belonging to woman, State and Temple". [Katyayana 330]

Death sentence for rape of women in custody

संरूद्धस्य वा तत्रैव घातः। तदेवाघ्यक्षेणगष्हीतायामार्यायां। विद्यात्।।

Capital sentence should be imposed for offence of rape committed against a women arrested by an officer of the State [vide Kautilya'sArthasastra P-256] [L & CH 390]

Under our Constitution, clause (3) of Article 15 empowers the State to make special provisions in favour of women, but no such provision has been made. This provision is also worthy of emulation. Hence, a general suitable provision on the above lines regarding women offenders should be introduced in the Penal Code.

DHARMA OF HUSBAND AND WIFE – FAMILY LIFE

The relationship between Husband and wife through which a family comes into existence has been considered as the most important and sacred in Hindu way of life. The important provisions concerning this aspect are as below:-

अन्योन्यस्याव्यभीचारोंभवेदामरणान्तिकः।

एष धर्मः समासेन ज्ञेयः स्त्रीपुंसयोः परः।।

Let mutual fidelity continue until death. This is the summary of the highest law for the husband and wife. [Manu Smriti IX 101] [page 258 of L and C. H]

The above verses of Manu Smriti contain the quintessence of the philosophy inherent in the Hindu concept of marriage and, irrespective of the changes in law brought about, is still inspiring substantial number of husbands and wives and, in all probability, will continue to inspire many future generations.

ननिष्क्रयविसर्गाभ्यांभर्तुर्भार्याविमुच्यते।

एवं धर्मविजानीमः प्राक्प्रजापतिनिर्मितम्।। 46।।

By sale or separation (abandonment) the husband and wife can not be liberated (severed) from each other; we know this law to have been originally made by the creator of the universe. [Manu Smriti Ch. IX-46]

DOCTRINE OF TRIVARGA

The Doctrine of Trivarga comprising *"DHARMA"*, *"ARTHA"*, and *"KAMA"* was evolved as the sum and substance of Bharatiya philosophy of life. The doctrine was invented to strike a reasonable balance between interests of the individual and the public interest.

परित्यजेदर्थकामौ यौस्यातां धर्मवर्जितौ।

The desire [kama] and material wealth [artha] must be rejected, if they are contrary to Dharma. [Manu Smriti IV 176] [Courts of India, p-25]

This doctrine means that proper and legitimate means of acquisition of Arthai.e., material wealth and pleasure must regulate the desire [***Kama***] as well as the means of acquiring material pleasure [***Artha***]. This fundamental principle manifests itself through various provisions meant to sustain the life of the individual and the Society. It is for this reason, that all the works on ***'Dharma'*** declare with one voice that ***'Trivarga'*** sustains the World.

Justice V.R. Krishna Iyer in his Foreword to my book ***"Trivarga"*** has eulogized ***Trivarga*** in his inimitable language thus:-

> "Reject wealth (***artha***) and desires (***kama***) which are contrary to Dharma (***righteous code of conduct***)" namely "Ahimsa (non-violence), Satya (***truthfulness***), Asteya (not acquiring illegitimate wealth), Shaucham (***purity***) and Indriyanigraha (***control of senses***) are, in brief, the common dharma for all the Varnas."

The trinity of fundamentals – ***Dharma, Artha, Kama*** *– which constitutes the constellation is collectively expressed as* ***Trivarga***.

The glorious epics, the ***Manusmriti, Kautilya's Artha Shastra*** and other classics governed the ruler and the ruled. Indeed, the rules of Dharma govern every sphere of activity, every profession, every avocation. The doctrine of Trivarga is an enduring system of values holding good in the social, political domestic and international planes of human business.

On consideration of excellent principles of administration of justice including procedural law, the book Courts of India – Past to Present published by the Supreme Court rightly states as follows:-

> "All unique principles, well-thought out procedures and best practices, some of which surpass the modern legal system, made the Hindu Court System sustain and serve for a couple of millenniums" (Courts of India p, 32)

The salient aspects of ***Dharma and Rajadharma*** makes every Bharatiya proud of his heritage and inspires him not only to follow them but also to improve and remain as a model to the World at large.

It is for this reason, in Part-I of this lecture, I have indicated the salient aspects of Bharatiya Cultural Values and Legal, Judicial and Constitutional System [***Vyavahara Dharma and Raja Dharma***] which will enable the present or future legislature either at State level or at Union level to formulate a Swadeshi Jurisprudence.

SYSTEM OF APPEAL FROM SINGLE JUDGE TO TWO OTHER JUDGES OF HIGH COURT

In the Private Member's bill, I had also proposed for reconstitution of the High Courts after abolishing what are called letters patent appeals which came into existence during the British period which provided for an appeal in ordinary in civil and criminal matters from the decision of the single judge of the High Court to the Division Bench of the same High Court, as a result, there has been difference in original and appellate jurisdiction of the High Courts. They are:-

[1] Some have original, civil jurisdiction, others do not,

[2] There exist letters patent appeals from the decision of the High Court to the same High Court i.e., from the decision rendered by a single judge of a High Court to two judges of the same Court in some of the High courts, which are called intra-court appeals.

[3] This is opposed to very concept of a appeal which means approaching a superior Court against the decision of the lower Courts. The Supreme Court in the case of ***Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat, AIR 1970 SC 1***, has clearly stated what does an appeal means thus:

> " The right of appeal is one of entering in superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of relation of superior and inferior Court and the power on the part of the former to review decisions of the latter."

On this aspect we have the earliest dissenting judgment by ***Justice Subodhranjan Das Gupta reported in AIR 1953 Cal. 433***, disagreeing with the majority and holding that there can be no appeal against the judgment of a single judge under Article 226 of the Constitution as single judge of High Court is no inferior court.

For these reasons, I make the following suggestions:-

The existing provision in some of the High Courts providing an appeal from the decision of the single Judge of the High Court to two other judges of the High Court shall be abolished.

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CRUELTY AS DEFINED UNDER SECTION 498-A IPC - CONCEPT AND DIMENSIONS

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"यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः"

(Where women is worshipped, there is abode of God)

Introduction :

Section 498-A has been engrafted into the Indian Penal Code in a situation where the national conscience was disturbed by the intensity and volume of instances of wife beating, bride burning and cruelty of different degrees and variations directed against women that necessitated a law to punish such acts. Whereas religion and custom prescribed marriage to be a bond founded on love and the concept of sharing, local experience indicated, in some strata of society particularly, that it had been transformed into a licence to ill-treat. Law as an instrument of fostering social order is also required to be used as a channel for doing good and conversely for curbing evil. (See: ***State of Maharashtra v. Vasant Shankar Mhasane, 1993 Cri. L.J. 1134***)

Cruelty :

Black's Law Dictionary defines *'cruelty'* as *"the intentional and malicious infliction of mental or physical suffering on a living creature particularly human beings"*.

Further, as per the New Webster's Dictionary (College Edition-1988) the meaning of expression ***'Cruel'*** is :

> *"Disposed to give pain to others in body or mind, destitute of pity, compassion, or kindness; applied to persons; exhibiting or proceeding from cruelty, causing pain, grief or distress; inhuman, tormenting, vexing."*

The above dictionary meaning of cruelty is in common parlance. As far as legal meaning of ***cruelty*** is concerned, a deep though has to be given since cruelty is covered in both civil and criminal law. Both in England and as well as in India the accepted legal meaning of 'cruelty' is the expression as opined in ***Russell v. Russell (1897) AC 395,*** as *"Conduct of such character as to have caused danger to life, limb or health, bodily or mentally or as to give rise to a reasonable apprehension of such danger"*

Section 498-A of the IPC speaks of cruelty to wife by husband or the relatives of the husband. The section has two limbs. The first limb of this Section provides for the punishment for the person, namely the husband or the relative of the husband of the woman who subjects the woman to cruelty. The second limb is the Explanation appended to this section, which makes it clear as to what meaning would be given to the term ***'cruelty'***.

Cruelty has been defined in Indian Penal Code in the Explanation to Section 498-A as *"Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman whether such harassment is with a view to coercing her, or any person related to her, to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."*

The expression ***'cruelty'*** takes within its sweep both mental and physical agony and torture. The concept of 'cruelty' varies from place to place and from individual to individual and according to the social and economic status of the person involved. Whether the act complained of was an act of cruelty, has to be determined from the wholesome appreciation of facts, circumstances and relationship between the parties. Therefore, to decide the question of 'cruelty' the relevant facts are the matrimonial relationship between the husband and wife, their cultural and temperamental status in life, state of health (mental & physical), their interactions in their daily life and their socio-educational scenario. Views of this nature are found in the judgment of ***Sarojakshan Shankaran Nayar v. State of Maharashtra, 1995 Cri. L.J. 340*** and ***State of Karnataka v. H.S. Srinivasa, 1996 Cri.L.J. 3103***.

A single act of cruelty of a person can fall within the mischief of various offences. He can be guilty under Section 498-A, under Section 306 and that very act can further bring within the mischief under Section 304-B I.P.C. Cruelty is also a ground of divorce in civil law. Therefore, it is very important to understand the concept of cruelty in criminal law. An attempt is being made to understand the concept of cruelty in criminal law and to differentiate between wilful conduct and harassment as defined in Explanation (a) and Explanation (b) of Section 498-A IPC

Cruelty under section 498-A of I.P.C.:

A new dimension has been given to the concept of cruelty under Section 498-A of the Indian Penal Code. The cruelty as contemplated under Section 498-A, denotes the state of wilful conduct, which is painful and distressing to the victim.

In ***D. Surender Reddy v. State of A.P., 2002 Cri.L.J. 2611,*** the High Court of Andhra Pradesh has expressed their view on cruelty as:

> *"The cruelty as contemplated under section 498-A of the Indian Penal Code denotes the state of conduct, which is painful and distressing to the victim. There is a state of conduct by the accused to the victim, which can be attributed to be painful or distressing, which constitutes an offence under Section 498-A for subjecting her to cruelty."*

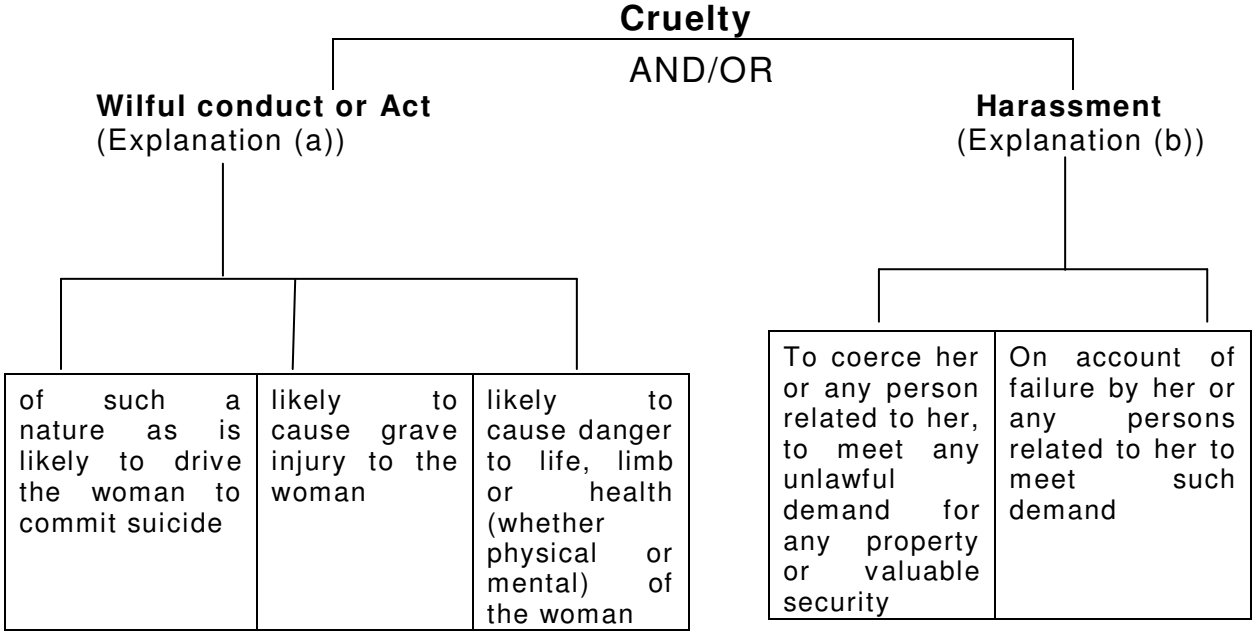
Two specific instances have been taken note of in order to ascribe a meaning to the word ***'cruelty'*** which is expressed by the legislatures as ***'wilful conduct'*** and ***'harassment'***. A bare perusal shows that the word 'cruelty' in Explanation (a) encompasses three specific situations which are:

(i) any 'wilful' conduct which is of such a nature as is likely to drive the woman to commit suicide; or
(ii) any 'wilful' conduct which is likely to cause grave injury to the woman; or
(iii) any 'wilful' act which is likely to cause danger to life, limb or health whether physical or mental of the woman.

Further, so far as criminality attached to word 'harassment' is concerned, it is independent of expression *'wilful conduct'* mentioned in Explanation (a) and is punishable only in the happening of two specific situations mentioned below:

(i) to coerce wife or any person related to her to meet any unlawful demand for any property or valuable security; or
(ii) on account of failure by her or any person related to her to meet such demand.

The meaning of ***'cruelty'*** which has been explained in Explanation (a) and (b) of section 498-A IPC can be understood in a simple form of diagram given below:



Mental cruelty :

Explanation (a) to Section 498-A specifically includes mental cruelty within the ambit of 'cruelty' which means causing mental torture to a wife to such an extent that it becomes unbearable for her to live with spouse. Wilful conduct or harassment need not be physical, it may be mental also.

In ***S. Hanumantha Rao v. S Ramani, (1993) 3 SCC 620***, the Supreme Court has discussed the meaning of mental cruelty as under:

> *"Mental cruelty broadly means, when other party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and the husband and as a result of which*

it becomes impossible for the party who has suffered to live with the other party."

Further, in ***V. Bhagat v. D. Bhagat, (1994) 1 SCC 337,*** the Supreme Court has once again laid down the definition of 'mental cruelty' with respect to civil law as:

"Mental cruelty can be broadly defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for the party to live with the other. In other words 'mental cruelty' must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner.

The word 'cruelty' is to be used in relation to human conduct or human behavior. It is the conduct in relation or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse."

In ***Pawan Kumar and other v. State of Haryana, (1998) 3 SCC 309,*** the Supreme Court observed that:

"....cruelty or harassment need not be physical. Even mental torture in a given case would be a case of cruelty and harassment within the meaning of Sections 304-B and 498-A Indian Penal Code. Explanation (a) to Section 498-A itself refers to both mental and physical cruelty.....''

In ***Gananath Pattnaik v. State of Orissa, (2002) 2 SCC 619,*** the Supreme Court specifically mentioned that:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behavior may amount to cruelty and harassment in a given case."

In ***Manju Ram Kalita v. State of Assam, (2009) 13 SCC 330,*** it was held by the Supreme Court that:

"'Cruelty' for the purpose of section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/

inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."

Mental cruelty, determinant factors :

In ***Mohd. Hoshan v. State of A.P., (2002) 7 SCC 414,*** the Supreme Court held that mental or physical torture should be continuously practiced by the accused on the wife. The apex court further observed as under:

"Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education, etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not."

Mental cruelty - No strait jacket mould :

Since the offence of cruelty is question of fact and depends upon various factors mentioned above. There is no straitjacket formula to hold which act/omission of husband amounts to mental cruelty. In ***Jamieson v. Jamieson, (1952)1 All ER 875 as quoted in Savitri Devi v. Ramesh Chand, 2003 Cri. L.J. 2759 (Delhi),*** Lord Tucker while discussing cruelty has held that :

"...Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purpose of matrimonial suits and experience has shows the wisdom of this course. It is, in my view, equally undesirable if not impossible by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offenders knowledge of the actual or probable effect of his conduct on the other's health are all matter which may be decisive in determining on which side of the line a particular act or course of conduct lies.

It is, generally speaking, not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so as not to constitute cruelty, though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof. It is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action."

Cruelty – An equation :

For deduction of legal cruelty a simple equation has been applied which Courts can follow as a yardstick or guideline in deducing the mental cruelty.

In order to find out the element of cruelty the Court should not only weigh the husband's conduct but at the same time must weigh it from the victim's point of view.

CRUELTY = $\dfrac{C+F}{E \pm A}$

Physical pain [of such nature that it would be injurious & harmful for the wife to live with the counter part]

Metal pain [of such nature that no reasonable person of that class would tolerate]

Here,

C = Conduct of the husband

F = Frequency of the said conduct

E = Endurance of the wife

A = A reasonable apprehension of such conduct.

(i) Conduct of the husband 'C'

Conduct of the husband should be "grave and weighty", and these acts should inflict any type of pain on the complainant *i.e.* wife.

(ii) Frequency of the conduct 'F'

Frequency of the conduct is an important element as this element can convert a trivial act into a grievous one. The frequency of the conduct can always tell the story of the ill treatment.

(iii) Endurance of the wife 'E'

Endurance or tolerance is a psychological factor and its quality depends upon complainant's health, sex, age, temperament, culture and the interaction between the parties. The conduct alleged must be judged up to a point by reference to the victim's capacity for endurance, in so far as that capacity is or ought to be known to the other spouse.

(iv) A reasonable apprehension of such conduct 'A'

For deducing 'cruelty', there must be an apprehension of harmful or injurious conduct on the part of the husband to the wife.

So, by this equation Court can deduce the cruelty.

Cruelty - As Harassment under Section 498-A IPC :

Explanation (b) to Section 498-A IPC does not make each and every harassment cruelty. The harassment has to be with a definite object, *i.e.* to coerce the woman or any person related to her to meet any unlawful demand. Hence, mere harassment by itself is not cruelty. Mere demand for property by itself is also not cruelty. It is only where harassment is shown to have been committed for the purpose of coercing a woman to meet the unlawful demands of property or valuable security would amount to cruelty. In other words, it is not every harassment or every type of cruelty that would attract Section 498-A IPC. It must be established that the beating or harassment was with a view to coerce the woman or any person related to her to meet any unlawful demand or on account of failure of such demand. (See: ***Giridhar Shankar Twaade v. State of Maharashtra, (2002) 5 SCC 177***)

In ***Savitri Devi v. Ramesh Chandra, 2003 Cri. L.J. 2759,*** the Delhi High Court has expressed that the offence of ***'harassment'*** is peculiar to Indian conditions and society where evil of dowry and its perpetuation through customary gifts or demands is widely prevalent and is eating the very vitals of matrimony and tearing familial social fabric apart. To curb this evil, the acts of not only the husband but the entire household have been brought within the net of 'harassment of woman' if done to coerce her or her relatives to fulfil the unlawful demands for property or valuable security.

Further, in ***Savitri Devi*** (supra) while discussing the meaning of 'harassment', the Delhi High Court has stated that the word 'harassment' in ordinary sense means *'to torment a person subjecting him or her through constant interference or intimidation'*. If such tormentation is done with a view to coerce any person and to meet the unlawful demand of property or valuable security, it amounts to 'harassment' as contemplated by Section 498-A. Word 'coercion' means persuading or compelling a person to do something by using force or threats.

Thus to constitute *'harassment'* under Section 498-A IPC, following ingredients are essential:

(a) Woman should be tormented, *i.e.*, tortured either physically or mentally through constant interference, indignation or intimidation;

(b) Such act should be with a view to pursuade or compel her to do something which she is legally or otherwise not expected to do by using force or threats; and

(c) Intention to compel or force her or her relatives to fulfill unlawful demands for any property or valuable security.

As discussed above, the word 'harassment' is independent of expression 'wilful conduct' as defined in Explanation (a) and is punishable only in the happening of following circumstances:

(a) to coerce wife or any person related to her, to meet any unlawful demand for any property or valuable security, or
(b) on account of failure by wife or any persons related to her to meet such demand.

Unlawful demand of any property :

One more question which generally arises in mind regarding cruelty is that whether is it only 'demand of dowry' which is punishable in the category of harassment? In this regard in ***State of Karnataka v. Balappa, 1999 Cri. L.J. 3064,*** the Karnataka High Court has clarified that cruelty need not to be in the form of demand for dowry. Further, Section 498-A does not specifically speak of a dowry demand. It speaks of unlawful demand for property and valuable articles. (Also See: ***Shivanand v. State, (2007) 13 SCC 68***).

Thus, the Court is not required to consider whether the demands made by the accused amounted to "dowry demand" within the meaning of Dowry Prohibition Act. The Court would only see whether the demands were unlawful or not. If such demands are prohibited by any law or without any legal basis, the same would be unlawful. Hence, if the husband coerces the wife to fulfill the unlawful demand of property or valuable security, it comes within the purview of harassment, amounting to cruelty.

Cruelty - Entailing suicide :

The term cruelty has been defined in the Explanation appended to Section 498-A IPC. Hence, it is not every cruelty that is made punishable but only the cruelty as defined under the explanation. Explanation (a) provides that cruelty means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide. Hence, under clause (a) the cruelty is to be of such a gravity as is likely to drive a woman to commit suicide. If cruelty is by itself established and the fact of suicide is also established, it would not be sufficient to bring home the guilt of committing cruelty as defined in Explanation(a). A reasonable nexus has to be established between the cruelty and the suicide in order to establish the offence of cruelty. Alternately, the cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide, etc. If suicide is established, it has further to be established that it was occasioned on account of cruelty which was of sufficient gravity so as to lead a reasonable person placed in similar circumstances to commit suicide. (See: ***Ravindra Pyarelal Bidlan v. State of Maharashtra, 1993 Cri. L.J. 3019 (Bom)***)

The conduct of the husband must be of such grave nature that it is likely to drive the woman to commit suicide. It must involve series of systematic persistent and wilful acts perpetrated with a view to make the life of the woman so burdensome or insupportable that she may be driven to commit suicide because of having been fed up with such life.

In ***Sahebrao & anr. v. State of Maharashtra, 2006 (2) RCR (Criminal) 855,*** the Apex Court has observed that, the husband and his brother were demanding Rs. 10,000/- and the deceased wife was constantly troubled and given beating. Her father was insulted in her presence. She was even reluctant to go to her matrimonial home. It was held that the accused by series of acts and conduct created such a difficult and hostile environment for the deceased that she was compelled to commit suicide.

Mensrea *sine qua non* under section 498-A IPC :

The intent to injure is the most important element of cruelty contemplated under Section 498-A IPC. The sole constituent of the offence under Section 498-A is 'cruelty' which mean 'wilful conduct'. The word wilful contemplates obstinate and deliberate behavior on the part of the offender for it to amount to cruelty. Thus *'Mensrea'* is an essential ingredient of the offence. Though intention to cause injury is not an essential ingredient, regard may be made as to the actual intention or knowledge on the part of the offending spouse as to act or the probable effect whether it would cause injury to physical or mental health. Again acts or conduct should be judged from the angle of a person possessing ordinary intellectual capabilities. In ***Mini Mathew v. Thomas Mathew, 2003 (2) DMC 33,*** the Delhi High Court has quoted views of Lord Denning a celebrated and legendary Judge as -

> *"When the conduct consists of direct action by one against the other, it can then properly be said to be aimed at the other, even though there is no desire to injure the other or to inflict misery on him. Thus, it may consist of a display of temperament, emotion or perversion whereby the one gives vent to his or her own feelings, not intending to injure the other, but making the other the object the butt at whose expense the emotion is relieved.*
>
> *When there is no intent to injure, they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health when the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, specially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The Court is, however not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may not be drawn. If in all*

the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party."

In order to constitute cruelty it is not enough that the conduct of the accused is wilful and is offensively unjust to the woman, but it is further necessary that the degree of intensity of such conduct on the part of the accused is such as is likely to drive the woman to commit suicide or such conduct is likely to cause grave injury or danger to her life or limb or to her mental and physical health. (See: ***Samir Samanta & another v. State, (1992) 2 DMC 233 (Cal.) (DB)***)

Instances of cruelty under section 498-A IPC :

1. Allegation by the husband that his wife is unfit for conjugal happiness amounts to cruelty within the meaning of Section 498-A. (See: ***The Public Prosecutor, High Court of A.P. v. Jangili Sammaiah alias Babu, 2004 Cri. L.J. 4489 (A.P.)***)
2. The husband was of a highly suspicious nature and made life difficult for the deceased wife by demeaning her, insulting her, calling her a prostitute not allowing her to meet others, denying her family life and comforts. (See: ***Sarojakshan Shankaran Nayar & ors v. State of Maharashtra, 1995 Cri. L.J. 340 (Bom.) (DB)***.
3. The husband constantly teasing and harassing his wife as he was wholly dissatisfied with dowry given at the time of marriage. Demanding more money and some other articles from her parents amounts to cruelty under Section 498-A of IPC. (See: ***Dalbir Singh v. State of U.P., (2004) 5 SCC 334***)
4. The habit of taking drinks and coming late at home much against the will of the wife, coupled with beatings and demand of dowry and harassment so as to bring money amounts to cruelty. (See: ***P. Bikshapathi & ors. v. State of Andhra Pardesh, 1989 Cri. L.J. 1186 (A.P.)***)
5. Practicing cruelty on wife for 15 years. For all these years accused was demanding dowry and money regularly. Accused gave beatings to wife 15 days prior to her suicide. The accused convicted under Section 498-A IPC. (See: ***Aman Singh v. State of M.P., 2005 (3) RCR (Criminal) 82 (Gwalior Bench)***)
6. Constantly nagging and harassing the deceased woman by her in-laws for not doing any work and to earn more money amounts to harassment and cruelty under Section 498-A IPC. (See: ***Vishvanath Kalubhai Kristi & anr. v. State of Gujarat, 2002 Cri. L.J. 3066 (Guj.) (DB)***)
7. The accused husband used to get drunk and beat his wife and abused her consistently. The act of the accused constitutes cruelty within the meaning of Section 498-A IPC. (See: ***Bommidi Rajamallu v. State of A. P., 2001 Cri. L.J. 1319 (A. P.)***)

8. Husband not allowing his wife to go to her parents home amounts to mental cruelty. (See: ***Kodadi Srinivasa Lingam v. State of A.P., 2001 Cri.L.J. 602***)

Instances of Acts/omissions not amounting to Cruelty :

1. A word uttered in a fit of anger or emotion without intending the consequences to actually follow can not attract cruelty. (See: ***Subhash Bhai Chandu Bhai Patel v. State of Gujrat, 2007 Cri. L.J. 320, : Ramesh Kumar v. State of Chhatisgarh, (2001) 9 SCC 618***)
2. The taking of drink and coming home late much against the will of the wife may not, ***per se***, amount to cruelty. (See: ***P. Bikshapathi & ors. v. State of A. P., 1989 Cri. L.J. 1186***)
3. The accused husband asked his wife to bring ` 1000-1200/- for domestic expenses and for purchasing manure as he had no sufficient money, can not be termed as demand for dowry, hence no cruelty. (See: ***Appasaheb & anr. v. State of Maharastra, AIR 2007 SC 763***)
4. When it is not established conclusively that the beating and harassment given to the wife was with a view to force her to commit suicide or to fulfill the illegal demands of the accused. (See: ***Smt. Sarla Prabhakar Waghmare v. State of Maharashtra & ors., 1990 Cri. L.J. 407***)
5. Some unhappy incident during the short married life between the husband and wife cannot be the circumstance to constitute an offence of cruelty. (See: ***State of Gujarat v. Bharatbhai Balubhai Lad, 2006 Cri. L.J. 428***)
6. Failure of a married person to take his wife along with him to place of posting and rather keeping his wife in village with parents would not amount to cruelty. (See: ***Mangat Ram v. State of Haryana, (2014)12 SCC 595 (S.C.)***)

Conclusion :

(1) Cruelty under Section 498-A IPC can be either by wilful conduct or harassment, as defined in explanation (a) and (b).
(2) The Judge need to differentiate between wilful conduct and harassment as defined in explanation appended to section 498-A.
(3) To constitute cruelty under Section 498-A IPC, wilful conduct may include any of 3 situations mentioned in explanation (a) to section 498-A (1) to drive the woman to commit suicide, (2) to cause grave injury to the woman or (3) to cause danger to life, limb or health, whether physical or mental of the woman.
(4) To constitute cruelty under Section 498-A IPC, harassment includes unlawful demand of property or valuable security or failure to fulfill such demand.
(5) Harassment under Section 498-IPC is not limited to dowry demand.
(6) Cruelty under Section 498-A (wilfull conduct or harassment) may be physical or mental. It varies from person to person and depends upon various factors.

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PART – II

NOTES ON IMPORTANT JUDGMENTS

***251. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 13**
CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 27
CIVIL COURT RULES, 1961 (M.P.) – Rule 466 (2)

(i) Additional evidence – Formal application for additional evidence at appellate stage is mandatory – Mere filing of printed list is not sufficient.

(ii) Court deposit – An application is necessary to obtain permission from the court to deposit money in CCD – Further, an order must be passed to deposit money in CCD.

(iii) Whether in absence of an application, can the court condone delay of few days in depositing arrears of rent? Held, No – Section 13 (1) confers power to the court to extend time for deposit of rent but court cannot *suo motu* condone the delay – Application is necessary.

(iv) Expression 'period of one month', explained.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) - धारा 13

सिविल प्रक्रिया संहिता, 1908 - आदेश 41 नियम 27

सिविल न्यायालय नियम, 1961 (म.प्र.) - नियम 466 (2)

(i) अतिरिक्त साक्ष्य - अपीलीय प्रक्रम पर अतिरिक्त साक्ष्य के लिए लिखित आवेदन आज्ञापक है - केवल मुद्रित सूची प्रस्तुत करना पर्याप्त नहीं है।

(ii) न्यायालयीन जमा - सिविल कोर्ट डिपाजिट में धनराशि जमा करने हेतु न्यायालय से अनुज्ञा के लिये आवेदन आवश्यक है - यह भी कि, सीसीडी में धनराशि जमा करने के लिए आदेश पारित किया जाना चाहिए।

(iii) क्या न्यायालय भाटक की बकाया जमा करने में हुए कुछ दिवसों के विलंब को आवेदन के अभाव में माफ कर सकता है? अभिनिर्धारित, नहीं - धारा 13 (1) न्यायालय को भाटक जमा करने हेतु समय बढ़ाने की शक्तियां प्रदान करती है परंतु न्यायालय स्वप्रेरणा से इसमें हुए विलंब को माफ नहीं कर सकता है - आवेदन आवश्यक है।

(iv) अभिव्यक्ति 'एक माह का समय', स्पष्ट की गयी।

Tarunveer Singh v. Mahesh Prasad Bhargava
Judgment dated 21.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 350 of 2003, reported in 2018 (I) MPJR 49

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252. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 13 (1) and 13 (2)

(i) Dispute as to rate of rent and quantum – Court must fix provisional rent first – Section 13 (1) will remain inoperative till such fixation.

(ii) Whether omission to deposit the rent regularly on monthly basis by tenant amounts to non-compliance of section 13 (1) of the Act? Held, Yes.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) - धाराएं 13 (1) एवं 13 (2)

(i) भाटक की दर तथा धनराशि के संबंध में विवाद - न्यायालय को प्रथमतः अनंतिम भाड़ा नियत करना चाहिए - ऐसे निर्धारण तक धारा 13 (1) अप्रभावशील रहेगी।

(ii) क्या अभिधारी द्वारा मासानुमासी भाटक नियमित रूप से निक्षिप्त करने का लोप अधिनियम की धारा 13 (1) का अननुपालन गठित करता है? अभिनिर्धारित, हाँ।

Virendra Prajapati v. Shri K.B. Agarwal

Order dated 18.07.2017 passed by the High Court of Madhya Pradesh(Gwalior Bench) in Second Appeal No. 431 of 2016, reported in 2018 (I) MPJR 9

Relevant extracts from the order:

It has been clearly held by the Apex Court in the case of ***Jamnalal & others v. Radheshyam, (2000) 4 SCC 380***, that where the rate of rent and the quantum of arrears of rent are disputed, whole of Section 13(1) of the Act becomes inoperative till provisional fixation of monthly rent by the court under sub-section (2) of Section 13 of the Act, which will govern compliance of Section 13(1) of the Act. Thus, it is clear that under Section 13(2) of the Act the court is duty bound only to fix provisionally rent and the learned trial court vide its interim order dated 12/2/2015 fixed the provisional rent at the rate of ` 600/- per month though the trial court also directed the tenant to deposit the arrears of rent from August, 2014.

Thus, it is evident that the tenant/defendant has not complied with the provisions of Section 13(1) of the Act as he was not thereafter regularly depositing the rent on monthly basis. It further transpires from the record that no any application was filed by the tenant/appellant before the Trial Court or lower Appellate Court for condonation of defaults committed by him in depositing the rent. Thus, it is clear that both the lower courts have not committed any error in decreeing the plaintiff's suit on the ground envisaged under Section 12(1)(a) of the Act.

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253. ARBITRATION AND CONCILIATION ACT, 1996 – Section 8
TRANSFER OF PROPERTY ACT, 1882 – Sections 105 and 108
Arbitration clause in the lease deed – Jurisdiction of civil court to try suit for eviction relating to same lease not barred – Rights of the parties will be governed by the Act of 1882. (*Natraj Studios (P) Ltd. v. Navrang Studios and another, (1981) 1 SCC 523* and *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and ors., (2011) 5 SCC 532* relied on)

मध्यस्थम् एवं सुलह अधिनियम, 1996 - धारा 8

सम्पत्ति अन्तरण अधिनियम, 1882 - धाराएं 105 व 108

पट्टा विलेख में मध्यस्थम् परिच्छेद - उसी पट्टे से संबंधित निष्कासन हेतु वाद के विचारण में सिविल न्यायालय का क्षेत्राधिकार वर्जित नहीं - पक्षकारों के अधिकार अधिनियम 1882 से शासित होंगे। (***नटराज स्टूडियोज (पी) लि. विरूद्ध नवरंग स्टूडियोज एवं अन्य, (1981) 1 एससीसी 523***और ***बूज ऐलेन एवं हैमिलटन निगम विरूद्ध एसबीआई होम फाइनेंस लि. एवं अन्य, (2011) 5 एससीसी 532,***अवलंबित।)

Himangni Enterprises v. Kamaljeet Singh Ahluwalia
Judgment dated 12.10.2017 passed by the Supreme Court in Civil Appeal No. 16850 of 2017, reported in AIR 2017 SC 5137

Relevant extracts from the judgment:

The suit is filed essentially to seek appellant's eviction from Shop No.
SF-2 measuring 7 around 317.29 Sq. ft. situated at 2nd floor in a Commercial Complex known as "Omaxe Square" in Block No.14, Non-Hierarchy Commercial Center, District Center Jasola, New Delhi (hereinafter referred to as "the suit premises") and for recovery of unpaid arrears of rent and grant of permanent injunction.

The contention of the appellant, in support of their application, was that since the disputes for which the civil suit is filed arise out of the lease deed dated 31.08.2010 which contained an arbitration clause (9.8) for their adjudication through the arbitrator, the civil suit to get such disputes decided by the Civil Court was barred.

In our considered opinion, the question involved in the appeal remains no longer ***res integra*** and stands answered by two decisions of this Court in ***Natraj Studios (P) Ltd. v. Navrang Studios and another, (1981) 1 SCC 523 : AIR 1981 SC 537*** and ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and ors., (2011) 5 SCC 532 : AIR 2011 SC 2507,*** against the appellant and in favour of the respondent.

So far as ***Natraj Studio's case*** (supra) is concerned there also, the landlord had filed a civil suit against the tenant in the Small Causes Court, Bombay claiming therein the tenant's eviction from the leased premises. There also, the tenant was inducted pursuant to "leave and license" agreement executed between the landlord and the tenant.

The tenant filed an application under Section 8 of the Arbitration Act, 1940 contending therein that since the "leave and license" agreement contained an arbitration clause for resolving all kinds of disputes arising between the parties in relation to the "leave and license" agreement and the disputes had arisen between the parties in relation to the "leave and license" agreement, such disputes could only be resolved by the arbitrator as agreed by the parties in the agreement. It was contended that the civil suit was, therefore, not maintainable and the disputes for which the suit has been filed be referred to the arbitrator for their adjudication.

This Court (Three Judge Bench) speaking through Justice O. Chinnappa Reddy rejected the application filed by the tenant under Section 8 of the Act and held, ***inter alia***, that the civil suit filed by the landlord was maintainable. It was held that the disputes of such nature cannot be referred to the arbitrator.

This is what their Lordships held as under:

> "In the light of the foregoing discussion and the authority of the precedents, we hold that both by reason of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and by reason of the broader considerations of public policy mentioned by us earlier and also in ***Deccan Merchants Co-operative Bank Ltd. v. Dalichand Jugraj Jain, AIR 1969 SC 1320,*** the Court of Small Causes has and the arbitrator has not the jurisdiction to decide the question whether the respondent-licensor landlord is entitled to seek possession of the two Studios and other premises together with machinery and equipment from the appellant-licensee tenant. That this is the real dispute between the parties is abundantly clear from the petition filed by the respondents in the High Court of Bombay, under Section 8 of the Arbitration Act seeking a reference to Arbitration. The petition refers to the notices exchanged by the parties, the respondent calling upon the appellant to hand over possession of the Studios to him and the appellant claiming to be a tenant or protected licensee in respect of the Studios. The relationship between the parties being that of licensor-landlord and licensee tenant and the dispute between them relating to the possession of the licensed demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the arbitrator has none to adjudicate upon the dispute between the parties."

Yet in another case of ***Booz Allen and Hamilton Inc.*** (supra) (Para 22), this Court (two Judge Bench) speaking through R. V. Raveendran J. laid down the

following proposition of law after examining the question as to which cases are arbitrable and which are non-arbitrable:

> "The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

Keeping in view the law laid down by this Court in aforementioned two decisions and applying the same to the facts of this case, we have no hesitation to hold that both the Courts below were right in dismissing the appellant's application filed under Section 8 of the Act and thereby were justified in holding that the civil suit filed by the respondent was maintainable for grant of reliefs claimed in the plaint despite parties agreeing to get the disputes arising therefrom to be decided by the arbitrator.

Learned counsel for the appellant, however, argued that the provisions of the Delhi Rent Act, 1955 are not applicable to the premises by virtue of Section 3(c) of the Act and hence the law laid down in the aforementioned two cases would not apply. We do not agree.

The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises, is a special Act. Though it contains a provision (Section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, ***ipso facto***, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the Civil Court and not by the arbitrator.

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254. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 75 and 81

(i) Whether demarcation report prepared in the course of conciliation proceedings is admissible in evidence in arbitrator judicial proceedings? Held, No – By virtue of Section 75 and 81 of the Act both, conciliator and the parties, are required to keep all matters relating to conciliation proceedings confidential – Alleged demarcation report having its genesis only in conciliation proceedings cannot be relied upon in evidence.

(ii) Litmus test for determining whether the matter relates to conciliation proceedings – If recourse to the conciliation proceedings is necessary for determining the dispute, it necessarily relates to conciliation proceedings. (*Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar and another, AIR 1952 SC 119* relied on)

माध्यस्थम् एवं सुलह अधिनियम, 1996 - धाराएं 75 व 81

(i) क्या सुलह कार्यवाही में तैयार किया गया सीमांकन प्रतिवेदन, मध्यस्थम् न्यायिक कार्यवाही में साक्ष्य में ग्राह्य है? अभिनिर्धारित, नहीं - अधिनियम की धाराएं 75 एवं 81 के अनुसार सुलहकर्ता एवं पक्षकारों दोनों के लिए आवश्यक है कि वे सुलह कार्यवाही से संबंधित सभी सामग्री को गोपनीय रखें - सुलह कार्यवाही में बनाये गये सीमांकन प्रतिवेदन का अवलम्बन साक्ष्य में नहीं लिया जा सकता है।

(ii) यह ज्ञात करने के लिए निश्चयात्मक परीक्षण कि कोई सामग्री सुलह कार्यवाही से संबंधित है - यदि सुलह कार्यवाही में किसी सामग्री का सहारा लिया जाना आवश्यक हो तो वह सामग्री निश्चित रूप से सुलह कार्यवाही से संबंधित है। (***रूबी जनरल इंस्योरेन्स कंपनी लि. विरूद्ध प्यारे लाल कुमार एवं अन्य, एआईआर 1952 एससी 119*** अवलंबित)

Govind Prasad Sharma and ors. v. Doon Valley Officers Co-operative Housing Society Ltd.

Judgment dated 23.08.2017 passed by the Supreme Court in Civil Appeal No. 10786 of 2017, reported in AIR 2017 SC 4968.

Relevant extracts from the judgment:

On a reading of Section 75, it is clear that the object of the section is sub-served by the expression "relating to" which is an expression of extremely wide import. (See: ***Renusagar Power Company Limited v. General Electric Company, (1984) 4 SCC 679 at 704, AIR 1985 SC 1156 at 1170***). It is clear, therefore, that both the conciliator and the parties must keep as confidential all matters relating to conciliation proceedings.

The litmus test for determining whether the matter relates to conciliation proceedings was laid down by an earlier judgment of this Court. In ***Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar and another, (1952) SCR 501 : AIR 1952 SC 119,*** the question to be decided was as to whether a dispute or difference arose out of a certain insurance policy. This Court laid down that the test for determining whether a dispute or difference arose out of the said policy is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If it is found that such recourse is necessary, then the matter would certainly fall within the policy. Following this judgment, and applying it to the facts of this case, it is clear that recourse needs to be had to conciliation proceedings as the genesis of this demarcation report is only in conciliation proceedings and not otherwise.

This being the case, it is of no matter that the present case does not fall within the four pigeon holes contained in Section 81, as otherwise, if there are insidious encroachments on confidentiality, a free and fair settlement may never be arrived at, thus stultifying the object sought to be achieved by Part III of the 1996 Act.

Learned counsel for the Respondents cited before us a judgment of the Supreme Court of Canada in ***Union Carbide Canada Inc. and Dow Chemical Canada Inc. v. Bombardier Inc., Bombardier Recreational Products Inc. and Allianz Global Risks US Insurance Company, (2014) 1 SCR 800***. He relied, in particular, on a sentence contained in para 36 of the said judgment which reads as under:-

> "Moreover, a litigant cannot object to evidence of a fact that is independent of and separate from a settlement offer."

We agree with this decision. In that a litigant cannot possibly object to evidence of a fact that is independent of or separate from a settlement offer. In the facts of the present case, this case is wholly distinguishable and would not apply for the simple reason that the demarcation report has its genesis only in the conciliation proceedings, as has been held by us above.

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255. CIVIL PROCEDURE CODE, 1908 – Sections 11, 151, Order 22 Rule 4, Order 1 Rule 10 and Order 7 Rule 6
LIMITATION ACT, 1963 – Section 21
Impleadment of legal representatives of defendant – Death of defendant prior to the filing of the suit and application under Order 22 Rule 4 of the Code dismissed as non-maintainable – Held, the legal representatives of the deceased defendant can be impleaded under Order 1 Rule 10 read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act – Even the earlier application could have been treated as filed under Order 1 Rule 10 – Parties should not suffer for non-mentioning of the correct provision in the initial stage – Law is to be administered to advance justice – Technical rules or procedures should not be given precedence over doing substantial justice.

सिविल प्रक्रिया संहिता, 1908 - धाराएं 11, 151, आदेश 22 नियम 4, आदेश 1 नियम 10 एवं आदेश 7 नियम 6

परिसीमा अधिनियम, 1963 - धारा 21

प्रतिवादी के विधिक प्रतिनिधियों को पक्षकार बनाना - वाद संस्थित किये जाने के पूर्व प्रतिवादी की मृत्यु और संहिता के आदेश 22 नियम 4 के अधीन आवेदन पोषणीय न होने से निरस्त किया गया - अभिनिर्धारित, मृत प्रतिवादी के विधिक प्रतिनिधि संहिता के आदेश 1 नियम 10 सहपठित धारा 151 के अधीन संहिता के आदेश

7 नियम 6 और परिसीमा अधिनियम की धारा 21 में अनुज्ञेय परिसीमा के अधीन रहते हुए पक्षकार बनाए जा सकते हैं - पूर्ववर्ती आवेदन को आदेश 1 नियम 10 के अधीन प्रस्तुत किया जाना माना जा सकता था - सही प्रावधान न लिखने के कारण पक्षकारों को प्रारंभिक अवस्था में पीड़ित नहीं होना चाहिए - विधि न्याय को प्रभावी करने के लिए है - तकनीकी नियम एवं प्रक्रियाओं को सारभूत न्याय पर वरीयता नहीं दी जाना चाहिए।

Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya

Judgment dated 03.10.2017 passed by the Supreme Court of India in Civil Appeal No. 15549 of 2017, reported in (2017) 9 SCC 700

Relevant extracts from the judgment:

Merely because the earlier application filed by the appellant under Order 22 Rule 4 of the Code was dismissed on 09.09.2009 as not maintainable, it will not prohibit the plaintiff from filing another application, which is maintainable in law. There was no adjudication of the application to bring legal representatives on record on merits by virtue of the order dated 09.09.2009. On the other hand, the earlier application filed under Order 22 Rule 4 of the Code was dismissed by the trial Court as not maintainable, inasmuch as defendant no. 7 had died prior to the filing of the suit and that Order 22 Rule 4 of the Code comes into the picture only when a party dies during the pendency of the suit. The only course open to the appellant in law was to file an application for impleadment to bring on record the legal representatives of deceased defendant no. 7 under Order 1 Rule 10 of the Code. Hence, the order passed by the trial Court on the application filed under Order 22 Rule 4 of the Code, dated 09.09.2009, will not act as ***res judicata***.

As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not

be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.

Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.

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***256. CIVIL PROCEDURE CODE, 1908 – Section 152**

Correction of judgements, decrees or orders – Powers are limited – Power not available when the court is required to dwell into the merits of the case – Reasoning cannot be examined – For this, proper remedy is to file appeal.

सिविल प्रक्रिया संहिता, 1908 - धारा 152

निर्णयों, डिक्रियों या आदेशों का संशोधन - शक्तियाँ सीमित हैं - जब प्रकरण के गुणावगुण पर प्रविष्ट होना न्यायालय के लिये आवश्यक हो तब इस प्रकार की शक्ति प्राप्त नहीं है - कारणों की परीक्षा नहीं की जा सकती है - इसके लिये उचित उपचार अपील प्रस्तुत करना है।

Smt. Chandan Bai v. Budh Prakash and others

Order dated 17.02.2017 passed by the High Court of M.P. (Gwalior Bench) in Civil Revision No. 32 of 2010, reported in 2017 (4) MPLJ 569

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

(i) Amendment of pleadings – General principle – Amendments which do not cause injustice to the other party, amendment necessary for determination of real question of controversy and which do not change the nature of the case can be allowed.

(ii) Amendment on the basis of subsequent events – Can be allowed – But the real controversy test is the cardinal test.

(iii) Commencement of trial – Filing of affidavit, *in lieu* of examination-in-chief of any witness, amounts to commencement of proceedings.

(iv) Jurisdiction to allow amendment – The second part of O. 6 R. 17 is imperative – Unless the jurisdictional fact, as envisaged in the proviso is found to be existing, the Court has no jurisdiction at all to allow the amendment.

(v) Amendment barred by limitation – Doctrine of relation back – The amendment relates back to the date when the suit was originally

filed – Amendment be declined if fresh suit on amended cause of action is barred by limitation on the date of application.

(vi) Change of nature – Suit originally filed for declaration and permanent injunction – Further relief for specific performance of contract sought to be amended – Would amount to change of nature and structure of suit – Amendment rejected.

सिविल प्रक्रिया संहिता, 1908 - आदेश 6 नियम 17

(i) अभिवचनों में संशोधन - सामान्य सिद्धांत - संशोधन जो दूसरे पक्ष को अन्याय कारित नहीं करते, जो विवादग्रस्त विषय के वास्तविक प्रश्न के निर्धारण के लिए आवश्यक हैं एवं जिनसे मामले की प्रकृति में परिवर्तन नहीं होता, अनुमत किये जा सकते हैं।

(ii) पश्चातवर्ती घटनाओं के आधार पर संशोधन - अनुज्ञात किये जा सकते हैं - परन्तु वास्तविक विवाद परीक्षण ही मुख्य परीक्षण है।

(iii) विचारण का प्रारंभ - साक्षी की मुख्य परीक्षा के स्थान पर शपथ-पत्र प्रस्तुत किया जाना कार्यवाहियों का प्रारंभ माना जाता है।

(iv) संशोधन अनुज्ञात करने का क्षेत्राधिकार - आदेश 6 नियम 17 का दूसरा भाग आज्ञापक है - जब तक परंतुक में परिकल्पित क्षेत्राधिकार संबंधी तथ्य अस्तित्व में होना दर्शित नहीं होता, न्यायालय को संशोधन अनुज्ञात करने का कोई क्षेत्राधिकार नहीं है।

(v) परिसीमा बाधित संशोधन - रिलेशन बैक का सिद्धांत - संशोधन वाद की मूलतः प्रस्तुति दिनांक से माना जाता है - संशोधन अस्वीकार कर दिया जायेगा यदि संशोधित वाद हेतुक के आधार पर नया वाद आवेदन की तारीख को परिसीमा बाधित है।

(vi) प्रकृति में परिवर्तन - वाद मूलतः घोषणा तथा स्थायी व्यादेश हेतु संस्थित किया गया - संविदा के विनिर्दिष्ट अनुपालन के अतिरिक्त अनुतोष के संशोधन की मांग - वाद की प्रकृति एवं संरचना में परिवर्तन समझा जायेगा - संशोधन नामंजूर किया गया।

Avinash Kumar Rai v. Sushri Chhaya Rai and others
Order dated 27.04.2017 passed by the High Court of M.P. in W.P.
No. 4461 of 2012, reported in 2017 (4) MPLJ 555

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

(i) Applicability of proviso appended to Order 6 Rule 17 to civil suit filed prior to year 2002 – Proviso inserted to Rule 17 of Order 6 by Amendment Act of 2002 – Held, Proviso to Order 6 Rule 17 will not apply to civil suits filed prior to the Amendment Act of 2002. (*State Bank of Hyderabad v. Town Municipal Council, (2007) 1 SCC 765* relied on)

(ii) Amendment in plaint *vis-a-vis* written statement, principles of – Amendment in plaint and amendment in written statement are not governed by exactly the same principles – Addition of new ground of defence or substituting or altering a defence or taking inconsistent pleas in written statement can be allowed (*Sushil Kumar Jain v. Manoj Kumar and another, (2009) 14 SCC 38* relied on)

सिविल प्रक्रिया संहिता, 1908 - आदेश 6 नियम 17

(i) वर्ष 2002 के पूर्व संस्थित सिविल वाद के संबंध में आदेश 6 नियम 17 से संलग्न परंतुक की प्रयोज्यता - आदेश 6 नियम 17 के साथ परंतुक 2002 के संशोधन अधिनियम द्वारा योजित किया गया है - अभिनिर्धारित, आदेश 6 नियम 17 का परंतुक ऐसे सिविल वादों पर प्रयोज्य नहीं होगा जो 2002 के संशोधन अधिनियम के पूर्व प्रस्तुत किये गये थे। (***स्टेट बैंक आफ हैदराबाद वि. टाउन म्यूनिसिपल काउंसिल, (2007) 1 एससीसी 765*** अवलंबित)

(ii) वादपत्र और लिखित कथन में संशोधन के सिद्धंात - वादपत्र में संशोधन तथा लिखित कथन में संशोधन सर्वथा एक समान सिद्धांतों द्वारा शासित नहीं होते हैं - प्रतिरक्षा के नये आधार का योजित किया जाना अथवा प्रतिरक्षा का परिवर्तन या प्रतिस्थापन अथवा लिखित कथन में असंगत अभिवाक् लिया जाना अनुज्ञात किया जा सकता है। (***सुशील कुमार जैन वि. मनोज कुमार एवं अन्य, (2009) 14 एससीसी 38*** अवलंबित)

Ajit Singh and other v. Devesh Pratap Singh and others
Order dated 11.08.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 8315 of 2017, reported in 2018 (1) MPLJ 374

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***259. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
PARTNERSHIP ACT, 1932 – Section 69 (3)

(i) Effect of non-registration of partnership firm on *inter se* disputes – Suit for demanding accounts and share in dividend from partner – Maintainable – Registration is required for third party suits and other disputes as provided in Section 69 (3) – Not for such type of *inter se* suit. (*Umesh Goel v. Himachal Pradesh Co-operative Group Housing Society Ltd., (2016) 11 SCC 313* relied on)

(ii) Rejection of plaint, basis for – Application for rejection of plaint must be decided on the basis of pleadings in plaint alone.

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11

भागीदारी अधिनियम, 1932 - धारा 69 (3)

(i) आपसी विवादों में भागीदारी फर्म के अपंजीयन का प्रभाव - खाते की मांग भागीदारों के बीच तथा भागीदार के लाभांश में हिस्से के लिए वाद - पोषणीय - पर व्यक्ति के विरूद्ध वादों तथा अन्य वादों में ही धारा 69 (3) में यथा

उपबंधित पंजीयन आवश्यक है - इस प्रकार के आपसी विवादों में नहीं (***उमेश गोयल वि. हिमाचल प्रदेश को - ऑपरेटिव ग्रुप हाउसिंग सोसायटी लि., (2016) 11 एससीसी 313***अवलंबित)

(ii) वाद पत्र की नामंजूरी के आधार - वादपत्र नामंजूरी हेतु आवेदन केवल वाद पत्र के अभिवचन के आधार पर निराकृत किया जाना चाहिए।

Abdul Salim v. Shamim Ahmad
Order dated 01.02.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Civil Revision No. 306 of 2015, reported in 2018 (1) MPLJ 337

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***260. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 1**

Deposit of money as mode of paying money under decree – Money deposited by judgment-debtor under interim order of the Court with conditions – Does not come under the category of "Deposit" under Order 21 Rule 1 – Also, interest shall not stop running on such deposit.

सिविल प्रक्रिया संहिता] 1908 - **आदेश** 21 **नियम** 1

डिक्री के अधीन राशि का भुगतान करने की रीति अनुसार धनराशि जमा करना - निर्णीत ऋणी द्वारा न्यायालय के अन्तरिम आदेश के अधीन शर्तों सहित जमा की गई धनराशि - आदेश 21 नियम 1 के अंतर्गत 'जमा'की श्रेणी में नहीं आती - यह भीए इस प्रकार जमा किये जाने पर ब्याज चलना बंद नहीं होगा।

Manoj Kumar Agrawal v. Nepa Ltd., Nepa Nagar through its CMD
Order dated 19.06.2017 passed by the High Court of Madhya Pradesh in Civil Revision No. 368 of 2012, reported in 2018 (1) MPLJ 198

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***261. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 1**

Withdrawal of suit with permission to file fresh suit – Cannot be claimed as a matter of right – Discretion of the court to allow or disallow. (*M. Subba Rao v. Vasanth, AIR 2015 Hyderabad 68* relied on)

सिविल प्रकिया संहिता, 1908 - आदेश 23 नियम 1

नया वाद संस्थित करने की अनुज्ञा के साथ वाद का प्रत्याहरण - अधिकार स्वरूप मांग नहीं की जा सकती - मंजूरी या नामंजूरी का न्यायालय का विवेकाधिकार है। (**एम. सुब्बा राव वि. बसन्य ए. आई. आर. 2015 हैदराबाद 68**अवलंबित)

Gordhanlal v. Babulal and ors.
Order dated 19.04.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Civil Revision No. 08 of 2016, reported in 2018 (1) MPLJ 151

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***262. CIVIL PROCEDURE CODE, 1908 – Order 33 Rules 1, 2 and 9**

Whether question of indigency is exclusive matter between applicant and State? Held, No – Defendant has right to oppose as well as seek withdrawal of permission. (*M.L. Sethi v. R.P. Kapur,(1972) 2 SCC 427* relied on)

सिविल प्रक्रिया संहिता, 1908 - आदेश 33 नियम 1, 2 एवं 9

क्या अकिंचनता का प्रश्न, अनन्यतः आवेदक तथा राज्य के मध्य मामला है?

अभिनिर्धारित, नहीं - प्रतिवादी को विरोध करने के साथ - साथ अनुमति के प्रत्याहरण की मांग करने का भी अधिकार है। (*एम.एल. सेठी वि. आर. पी. कपूर, (1972) 2 एससीसी 427*अवलंबित)

Prakash Porwal and ors. v. Shaila and ors.
Order dated 08.02.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No. 4550 of 2014, reported in 2018 (1) MPLJ 236

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***263. CRIMINAL PROCEDURE CODE, 1973 – Section 82 (1)**

Opportunity for absconder to make appearance – 30 days – Must be calculated from the date of the publication – Non-granting of mandatory time for appearance vitiates the proceedings.

दण्ड प्रक्रिया संहिता, 1973 – धारा 82 (1)

फरार अभियुक्त को उपस्थिति हेतु अवसर दिया जाना - 30 दिन - प्रकाशन की तारीख से गणना किया जाना चाहिए - उपस्थिति हेतु अनिवार्य समय न दिया जाना कार्यवाहियों को दूषित करता है।

Chhotan Prasad v. State of M.P.
Order dated 17.11.2016 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 4264 of 2014, reported in 2018 (1) ANJ (MP) 33

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264. CRIMINAL PROCEDURE CODE, 1973 – Section 91

Documents which are not made part of charge-sheet by investigator, whether can be summoned by accused at the stage of framing of charge? Held, No absolute right of accused to invoke Section 91 to summon to produce document at stage of charge, *de hors* satisfaction of Court – However, to impart justice Court is not debarred from exercising such power, if requisite documents have crucial bearing on issue of framing of charge.

दण्ड प्रक्रिया संहिता, 1973 – धारा 91

क्या आरोप विरचना के प्रक्रम पर अभियुक्त द्वारा ऐसे दस्तावेज आहूत कराये जा सकते हैं जिन्हें अन्वेषणकर्ता द्वारा अभियोग पत्र का भाग नहीं बनाया गया है? अभिनिर्धारित, - आरोप विरचना के प्रक्रम पर धारा 91 पर अवलंबित दस्तावेज आहूत करने हेतु

न्यायालय के समाधान से असंगत अभियुक्त का कोई अनन्य अधिकार नहीं है - यद्यपि न्यायहित में न्यायालय ऐसी अधिकारिता को प्रयोग करने से वर्जित नहीं है, यदि अपेक्षित दस्तावेज मामले में आरोप विरचन के लिए अत्यंत आवश्यक हैं।

Nitya Dharmananda alias K. Lenin and another v. Gopal Sheelum Reddy and another

Order dated 07.12.2017 passed by the Supreme Court in Criminal Appeal No. 2115 of 2017, reported in (2018) 2 SCC 93

Relevant extracts from the order:

It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the chargesheet, has crucial bearing on the issue of framing of charge.

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Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet. It does not mean that the defence has a right to invoke Section 91 Cr.P.C. ***de hors*** the satisfaction of the court, at the stage of charge.

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***265. CRIMINAL PROCEDURE CODE, 1973 – Section 125**

Grant of maintenance to second wife – Husband contracting second marriage by suppressing the *factum* of first surviving marriage – Second wife be treated as legally wedded wife and entitled for maintenance – Husband cannot be permitted to take advantage of his own wrong. (*Badshah v. Urmila Badshah Godse and another, (2014) 1 SCC 188* relied on)

दण्ड प्रक्रिया संहिता, 1973 - धारा 125

द्वितीय पत्नी को भरण पोषण दिलाया जाना - प्रथम विवाह के जीवित होने के तथ्य का छिपाव करते हुये पति ने द्वितीय विवाह किया - अभिनिर्धारित, द्वितीय पत्नी को विधितः विवाहित पत्नी की तरह माना जायेगा और वह भरण पोषण पाने की हकदार है - पति को स्वयं के दोष का लाभ लेने के लिये अनुमत न किया जायेगा। (***बादशाह विरूद्ध उर्मिला बादशाह गोडसे व अन्य, (2014) 1 एस.सी.सी. 188,*** अवलंबित)

Sardar Singh v. Smt. Chain Kunwar
Order dated 01.03.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 8488 of 2016, reported in 2018 (1) ANJ (MP) 105

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***266. CRIMINAL PROCEDURE CODE, 1973 – Sections 300 and 397**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
INDIAN PENAL CODE, 1860 – Sections 420, 467, 468 and 471

(i) *Double Jeopardy* – Doctrine of *autrefois acquit* – Ingredients of the offences in earlier case as well as latter case must be same and not different – The test to ascertain whether two offences are same is not the identity of the allegations but the identity of the ingredients of the offences – Motive for committing the offence can not be termed as ingredients of offences to determine the issue – The plea of autrefois is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge – Acquittal from charge under section 138 of Negotiable Instruments Act not prove autrefois acquit from subsequent prosecution under Sections 420, 467, 468 and 471 of I.P.C.

(ii) Revision against framing of charge – Powers of Revisional Court – Marshalling of evidence is beyond the scope of revisional jurisdiction of the court – Power are inherently limited to the enquiry into material available against the accused person to see that the ingredients of offences charged against them are made out or not. [*Sangeeta Ben Mahendra Bhai Patel v. State of Gujarat (2012) 7 SCC 621* relied on.]

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 300 एवं 397

परक्राम्य लिखत अधिनियम, 1881 - धारा 138

भारतीय दण्ड संहिता, 1860 - धाराएं 420, 467, 468 एवं 471

(i) दोहरा संकट - पूर्व दोषमुक्ति का सिद्धांत - पूर्व के अपराध और पश्चातवर्ती प्रकरण के आवश्यक तत्व निश्चित रूप से समान होने चाहिये उनमें अंतर नहीं होना चाहिये - यह विनिश्चत करने हेतु कि दो अपराध समान हैं; आवश्यक परीक्षण अभिकथनों की समानता नहीं बल्कि अपराध गठित करने वाले तत्वों की समानता है - इस विवाद्यक के विनिश्चयन हेतु अपराध कारित करने के हेतुक को अपराध गठित करने वाला आवश्यक तत्व नहीं कहा जा सकता है - पूर्व दोषमुक्ति का अभिवाक् तब तक साबित न होगा जब तक यह दर्शित न किया जाये कि पूर्व आरोप से दोषमुक्ति के निर्णय में पश्चात्वर्ती आरोप की दोषमुक्ति आवश्यक रूप से शामिल थी - धारा 138 परक्राम्य लिखित अधिनियम के अपराध से दोषमुक्ति, धारा 420, 467, 468 एवं 471 भा.दं.सं. के अधीन पश्चातवर्ती अभियोजन में, पूर्व दोषमुक्ति साबित नहीं करती।

(ii) आरोप के विरूद्ध पुनरीक्षण - पुनरीक्षण न्यायालय की शक्तियां - साक्ष्य का क्रमबंधन न्यायालय की पुनरीक्षण शक्ति से परे है - शाक्तियां केवल इस विषय तक सीमित हैं कि प्रकरण में अभियुक्त के विरूद्ध उपलब्ध सामग्री के आधार पर लगाये गये आरोपों के तत्व विद्यमान हैं या नहीं। (***संगीता बेन महेन्द्र भाई पटेल वि. स्टेट ऑफ गुजरात (2012) 7 एससीसी 621*** अवलंबित)

Om Prakash Gupta v. State of M.P. and anr.
Order dated 24.10.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 1015 of 2015, reported in 2017 (IV) MPJR 178

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267. CRIMINAL PROCEDUURE CODE, 1973 – Section 319

Scope and ambit of expression 'evidence'- Implicative evidence (documentary or oral) having probative value more convincing than grave suspicion may be brought on record during trial – Other evidence which is introduced between the stage of taking cognizance and stage of commencement of trial can be used for corroboration – Evidence which is part of investigation stage and has not been placed on record between the stage of taking cognizance and before the trial begins, cannot be taken into consideration. (*Hardeep Singh v. State of Punjab and ors., (2014) 3 SCC 92* relied on).

दण्ड प्रक्रिया संहिता, 1973 - धारा 319

अभिव्यक्ति 'साक्ष्य' का क्षेत्र एवं परिधि - फंसाने वाली साक्ष्य (दस्तावेजी अथवा मौखिक) जिसका साक्ष्यिक मूल्य गंभीर संदेह की तुलना में अधिक विश्वसनीय हो, विचारण में अभिलेख पर लाई जा सकती है - अन्य साक्ष्य, जो संज्ञान लेने के प्रक्रम और विचारण प्रारम्भ होने के प्रक्रम के मध्य प्रस्तुत की गई हो, सम्पुष्टि हेतु प्रयुक्त की जा सकती है - साक्ष्य जो अन्वेषण का भाग हो और जिसे अभिलेख पर संज्ञान लेने के प्रक्रम तथा विचारण प्रारम्भ होने के मध्य प्रस्तुत नहीं किया गया हो, को विचार में नहीं लिया जा सकता है। (**हरदीप सिंह विरूद्ध पंजाब राज्य एवं अन्य (2014) 3 एससीसी 92,** अवलंबित)

Amar Singh Kamria & ors v. State of M.P. & anr.
Order dated 06.12.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 24766 of 2017, reported in 2018 (I) MPJR 39

Relevant extracts from the order:

It is evident that for the purpose of deciding application u/s 319 Cr.P.C. the expression "evidence" used in the said provision means the evidence which has come during the trial in shape of oral and documentary evidence and any other piece of evidence which has come on record of the trial court between the stage of taking cognizance and commencement of trial can be utilized for corroborative

purpose. The necessary inference which can be drawn from the above said answer of the said question rendered by the Constitution bench is that any material which formed part of investigating process but was not part of the charge sheet or was not brought on record between the stage of taking cognizance and commencement of trial, cannot be utilized for the purpose of invoking Section 319 Cr.PC.

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In view of the above, this Court has no hesitation to hold that the expression "evidence" found in Section 319 Cr.P.C is to be understood to mean the evidence collected during the trial in shape of oral and documentary evidence. However, the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes as laid down by the Apex Court in five Judge Bench decision in the case of ***Hardeep Singh v. State of Punjab and ors., (2014) 3 SCC 92***. In other words, an application u/s 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial. While considering such application u/s 319 Cr.P.C. the trial court can take assistance, for corroboration only, of any evidence which is already on record introduced between the stage of taking cognizance and the stage of commencement of trial. However, the trial court is not empowered to invoke Section 319 Cr.P.C. merely based on evidence which is part of investigation stage unless the same is already brought on record between the period of taking cognizance and before the trial begins.

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***268. CRIMINAL PROCEDURE CODE, 1973 – Section 320**
INDIAN PENAL CODE, 1860 – Section 324
Section 324 made non-compoundable by the Amendment Act of 2005 – Offence committed prior to such amendment can be compounded with the permission of Court. (*Mohd. Abdul Sufan Laskar and others v. State of Assam, (2008) 9 SCC 333* relied upon)

दण्ड प्रक्रिया संहिता, 1973 - धारा 320

भारतीय दंड संहिता, 1860 - धारा 324

धारा 324 को 2005 के संशोधन अधिनियम द्वारा अशमनीय बनाया गया - इस संशोधन के पूर्व कारित यह अपराध न्यायालय की अनुमति से शमन किया जा सकता है। (***मोहम्मद अब्दुल सूफान लश्कर एवं अन्य विरूद्ध असम राज्य (2008) 9 एससीसी 333*** अवलंबित)

Shankar Yadav and ors. v. State of Chhattisgarh
Order dated 03.07.2017 passed by the Supreme Court in Criminal Appeal No. 982 of 2017, reported in 2017 (4) Crimes 356 (SC)

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269. CRIMINAL PROCEDURE CODE, 1973 – Sections 340 and 343
INDIAN PENAL CODE, 1860 – Section 193
Procedure – Complaint under section 193 of IPC forwarded without holding preliminary inquiry – Requirement of preliminary inquiry is not obligatory – Open to magistrate to whom complaint has been forwarded to embark upon summary inquiry to collect further material – But in cases where a preliminary inquiry has been made, the same be tried as a warrant case instituted on police report.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 340 एवं 343

भारतीय दंड संहिता, 1860 - धारा 193

प्रक्रिया - भा.द.सं. की धारा 193 के अधीन परिवाद बिना प्रारंभिक जांच के अग्रेषित - प्रारंभिक जांच की आवश्यकता बाध्यकर नहीं है - जिस मजिस्ट्रेट को परिवाद भेजा गया है उसे आगे सामग्री संकलित करने हेतु संक्षिप्त जांच आरम्भ करने का अधिकार है - किंतु जिन मामलों में प्रारंभिक जांच की जा चुकी है, उन्हें पुलिस रिपोर्ट पर संस्थित वारन्ट मामले की भांति विचारित किया जाना चाहिए।

State of Goa v. Jose Maria Albert Vales @ Robert Vales
Judgment dated 18.08.2017 passed by the Supreme Court in Criminal Appeal No. 1427 of 2017, reported in 2017 (4) Crimes 456 (SC)

Relevant extracts from the judgment:

The view of the Commission and the recommendations stemming therefrom, are in accord with the expression "as far as may be" engrafted in Section 343, the salient features whereof can be deciphered as: (i) a Magistrate dealing with a complaint under Section 340 or Section 341 has to proceed as far as may be to deal with the case as if it were instituted on a police report;

(ii) this course the Magistrate would follow not with standing anything contained in Chapter XV.

Noticeably, the expression "as far as may be" assuredly lends some elasticity, relaxing the otherwise rigour of the legislative mandate to deal with the complaint as a case instituted on a police report. It cannot be gainsaid that in absence of this discernible flexibility, the Magistrate would be left with no option but to construe the complaint under Section 340 or Section 341 to be a case as if instituted on a police report, Section 343(1) thus clearly marks an exception ***qua*** the procedure to be adopted by the Trial Magistrate if the complaint is filed under Section 340 or Section 341 of the Code. To reiterate, barring the perceptible flexibility as contained in the expression "as far as may be", the Magistrate is required to deal with the complaint as a case as if instituted on a police report. The relaxation in this rigour is patently traceable to the views/recommendations of the Law Commission, as recorded hereinabove, whereby in a given fact situation, the legislative mandate to the Magistrate to treat a complaint under Section 340 or Section 341 to be a case as if instituted on a police report notwithstanding it would be open for him, if in his opinion, further

materials are required to enable him to proceed and for that purpose, an inquiry is warranted to undertake that exercise.

As noted hereinabove, in cases instituted on police report, as is contained under Chapter XIX, the Trial Magistrate can discharge an accused or frame a charge against him on a consideration only of the police report and the documents, laid under Section 173 and the statement made if any, by the accused in his examination and after affording an opportunity of hearing both the sides. To repeat, at that stage, the prosecution has no scope to examine any witness and thus is not obligated to adduce any evidence in support of its case.

Judged from the standpoint of interplay between Sections 340 and 343 of the Code, thus the following eventualities may arise:

(a) When a judicial complaint is based on materials collected in the course of preliminary inquiry before the complaint under Section 340 is filed. This is a situation where in terms of Section 343, the Trial Magistrate shall straightway deal therewith as if it was instituted on a police report as per Chapter XIX-A of the Code.

(b) Where the judicial complaint is not preceded by a preliminary inquiry and there is no material either by way of any statement or document and the Trial Magistrate genuinely feels in the cause of justice that even if there is a ***prima facie*** satisfaction of the complaining court that the offence mentioned appears to have been committed, he can undertake a summary enquiry and on the completion thereof, may decide on the complaint in accordance with law.

(c) Where though no preliminary inquiry had been made before filing of the judicial complaint, the facts are so clear and obvious in endorsement of the ***prima facie*** satisfaction that the offence had been committed and that it is expedient in the interests of justice to have the same probed into further by the Trial Magistrate, the Trial Magistrate shall deal with the case as if it was instituted on a police report and follow the procedure under Chapter XIX-A of the Code.

That Section 343(1) of the new Code has been casted in the mould, totally different from the one, as in Section 476(2) of the old Code, is crystal clear. Having regard to the recommendations of the Law Commission, as set-out hereinabove, the shift by the amendment is from the detailed procedure, prescribed for a case registered on a complaint i.e. instituted otherwise than on a police report. This is more so vis-a-vis a complaint case involving an offence to be tried by applying the warrant procedure. Section 343(1) of the Code now enjoins the Trial Magistrate to deal with the complaint under Section 340 or Section 341 by treating it to be a case, as if instituted on a police report.

There is indeed a deeming element ingrained in the provision. Further, the expression "as far as may be" does not foreclose wholly, at the same time the discretion of the Trial Magistrate, if he genuinely feels it necessary, to get additional materials on record for his necessary satisfaction to proceed thereafter as required in law. This element of discretion conferred on the Trial Magistrate, in our comprehension, does not either suggest or encourage any irreverence to the complaining court and the legislative intent is to ensure against avertable judicial proceedings in the overall interest of justice. The amendment, while secures an expeditious disposal of the complaint by treating it to be a case instituted on a police report as far as may be without undergoing the rigour of the elaborate procedure meant for a complaint case, has with the conferment of the discretion on the Trial Magistrate, as above provided the necessary balance to prevent even the remotest possibility of a lame prosecution.

In our view, Sections 200, 202, 204, 238 to 243, 340 and 343(1), when juxtaposed to each other, would endorse the availability of a discretion in the Trial Magistrate to conduct a semblance of inquiry, if considered indispensable for proceeding with the complaint in accordance with law. This is more so, amongst others, as a complaint under Section 340 or Section 341 may be filed even without holding a preliminary inquiry into the facts, on which it appears to the complainant Court ***prima facie*** that an offence, as contemplated, had been committed and that it is expedient in the interests of justice that an inquiry should be made into such offence by a Magistrate. In the event of a complaint being made after a preliminary inquiry, in which sufficient materials are obtained following which a complaint is filed, to reiterate, it may not be necessary for the Trial Magistrate to embark upon any further inquiry to complement the same. However, if no such preliminary inquiry is held and a complaint is filed, in the interest of justice and to obviate unwarranted prosecution, the Trial Magistrate may, to be satisfied, feel the necessity of some inquiry, summary though, to decide the next course of action in law. In other words, if the Trial Court on receipt of a complaint is satisfied that the materials on record are adequate enough, it shall, as per the mandate contained in Section 343(1), deal with the case as if instituted on a police report. On the other hand, if the complaint has been filed without a preliminary inquiry, in our estimate, having regard to the inbuilt flexibility in the text of Section 343(1), which cannot by any means be construed to be an unnecessary appendage or surplusage, introduced by the legislature, it would be open for the Trial Magistrate to hold a summary inquiry before proceeding further with the complaint. As in any case, the cause of justice would be paramount, the mandate in Section 343(1) to the Trial Magistrate to deal with a complaint under Section 340 or Section 341 Cr.P.C. as a case instituted on a police report, if construed to be inexorably absolute, would tantamount to neutering the expression "as far as may be", which is impermissible when judged on the touchstone of fundamental principles of justice, equity and good conscience as well as of interpretation of statutes. Though expectedly, a complaint under Section 340 or Section 341 Cr.P.C. would be founded on

materials in support thereof and would also be preceded by a ***prima facie*** satisfaction of the complaining Court with regard to the commission of the offence and the expediency of an inquiry into the same in the interests of justice, the plea of unavoidable compulsion of a Trial Magistrate to treat the same, as a case as if instituted on a police report, by totally disregarding the necessity, even if felt, for further inquiry, does not commend acceptance. True it is that the text of Section 343(1) otherwise portrays a predominant legislative intent of treating the complaint under Section 340 and Section 341 to be a case, as if instituted on a police report, the presence and purport of the expression "as far as may be" by no means can be totally ignored. This, in our estimate, acknowledges the discretion of the Trial Magistrate to obtain further materials by way of an inquiry even if summary in nature, if genuinely felt necessary in the interest of justice for generating the required satisfaction to proceed in the matter as ought to be in law. However, in exercising such discretion, the Trial Magistrate has to be cautiously conscious of the fact that the complaint pertains to an offence affecting the administration of justice and is preceded by a prima facie satisfaction of the complaining Court that the same might have been committed and that it was expedient in the interests of justice to inquire into the same. In other words, the discretion, as endowed to the Trial Magistrate under Section 343(1) has to be very sparingly exercised and only if it is genuinely felt that further materials are required to be collected through an inquiry by him only to sub-serve the ends of justice and avoid unwarranted judicial proceedings. This is particularly as the Legislature, while designing Section 343(1) of the Code, was fully conscious of the distinction between cases instituted on police report and otherwise and had amended Section 476(2) of the 1898 Code with due deference to the recommendations of the Law Commission of India.

To recount, the Law Commission had in its recommendations, observed that the Court making the complaint under Section 476 (now under Section 340) may not make a thorough inquiry and the Trial Magistrate taking cognizance of the offence then might like to have more materials before issuing the process. It underlined that the nature of jurisdiction to be exercised by the Trial Magistrate under Sections 202 and 203 of the Code is always not similar to the nature of proceedings held by the complaining court under Section 476 (now under Section 340) and therefore, the inquiry under Section 476 (now Section 340) being of a limited nature, may not in all eventualities, serve the purpose of "investigation" as contemplated in Section 202 of the Code.

We are thus of the firm opinion that a Trial Magistrate, on receipt of a complaint under Section 340 and/or Section 341 of the Code, if there is a preliminary inquiry and adequate materials in support of the considerations impelling action under the above provisions are available, would be required to treat such complaint to constitute a case, as if instituted on police report and proceed in accordance with law. However, in absence of any preliminary inquiry or adequate materials, it would be open for the Trial Magistrate, if he genuinely feels it necessary, in the interest of justice and to avoid unmerited prosecution

to embark on a summary inquiry to collect further materials and then decide the future course of action as per law. In both the eventualities, the Trial Magistrate has to be cautious, circumspect, rational, objective and further informed with the overwhelming caveat that the offence alleged is one affecting the administration of justice, requiring a responsible, uncompromising and committed approach to the issue referred to him for inquiry and trial, as the case may be. In no case, however, in the teeth of Section 343(1), the procedure prescribed for cases instituted otherwise than on police report would either be relevant or applicable qua the complaints under Section 340 and/or 341 of the Cr.P.C.

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270. CRIMINAL PROCEDURE CODE, 1973 – Section 439

CRIMINAL TRIAL

Allegations of murder of an activist complaining against illegal mining – Accused who is sitting Member of Parliament released on bail, pending trial – Accused allegedly violated the conditions of the bail – Threat and intimidation to witnesses – Held, trial must be held fairly where witnesses are able to dispose truthfully and fearlessly – Direction of *denovo* trial issued – Also, bail of the accused cancelled with direction to keep him in custody during the period when eight eye-witnesses are re-examined – Further, during rest of the trial accused restricted from entering the State except on the days of trial.

दण्ड प्रक्रिया संहिता, 1973 - धारा 439

आपराधिक विचारण

अवैध खनन के विरूद्ध शिकायत करने वाले कार्यकर्ता की हत्या के अभिकथन - अभियुक्त, विद्यमान लोकसभा का सदस्य, को विचारण लंबित रहते जमानत पर स्वतंत्र किया गया - अभियुक्त द्वारा अभिकथित रूप से जमानत की शर्तों का उल्लंघन किया गया - साक्षियों को भयभीत एवं अभित्रस्त किया - अभिनिर्धारित, विचारण निष्पक्ष होना चाहिये जहाँ साक्षीगण निर्भय एवं सत्यनिष्ठ अभिसाक्ष्य दे सकें - नवीन विचारण किए जाने का निर्देश - यह भी, अभियुक्त की जमानत इस निर्देश के साथ निरस्त की गई कि उसे आठ चक्षुदर्शी साक्षियों के पुनः परीक्षित होने तक अभिरक्षा में रखा जाए - पुनः यह और भी कि अभियुक्त को विचारण के दिनों को छोड़कर राज्य में प्रवेश से निषिद्ध किया गया।

Dinubhai Boghabhai Solanki v. State of Gujarat and ors.

Judgment dated 30.10.2017 passed by the Supreme Court in Criminal Appeal No. 492 of 2014 and others, reported in 2017 (4) Crimes 407 (SC)

Relevant extracts from the judgment:

We are also mindful of the principle that standard of proof that is required in such criminal cases is that the guilt has to be proved beyond reasonable doubt. However, at the same time, it is also necessary to ensure that trial is

conducted fairly where witnesses are able to depose truthfully and fearlessly. Old adage judicial doctrine, which is the bedrock of criminal jurisprudence, still holds good, viz., the basic assumption that an accused is innocent till the guilt is proved by cogent evidence. It is also an acceptable principle that guilt of an accused is to be proved beyond reasonable doubt. Even in a case of a slight doubt about the guilt of the under trial, he is entitled to benefit of doubt. All these principles are premised on the doctrine that 'ten criminals may go unpunished but one innocent person should not be convicted". Emphasis here is on ensuring that innocent person should not be convicted. Convicting innocence leads to serious flaws in the criminal justice system. That has remained one of the fundamental reasons for loading the procession system in criminal law with various safeguards that accused persons enjoy when they suffer trials. Conventional criminology has leaned in favour of persons facing trials, with the main objective that innocent persons should not get punished.

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That apart, it is in the larger interest of the society that actual perpetrator of the crime gets convicted and is suitably punished. Those persons who have committed the crime, if allowed to go unpunished, this also leads to weakening of the criminal justice system and the society starts losing faith therein. Therefore, the first part of the celebrated dictum "ten criminals may go unpunished but one innocent should not be convicted" has not to be taken routinely. No doubt, latter part of the aforesaid phrase, i.e., "innocent person should not be convicted" remains still valid. However, that does not mean that in the process "ten persons may go unpunished" and law becomes a mute spectator to this scenario, showing its helplessness. In order to ensure that criminal justice system is vibrant and effective, perpetrators of the crime should not go unpunished and all efforts are to be made to plug the loopholes which may give rise to the aforesaid situation.

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With this, we advert to the application filed by the complainant for cancellation of bail. As mentioned above, application for cancellation of bail has been filed on the ground that Mr. Solanki had been threatening the witnesses; threats have been extended to the complainant and his family members as well for whose protection CBI had written to the DGP, Gujarat and it is also stated that apprehension of the complainant expressed earlier which can be discerned from the events that have taken place. Coupled with that, a very pertinent and significant factor is that even CBI has affirmed the aforesaid plea of the complainant with categorical assertion that the witnesses are threatened by Mr. Solanki. In this scenario, prima facie case for cancellation of bail has been made out. In this behalf, we may usefully refer to the following discussion in State of ***Bihar v. Rajballav Prasad, (2017) 2 SCC 178***:

> "Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf. We would like to reproduce following discussion from the judgment in ***Kanwar Singh Meena v. State of Rajasthan, (2012) 12 SCC 180*** (SCC pp. 186 & 189, paras 10 & 18)
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> "While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well-recognised principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this Court are much wider, this Court is equally guided by the above principles in the matter of grant or cancellation of bail.
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> Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody."

As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent

is not enlarged on bail. This importance of fair trial was emphasised in ***Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143,*** while setting aside the order of the High Court granting bail in the following terms:

> "We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

Such sentiments were expressed much earlier as well by the Court in ***Talab Haji Hussain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376,*** in the following manner:

> "There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked."

In this hue, we need to examine as to whether purpose can be served by banning the entry of Mr. Solanki in the city of Gujarat. It was passionately argued by Mr. Rohatgi that during the period aforesaid witnesses are examined, Mr. Solanki can be barred from entering Gujarat. He even offered that Mr. Solanki would remain in Delhi during that period. In normal circumstances, we would have accepted this suggestion of Mr. Rohatgi. For examining this argument, we have to keep in mind the principle laid down by this Court in ***Masroor v. State of Uttar Pradesh and another, (2009) 14 SCC 286,*** expressed in the following words:

> "There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in ***Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684***, are quite apposite:
>
> > "Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution."

We, thus, require to adopt a balancing approach which takes care of right of liberty of Mr. Solanki as an undertrial and at the same time the interest of the society in general, viz., the fair trial is also fulfilled.

Going by the exceptional circumstances in which retrial is ordered by the High Court, and is being maintained in principle, with only modification that instead of all witnesses, 26 witnesses would be re-examined, we are of the opinion that in order to ensure that there is a fair trial in literal sense of the term, at least till the time eight eye-witnesses are re-examined, Mr. Solanki should remain in confinement and he be released thereafter with certain conditions, pending remaining trial. We, therefore, dispose of Criminal Miscellaneous Petition No. 14006 of 2015 with the following directions:

(a) Bail granted to Mr. Solanki by this Court vide order dated February 25, 2014 stands cancelled for the time being. He shall be taken into custody and shall remain in custody during the period eight eye-witnesses are re-examined.

(b) The trial court shall summon 26 witnesses who are to be examined afresh. In the first instance, 8 eye-witnesses shall be summoned and examined on day to day basis. Once their depositions in the form of examination-in-chief and cross-examination are recorded, Mr. Solanki shall be released on bail again on the same terms and conditions on which he was granted bail earlier by this Court by order dated February 25, 2014. After Mr. Solanki comes out on bail, there shall be an additional condition, namely, till the recording and completion of the statements of other witnesses, he shall not enter the State of Gujarat. To put it clearly, after Mr. Solanki is released on bail, he shall immediately move out of the State of Gujarat and shall not enter the said State till the completion of remaining evidence, except on the days of hearing when he would be appearing in the court. It will be open to the trial court to add any further conditions, if the circumstances so warrant.

(c) The trial court shall also endeavour to record the remaining evidence as well as expeditiously as possible by conducting the trial on day to day basis.

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271. DOWRY PROHIBITION ACT, 1961 – Sections 3 and 4
INDIAN PENAL CODE, 1860 – Sections 406 and 498A
CRIMINAL PROCEDURE CODE, 1973 – Sections 177 and 178
Territorial jurisdiction of Court – Major acts of dowry demand and harassment occurred in Jaipur and Agartala whereas an isolated portion occurred in Bhopal – Whether court at Bhopal has territorial jurisdiction? Held, Yes – Word 'partly' appearing in Section 178(b) covers isolated part or portion of the crime.

दहेज प्रतिषेध अधिनियम, 1961 - धाराएं 3 एवं 4

भारतीय दंड संहिता, 1860 - धाराएं 306 एवं 498क

दंड प्रक्रिया संहिता, 1973 - धाराएं 177 एवं 178

न्यायालय का स्थानीय क्षेत्राधिकार - दहेज की मांग व प्रताड़ना के मुख्य कृत्य जयपुर और अगरतला में कारित हुये और अकेला एक कार्य भोपाल में कारित हुआ - क्या भोपाल में स्थित न्यायालय को विचारण का स्थानीय क्षेत्राधिकार है? अभिनिर्धारित, हाँ - धारा 178(ख) में प्रयुक्त ''आंशिक'' शब्द अपराध के भाग अथवा अकेले कार्य को समाहित करता है।

Anurag Mathur and ors. v. State of M.P. and anr.
Order dated 11.04.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 2744 of 2016, reported in 2018 (1) ANJ (MP) 140

Relevant extracts from the order:

A bare reading of Sections 177 and 178 of Cr.P.C. makes it clear that Section 177 of Cr.P.C. states the ordinary place of inquiry or trial, whereas Section 178 Cr.P.C. provides for place of inquiry or trial when it is uncertain in which of several local areas an offence was committed or where the offence was committed partly in one local area and partly in another and where it is consisted of several acts done in different local areas, it could be inquired into or tried by a court having jurisdiction over or any such local areas. In the present case, as per the contents of the FIR and the case diary statements of respondent No.2, her father and brother, petitioner No.1 came over to Bhopal on 04.02.2012 and there he committed dowry related offences in furtherance of demand of dowry as made by him and his parents. In the light of aforestated factual matrix, it is held that the provisions of clause (b) of Section 178 of Cr.P.C. is wholly attracted in the present case irrespective of the facts that an isolated part/portion of the whole crime occurred in Bhopal, whereas the major parts of it occurred in Jaipur and Agartala because the dictionary meaning of "partly", which is appearing in Section 178(b) of Cr.P.C., is to some extent or in some degree i.e. an unspecified amount or extent or number of degree. Therefore, it is held that the Court at Bhopal has territorial jurisdiction to hold trial of the case.

In ***Sujata Mukherjee v. Prashant Kumar Mukherjee, (1997) 5 SCC 30***, the parents of complainant-wife were residents of Raipur, whereas her husband, an accused, and other accused persons of the case were the residents of Raigarh. The complainant-wife had to come to Raipur to save herself from the maltreatment and humiliation being meted out to her at the hands of all the accused persons. The complainant-wife has stated in the FIR, inter alia, that her husband had also come to the house of her parents at Raipur and there he had also assaulted her. On the basis of the said facts, the Supreme Court has held that even though only one isolated incident of dowry related offence was committed at the complainant-wife's parental house at Raipur, the court at Raipur has territorial jurisdiction to try the case. The Supreme court has also held that the FIR reveals that on some occasions all the accused persons had taken part in the commission of dowry related offences, on other occasion one of the accused persons had taken part in commission of the alleged offences, therefore, the Court at Raipur will have jurisdiction to try the case against all the accused persons though only the husband committed the offence at Raipur.

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272. EVIDENCE ACT, 1872 – Sections 112 and 114

Refusal to undergo DNA test – Presumption under Section 114 can be drawn without disturbing presumption under Section 112.

साक्ष्य अधिनियम, 1872 - धाराएं 112 एवं 114

डी. एन. ए. परीक्षण कराने से इन्कारी - धारा 112 में वर्णित उपधारणा को प्रभावित किये बिना, धारा 114 में यथा उपबंधित उपधारणा की जा सकती है ।

Badri Prasad Jharia v. Seeta Jharia

Order dated 21.04.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 15345 of 2016, reported in 2018 (1) MPLJ 331

Relevant extracts from the Order:

The Apex Court in the case of ***Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365,*** where the High Court had already directed for the DNA test, held in para 18 of the order while upholding the order passed by the High Court by putting a caveat before passing of the order regarding paternity test by DNA, observed thus :

> "We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:
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> **"114. Court may presume existence of certain facts –** The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> ***Illustration (h)*** – That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.
>
> This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

In the light of para 18 of the judgment passed by the Apex Court in ***Dipanwita Roy v. Ronobroto Roy*** (supra), the impugned order cannot be held to be illegal. It has been held by the Apex Court that a person cannot be compelled for the DNA test,

though, the DNA test is most legitimate and scientifically perfect means which the husband can use to establish and ascertain the paternity and infidelity, but at the same time the Court has evolved the principle of balance by directing for preservation and the right of individual privacy to the extent possible and, therefore, the Court itself has held that in case, the wife declines for the DNA test, the Court can draw presumption as contemplated in Section 114 of the Evidence Act, without disturbing the presumption envisaged in Section 112 of the Evidence Act.

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***273. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 13**
CRIMINAL PROCEDURE CODE, 1973 – Section 97

(i) Custody of teenage children, considerations for – Paramount consideration is welfare of children and not the dispute between husband and wife or their conduct – Teenage children, are better mentally and psychologically equipped to take decision in this behalf and are capable of understanding where their welfare lies – Court should take a holistic approach by interviewing the children and ascertaining their wishes as well as welfare.

(ii) Circumstances that can be taken into consideration while granting custody – Father admitting children in boarding school, being not in a position to take personal care of the Children due to his pre-occupations in business or otherwise – The academic performance of children improved significantly while in custody of mother – Children aged 13 and 17 years expressing their desire to stay with their mother – In the opinion of Court also, both Children are comfortable in the company of their mother – Custody given to mother.

हिन्दू अवयस्कता एवं संरक्षकता अधिनियम, 1956 - धारा 13

दण्ड प्रक्रिया संहिता, 1973 - धारा 97

(i) किशोरवय बालकों की अभिरक्षा हेतु विचार योग्य बिन्दु - बालकों का कल्याण ही सर्वोपरि है, न कि पति-पत्नी के बीच का आचरण या विवाद - किशोरवय बालक अपने हित के बारे में निर्णय लेने हेतु मानसिक और मनोवैज्ञानिक रूप से समर्थ होते हैं कि उनका कल्याण कहाँ है - न्यायालय को बालकों से साक्षात्कार कर उनकी इच्छा व कल्याण के बारे में समग्र दृष्टिकोण अपनाना चाहिये।

(ii) अभिरक्षा अनुदत्त करते समय विचार में ली जाने वाली परिस्थितियां - पिता ने बालकों को आवासीय विद्यालय में प्रविष्ट करा दिया, व्यावसायिक व्यस्तता या अन्य कारणों से वह बालकों की व्यक्तिगत देखभाल करने की स्थिति में नहीं - माँ की अभिरक्षा में बालकों की शैक्षणिक स्थिति में उल्लेखनीय सुधार हुआ - 13 व 17 वर्षीय बालकों ने माँ के साथ रहने की इच्छा प्रकट की - न्यायालय

की राय में भी दोनों बालक माँ की अभिरक्षा में सुखी थे - माँ को अभिरक्षा प्रदान की गई।

Purvi Mukesh Gada v. Mukesh Popatlal Gada and anr.
Judgment dated 04.09.2017 passed by the Supreme Court in Criminal Appeal No. 1553 of 2017, reported in AIR 2017 SC 5407

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***274. IMMORAL TRAFFIC (PREVENTION) ACT, 1956 – Sections 13 and 14**

Charge-sheet filed on the basis of investigation by a person other than Special Police Officer authorised under the Act – Quashment of the charge-sheet by the High Court on the same ground challenged before the Supreme Court – Held, it is settled law that trial does not vitiate merely on the ground that investigation was not valid – Accused must show prejudice to him by such investigation – Order of the High Court set aside. (*H.N. Rishbud and anr. v. State of Delhi, (1955) 1 SCR 1150* relied upon)

अनैतिक व्यापार (निवारण) अधिनियम, 1956 - धाराएं 13 एवं 14

इस अधिनियम के अधीन अधिकृत विशेष पुलिस अधिकारी से भिन्न व्यक्ति द्वारा अन्वेषण के आधार पर अभियोगपत्र प्रस्तुत - इस आधार पर उच्च न्यायालय द्वारा अभियोग-पत्र के अभिखंडन को उच्चतम न्यायालय के समक्ष चुनौती दी गई - अभिनिर्धारित, यह सुस्थापित विधि है कि मात्र अन्वेषण वैध नहीं होने के आधार पर विचारण दूषित नहीं होता है - अभियुक्त द्वारा यह साबित किया जाना चाहिए कि ऐसे अन्वेषण से वह प्रतिकूलतः प्रभावित हुआ है - उच्च न्यायालय का आदेश अपास्त किया गया। (**एच.एन. रिशबद एवं अन्य विरूद्ध दिल्ली राज्य, (1955) 1 एससीआर 1150** अवलंबित)

R.A.H. Siguran v. Shankare Gowda @ Shankara & anr.
Judgment dated 18.08.2017 passed by the Supreme Court in Criminal Appeal No. 1439 of 2017, reported in 2017 (4) Crimes 379

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***275. INDIAN PENAL CODE, 1860 – Section 68**

Imprisonment in default of fine – Direction of the appellate court to deposit fine within stipulated period in default of which imprisonment was ordered – Failure of the accused to deposit fine within such stipulated period – Deposit of fine after being sent to jail to undergo default imprisonment – Accused is eligible to be released.

भारतीय दण्ड संहिता, 1860 - धारा 68

जुर्माना के व्यतिक्रम में कारावास - निर्धारित अवधि में जुर्माना, जिसके व्यतिक्रम में कारावास का आदेश पारित किया गया हो, को जमा करने के लिए अपीलीय न्यायालय का निर्देश - अभियुक्त का इस निर्धारित अवधि में जुर्माना जमा करने में असफल रहना

- व्यतिक्रम कारावास भुगताने के लिए जेल भेजे जाने के पश्चात् जुर्माने की अदायगी - अभियुक्त निर्मुक्त किये जाने का हकदार है।

Munna Basor v. State of M.P.
Order dated 13.01.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 720 of 2017, reported in 2018 (1) ANJ (MP) 45

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***276. INDIAN PENAL CODE, 1860 – Sections 354 and 354A**
PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 – Sections 7 and 8
Accused had caught hold of victim girl's hand in public place, saying her that he loves her and wants to marry – Neither amounts to sexual harassment as required under Section 354A nor sexual assault as required under Section 7 of POCSO Act – Only constitutes outraging the modesty of the victim girl, punishable under Section 354 of IPC, simpliciter.

भारतीय दण्ड संहिता, 1860 - धाराएं 354 एवं 354क

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 - धाराएं 7 एवं 8

अभियुक्त ने लोक स्थान में आहत बालिका का हाथ पकड़ कर कहा कि वह उससे प्यार करता है और विवाह करना चाहता है - अभियुक्त का कार्य धारा 354क भा.दं.सं. के अधीन यौन उत्पीड़न या पाक्सो अधिनियम की धारा 7 के अधीन यौन हमले के तुल्य नहीं है - मात्र अभियुक्त का कृत्य आहत् बालिका की लज्जा भंग करने का मामला है जो कि भा.दं.सं. की धारा 354 के अधीन दण्डनीय है।

Vasudev @ Kallu v. State of M.P.
Judgment dated 07.11.2016 passed by the High Court of Madhya Pradesh in Criminal Appeal No.490 of 2014 reported in 2018 (1) ANJ (MP) 54

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277. INDIAN PENAL CODE, 1860 – Sections 499, 500, 501 and 502
Liability of the owner for alleged defamatory content published in the newspaper – Act of printing or selling or offering to sell include the legal right to sell i.e. to transfer the title in the goods, the newspaper – Liability of the owner would depend upon the evidence of the case – Facts, issue and *ratio decidendi of K.M. Mathew v. K.A Abraham and ors., (2002) 6 SCC 670* explained.

भारतीय दंड संहिता, 1860 - धाराएं 499, 500, 501 एवं 502

समाचार पत्र में अभिकथित मानहानिकारक प्रकाशित विषय के लिए स्वामी का दायित्व - मुद्रण या विक्रय या विक्रय के प्रस्ताव के कार्य में विक्रय करने का विधिक अधिकार यथा समाचार पत्र, सामग्री के स्वत्व का अंतरण सम्मिलित है - स्वामी का दायित्व

मामले की साक्ष्य पर निर्भर करेगा - ***के. एम. मेथ्यू विरूद्ध के. ए. अब्राहम और अन्य, (2002) 6 एससीसी 670*** के तथ्यों, विवाद्यायन एवं विनिश्चय की व्याख्या की गई।

Mohammed Abdulla Khan v. Prakash K.
Judgment dated 04.12.2017 passed by the Supreme Court in Criminal Appeal No. 2059 of 2017, reported in 2017 (4) Crimes 428 (SC)

Relevant extracts from the judgment:

An analysis of the facts reveals that to constitute an offence of defamation it requires a person to make some imputation concerning any other person;

(i) Such imputation must be made either
  (a) With intention, or
  (b) Knowledge, or
  (c) Having a reason to believe
    (that such an imputation will harm the reputation of the person against whom the imputation is made).

(ii) Imputation could be, by
  (a) Words, either spoken or written, or
  (b) By making signs, or
  (c) Visible representations

(iii) Imputation could be either made or published.

The difference between making of an imputation and publishing the same is:

If 'X' tells 'Y' that 'Y' is a criminal – 'X' makes an imputation.

If 'X' tells 'Z' that 'Y' is a criminal – 'X' publishes the imputation.

The essence of publication in the context of Section 499 is the communication of defamatory imputation to persons other than the persons against whom the imputation is made. ***Khima Nand v. Emperor, (1937) 38 Cri.L.J. 806 (All) : Amar Singh v. K.S. Badalia, (1965) 2 Cri.L.J. 693 (Pat)***

Committing any act which constitutes defamation under Section 499 IPC is punishable offence under Section 500 IPC. Printing or engraving any defamatory material is altogether a different offence under Section 501 IPC. Offering for sale or selling any such printed or engraved defamatory material is yet another distinct offence under Section 502 IPC.

If the content of any news item carried in a newspaper is defamatory as defined under Section 499 IPC, the mere printing of such material "knowing or having good reason to believe that such matter is defamatory" itself constitutes a distinct offence under Section 501 IPC. The sale or offering for sale of such printed "substance containing defamatory matter" "knowing that it contains such matter" is a distinct offence under Section 502 IPC.

Whether an accused (such as the respondent) against whom a complaint is registered under various Sections of the IPC (Sections 500, 501 & 502 IPC) could be convicted for any of those offences depends upon the evidence regarding the existence of the facts relevant to constitute those offences.

In the context of the facts of the present case, first of all, it must be established that the matter printed and offered for sale is defamatory within the meaning of the expression under Section 499 IPC. If so proved, the next step would be to examine the question whether the accused committed the acts which constitute the offence of which he is charged with the requisite intention or knowledge etc. to make his acts culpable.

Answer to the question depends upon the facts. If the respondent is the person who either made or published the defamatory imputation, he would be liable for punishment under Section 500 IPC. If he is the person who "printed" the matter within the meaning of the expression under Section 501 IPC. Similarly to constitute an offence under Section 502 IPC, it must be established that the respondent is not only the owner of the newspaper but also sold or offered the newspaper for sale.

We must make it clear that for the acts of printing or selling or offering to sell need not only be the physical acts but include the legal right to sell i.e. to transfer the title in the goods – the newspaper. Those activities if carried on by people, who are employed either directly or indirectly by the owner of the newspaper, perhaps render all of them i.e., the owner, the printer, or the person selling or offering for sale liable for the offences under Sections 501 or 502 IPC, (as the case may be) if the other elements indicated in those Sections are satisfied.

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278. LAND ACQUISITION ACT, 1894 – Sections 3, 49 and 23
CONSTITUTION OF INDIA : Article 300A
WORDS AND PHRASES

(i) Whether, under Land Acquisition Act, 1894, acquisition of part of building can be made without acquiring land underneath to such building, when owner of the building is also the owner of land? Held, Yes.

(ii) Is owner of the land deprived of his ownership rights over the land when Government acquires only a building or portion thereof standing on his land, without acquiring the underlying land? Held, No – Owner can exercise the option for acquisition of the entire building and land, which is available under section 49 of the Act – Besides, owner can be compensated also in case he is having any interest in the land or if his land is rendered of less utility.

(iii) When land belongs to the Government but building standing on such land belongs to another person, whether the Government is required to acquire its own land underneath

the building? Held, No – Government is not required to acquire land which already belongs to the Government but is only required to acquire such interest in the land which do not belong to the Government.

(iv) How compensation has to be determined when a building or part thereof only is acquired? All aspects of the owner's interest and the bundle of other rights can be taken into consideration including support provided by the land and value of the land in the locality etc.

(v) Words "land" and "includes", meaning of, explained.

भू-अर्जन अधिनियम, 1894 - धाराएं 3, 49 एवं 23

भारत का संविधान - अनुच्छेद 300क

शब्द एवं वाक्यांश:

(i) क्या भू-अर्जन अधिनियम, 1894 के अधीन भवन की भूमि का अर्जन किये बिना भवन के किसी भाग का अर्जन किया जा सकता है जबकि भवन का स्वामी, भूमि का भी स्वामी है? अभिनिर्धारित, हाँ।

(ii) क्या जब शासन द्वारा भूमि को अर्जित किये बिना केवल भवन या भवन के भाग का अर्जन किया जाता है तो भूमि-स्वामी अपने भूमि स्वामित्व के अधिकार से वंचित हो जायेगा? अभिनिर्धारित, नहीं - स्वामी धारा 49 के अधीन प्राप्त अपने विकल्प का प्रयोग कर सकता है कि पूरे भवन व भूमि का अर्जन किया जाये, साथ ही ऐसे स्वामी को भूमि में उसके हित और भूमि की उपयोगिता मंे आई कमी के बारे में भी क्षतिपूर्ति दिलाई जा सकती है।

(iii) जहाँ भूमि शासन की हो और उस भूमि पर निर्मित भवन अन्य व्यक्ति का है वहाँ क्या भवन अर्जित करते समय शासन को स्वयं की भूमि अर्जित करनी होगी? अभिनिर्धारित, नहीं - शासन को स्वयं की भूमि अर्जित करने की आवश्यकता नहीं है, किन्तु उस भूमि के ऐसे हित जो शासन के नहीं हैं, अर्जित करने होंगे।

(iv) भवन या उसके भाग के अर्जन की दशा में क्षतिपूर्ति का निर्धारण कैसे करें? भवन या उसके विशिष्ट भाग के मूल्य निर्धारण हेतु जिस भूमि पर भवन निर्मित है उसकी स्थानीय स्थिति अनुसार भूमि के मूल्य सहित स्वामी के सभी हितों और सभी अधिकारों को विचार में लिया जाना चाहिये।

(v) शब्दों 'भूमि' एवं 'शामिल है' के अर्थ की व्याख्या की गई।

State of Maharashtra and ors. v. Reliance Industries Ltd. and ors.
Judgment dated 15.09.2017 passed by the Supreme Court in Civil Appeal No.1699 of 2007, reported in AIR 2017 SC 4490

Relevant extracts from the judgment:

It was submitted that Section 49 of the Act does not empower the acquisition of any building or part thereof dehors the underlying land. The submission to that effect to be accepted would require ownership of the land with owner of the

building and owner has required by expressing desire that the whole of the building with land be acquired is not the factual scenario in the instant case. The land upon which the building is standing need not be acquired and there is no necessity to acquire it. There can be acquisition of part of the building or the house or manufactory as the owners have not exercised their option to insist for acquisition for whole of the building as such only the rights which they have in the particular floors are being acquired. No doubt about it that under proviso to Section 49 (1) there can be acquisition of land beside the part of the building, house or manufactory and when the land is proposed to be taken, the dispute as to whether it does or does not form part of the house, manufactory or building, the Collector shall refer the determination of such question to the Court.

There is no dispute with aforesaid proposition but where part of building that too a multi-storied building is being acquired, the land need not be acquired moreso when the owner of building is not the owner of land and his entire interest in part of building can be acquired.

It was also submitted that owner of the land is deprived of his ownership rights over the land when the State purports to acquire only a building or portion thereof standing on his land, without acquiring the underlying land. The submission cannot be accepted as the respondents are not the owner of the underlying land. Secondly, the acquisition of a particular floor as per the provision of section 49 of the Act is permissible and the entire interest of owner in a particular portion has been acquired for that he would to be compensated. It is not the case of partial acquisition of the interest on a particular floor. When without selling the land, in a building, a particular floor can be sold why there could not be acquisition of particular floor for public purpose.

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Firstly, it pre-supposes ownership of land also is with owner of building, if that be so, the owner can exercise the option for acquisition of the entire building and land which is available under Section 49 of the Act and besides that the owner can be compensated also in case he is having any interest in the land and in case his land is rendered of less utility obviously he can claim compensation under the provisions of the Land Acquisition Act. If the land is rendered value less then also adequate compensation can be claimed under the provisions of Section 23 in accordance with law. In case right is affected in land which is not acquired by severance, for that also compensation can be claimed. Thus, the submission so placed is factually incorrect and legally unsustainable.

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In case the building or portion is acquired without acquiring the underlying land there is no question of overreach of the State's power to the eminent domain. Article 300A interdict taking of the property for a public purpose without compensating the owner for its loss. In case entire ownership of the land does not lie with the owner only the right which is capable of being acquired would be acquired not something which is non-existent. The building or part can be

acquired and there is no question of acquisition of the land in such cases. In adjudication of the compensation as per the provisions of Section 23, the State is not depriving the respondents of their property. There is acquisition of land by fair procedure along with reasonable compensation. The action has been taken by the State in accordance with law. The action is legally justified. Thus, there is no question of eminent domain being misused or violation of provisions of Article 300A of the Constitution of India

xxx xxx xxx

Reliance has also been placed on the decision of this Court in ***Kiran Tandon v. Allahabad Development Authority, (2004) 10 SCC 745 : AIR 2004 SC 2006,*** thus :

> "A question which arises here is as to what method for determining the value of the property should be adopted when the land is comprised of buildings, trees or some other additions of like nature. In Parks, J.A.: Principles and Practice of Valuation (published by Eastern Law House, 1998 Edn.) the following paragraph on p. 332 illustrates the different aspects of the problem:
>
> > "Land with buildings is viewed in a different perspective than bare land as such. Land and buildings once married become one unit, and neither land nor building can thereafter be valued separately. A building once erected on or married to the site, as it is technicallv often termed takes unto itself a value which may be either greater or less than the cost of erection depending upon the market situation. If the building properly and economically develops the land, the total value of the complete entity may be worth more than the sum of the individual valuer. In such cases, the excess of the composite value over the sum of the individual values is ascribable as the builder's profit. But there may also be instances to the contrary. It is generally impossible to arrive at the true value of the whole by addition of the parts."
>
> In ***Abdullah Jan Mohd. Ganjee v. State of Bihar, (1967) l SCWR 214,*** it was observed that a building standing on the land and the land on which it stands may not for the purposes of the Land Acquisition Act ordinarily be regarded as separate units capable of being separately valued and the Reference Court in the normal course should have valued the land and building as composite property by the evidence furnished by the value of similar and comparable

properties in the neighborhood by capitalization of rent or other income received out of the property.

This principle was reiterated in ***State of Kerala v. P.P. Hassan Koya, AIR 1968 SC 1201,*** wherein it was held as under:

"In determining compensation payable in respect of land with buildings, compensation cannot be determined by ascertaining the value of the land and the 'break-up value' of the building separately. The land and the building constitute one unit, and the value of the "entire unit must be determined with all its advantages and its potentialities.

In ***O. Janardhan Reddy v. Spl. Dy. Collector, (1994) 6 SCC 456 : AIR 1995 SC 186,*** it was held that where there are irrigation wells in the land, estimated construction cost of the wells cannot be separately assessed apart from assessment of market value of the land and the value of the land has to be assessed having regard to the availability of irrigation facility on the land as a prime factor. This view has been reiterated in ***State of Bihar v. Madheshwar Prasad, (1996) 6 SCC 197 and State of Bihar v. Ratan Lal Sahu, (1996) 10 SCC 635 : AIR 1996 SC 3500.*** But there is no hard-and-fast rule that land and building must be valued as one unit. They can be separately assessed if the large portion of the land is lying vacant and is capable of better use as stated by Venkatachaliah J. as His Lordship then was in ***Administrator General of W.B v. Collector, Varanasi, (1988) 2 SCC 150 : AIR 1988 SC 943,*** and it will be useful to extract the relevant part of AIR para 8 of the Report:

"Usually land and building thereon constitute one unit. Land is one kind of property; land and building together constitute an altogether different kind of property. They must be valued as one unit. But where however the property comprises extensive land and the structures thereon do not indicate a realisation of the full developmental potential of the land it might not be impermissible to value the property estimating separately the market value of the land with reference to the date of the preliminary notification and to add to it the value of the structures as at that time. In this method, building value is estimated on the basis of the prime cost or replacement cost less depreciation.

> The rate of depreciation is, generally, arrived at by dividing the cost of construction (less the salvage value at the end of the period of utility) by the number of years of utility of the building. The factors that prolong the life and utility of the building, such as good maintenance, necessarily influence and bring down the rate of depreciation."

The question in the above matter was as to the method for determining the value of property that has to be adopted in the facts of each case. No doubt about it when land and building once married becomes one unit, neither land nor building can thereafter be valued separately. But this would not come in the way of determining the valuation of a particular floor, all the aspects of the owners interest and the bundle of other rights can be taken into consideration including support provided by the land and value of the land in the locality etc. Value of the part of the building can also be accordingly assessed.

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In ***Municipal Corporation of Greater Bombay and ors. v. Indian Oil Corporation Ltd., (1991) Supp. 2 SCC 18 : AIR 1991 SC 686,*** this court had considered the definition of "land" which is an inclusive definition and has observed that its accompaniments are land which is being built upon or is built upon or covered with water; benefits to arise out of land; things attached to the earth, This Court has held thus:

> "The question then is whether it is a land? Indisputably the definition of 'land' also is of an inclusive definition. Its accompaniments are land which is being built upon or is built upon or covered with water; benefits to arise out of land; things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street. The question is whether the tank is attached to the earth? In Stroud's Judicial Dictionary (5th edn. Vol. 1) relied on by the learned counsel for the appellant, the word 'attached' has been defined at page 217 thus:
>
> > "This word does not always mean physically fastened; it may also mean, super incumbent upon. Thus, in citing the judgment of Cockburn, C.J., ***Laing v. Bishopswearmouth,*** that whatever is 'attached' to premises has to be estimated for the purpose of ascertaining its rating value."

The meaning of "land" has also been considered by this Court in ***P. Rami Reddy and ors. v. State of Andhra Pradesh and ors., (1988) 3 SCC 433 : AIR 1988 SC 1626.*** This Court has discussed the question that arose in the context of the

meaning of the expression 'land' in paragraph 5(2)(a) of the Fifth Schedule to the Constitution and section 3(1) of the Schedule to A.P. Scheduled Area Land Transfer Regulation, 1959. This Court has laid down thus:

> "Another argument which did not succeed in the High Court has been hopefully persisted with in this Court. The expression "Land" has been used in its restricted sense in para 5(2)(a) of the Fifth Schedule and therefore the impugned provisions prohibiting the transfer of lands along with structures thereon by employing the expression "immovable property" is not in accordance with law. Such is the argument. This argument is not devoid of merit for two reasons: Firstly, there is no reason to believe that "land" employed in its legal sense. The expression "land" in its legal sense is a comprehensive expression which is wide enough to include structures, if any, raised thereon. While this proposition hardly needs to be buttressed, support can be sought from the following sources:
>
> *The Dictionary of English Law [1959 edn., Vol. 2, p.1053 by Earl Jowitt]*
>
> LAND, in its restrained sense, means soil, but in its legal acceptation it is a generic term, comprehending every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also houses, mills, castles, and other buildings; for with the conveyance of the land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's center, hence the maxim, *Cujusest solume jusestusquead caelum etadinferos;* or, more curtly Words and Phrases Judicially expressed, *Cujusest solumejus estaltum* (Co. Litt. 4-a).
>
> Defined (By Roland Burrows- Vol. III, 1944 edn., p.206).The word "land" would be variously understood by different persons. To a farmer the word "land" would not mean his farm buildings; to a lawyer the word would include everything ***Smith v. Richmond per*** Lord Halsbury, that was upon the land fixed immovable upon it. L.C., at p. 448.
>
> The Law Lexicon The word "land" is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support.

> Secondly, to interpret the expression “land” in its narrow sense is to render the in that event the prohibition can be easily benevolent provisions impotent and ineffective. circumvented by just raising a farmhouse or a structure on the land. The impugned provisions were inserted by the Amending Regulation precisely to plug such loopholes and make the law really effective. The High Court was perfectly justified in repelling this merit less plea. It is therefore not possible to accede to this submission.”

The definition of land is of wide connotation. It cannot be construed in narrow sense to render provisions of the Act otiose or impracticable.

xxx xxx xxx

The Land Acquisition Act, 1894 was enacted since the Act of 1870 was found entirely ineffective for the protection either of the persons interested in lands taken up or of the public purse. The object of the Land Acquisition Act, 1894 was to amend the then existing law for acquisition of law for public purpose and to determine the adequate amount of compensation to be paid on account of such acquisition.

By looking at the definition as a whole in the scheme of the entire Land Acquisition Act and by reference to what preceded the enactment and the reasons for it, we have interpreted the word ‘includes’. The word ‘include’ is opposite to the word ‘exclude’. If the interpretation as suggested by the learned counsel for the respondents is accepted, then the definition of the land could not become an inclusive definition but the definition of “land” excludes certain factors. The expression ‘land’ includes benefits arising out of the land and things attached to the earth or permanently fastened to anything attached to the earth. The portion of the building cannot survive independent of the building and the building without the land. The word “land” should be understood having been covered by the elongated definition since it defines with inclusiveness that part of the building.

Having regard to the true intent of the meaning of the word ‘land’, the only interpretation possible in the context is the interpretation as made by us, inasmuch as such interpretation will not take away the very meaning of the land. In the matter on hand, owner of the land is the State whereas the owner of the building is a respondent. Since, building cannot stand without the land, the building also becomes part of the land. However, since the owner of the building is different from the owner of the land, and if a portion of the building is required for public purpose, it is open for the State to acquire that portion of the building by paying adequate compensation in respect of that portion of the building, as well as, in respect of proportionate diminution of the user if any of the land under Section 23 of the Land Acquisition Act, 1894, in accordance with law.

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***279. LAND ACQUISITION ACT, 1894 – Section 23**

(i) Compensation, determination of – On the basis of comparative sales method – Principles explained.

(ii) Whether one or two isolated sale deeds of higher value of small plots to be relied for determination of compensation for large chunk of land? Held, in absence of exemplar sale deed of large chunk of land, it is not safe to rely upon one or two isolated sale deeds of high value of small plots – Further average of exemplar sale deeds to be prefered for determining market value of acquired land.

भू-अर्जन अधिनियम, 1894 - धारा 23

(i) मुआवजे का निर्धारण - विक्रयों की तुलना पर आधारित पद्धति - सिद्धांतो की व्याख्या की गई।

(ii) क्या भूमि के बड़े खण्ड के मुआवजे के निर्धारण के लिये उच्च मूल्य वाले भूमि के छोटे भूखंड के एक या दो विक्रय पत्रों पर निर्भर किया जा सकता है? - अभिनिर्धारित, अनुकरणीय उदाहरण के रूप में बड़े भूखंड से संबंधित विक्रय पत्र के अभाव में उच्च मूल्य वाले छोटे-छोटे भूखंडो के एक या दो विक्रय पत्रों में निर्भर करना सुरक्षित नहीं है - आगे, अर्जित भूमि के बाजार मूल्य के अभिनिश्चयन हेतु अनुकरणीय उदाहरण के रूप में प्रस्तुत विक्रय पत्रों के औसत को वरीयता दी जानी चाहिये।

Vithal Rao and another v. Special Land Acquisition Officer Judgment dated 07.07.2017 passed by the Supreme Court in Civil Appeal No. 1645 of 2016, reported in 2018 (1) MPLJ 287

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

Theft of vehicle – Insurance company repudiated the claim on the ground that driver gave lift to two passengers who fled with vehicle violating the condition of insurance – Held, the violation of the condition should be such a fundamental breach so that claimant cannot claim any amount whatsoever – Carrying such passengers may amount to breach of the policy, but it cannot be said to be a fundamental breach – The driver, on a cold winterly night, giving lift to some persons, standing on road, was a humanitarian gesture – It cannot be said to be such a breach that it nullifies the policy.

मोटरयान अधिनियम, 1988 - धारा 147

वाहन की चोरी - बीमा कंपनी ने इस आधार पर क्लेम देने का विरोध किया कि चालक ने यात्रियों को लिफ्ट देकर, जो वाहन ले भागे, बीमा की शर्त का उल्लंघन किया है - अभिनिर्धारित, शर्तों का ऐसा मूलभूत उल्लंघन होना चाहिये जिससे की दावेदार किसी भी राशि का दावा न कर सके - यात्रियों को वाहन में ले जाना पॉलिसी की

शर्तों का उल्लंघन हो सकता है लेकिन इसे मूलभूत उल्लंघन नहीं कहा जा सकता - ठंड की रात्रि में सड़क के किनारे खड़े व्यक्तियों को चालक द्वारा लिफ्ट दिया जाना, मानवीय व्यवहार था - इसे ऐसा भंग नहीं कहा जा सकता जो पॉलिसी को शून्य कर दे।

Manjeet Singh v. National Insurance Company Ltd. and ors. Judgment dated 08.12.2017 passed by the Supreme Court in Civil Appeal No. 21552 of 2017, reported in 2018 ACJ 8 (SC)

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281. MOTOR VEHICLES ACT, 1988 – Section 163A

Whether in a claim proceeding under section 163A of Motor Vehicles Act 1988, it is open for the insurer to raise the defence/plea of negligence? Held, No. (*National Insurance Co. Ltd. v. Sinitha, 2012 ACJ 1 (SC)* is no longer a good law to that extent)

मोटरयान अधिनियम, 1988 - धारा 163क

क्या मोटरयान अधिनियम, 1988 की धारा 163क के अंतर्गत दावे की कार्यवाही में बीमकर्ता को लापरवाही का बचाव/अभिवाक रखना अनुज्ञेय है? अभिनिर्धारित, नहीं। (नेशनल इंश्योरेंस कंपनी विरूद्ध सिनिथा, 2012 ए.सी.जे. 1 (सु.को.) उक्त सीमा तक अमान्य

United India Insurance Company Ltd. v. Sunil Kumar and ors. Judgment dated 24.11.2017 passed by the Supreme Court in CA No. 9694 of 2013, reported in 2018 ACJ 1 (Three Judge Bench)

Relevant extracts from the judgment:

It is clear that grant of compensation under section 163A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by section 163A (2). Though the aforesaid section of the Act does not specifically exclude a possible defence of the insurer based on negligence of the claimant as contemplated by section 140(4), to permit such defence to be introduced by the insurer and/or to understand the provisions of section 163A of the Act to be contemplating any such situation would go contrary to the very legislative object behind introduction of section 163A of the Act, namely, final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time. In fact, to understand section 163A of the Act to permit the insurer to raise the defence of negligence would be to bring a proceeding under section 163A of the Act at par with the proceeding under section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention.

For the aforesaid reasons, we answer the question arising by holding that in a proceeding under section 163A of the Act it is not open for the insurer to raise any defence of negligence on the part of the victim.

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***282. MOTOR VEHICLES ACT, 1988 – Section 166**
EMPLOYEES' STATE INSURANCE ACT, 1948 – Section 53
Death of an employee in motor accident while he was returning home from his workplace – Whether claim petition under section 166 of the Motor Vehicles Act is maintainable in view of bar under section 53 of the ESI Act ? Held, Yes – Unless it can be said that his employment continues till the time the employee reaches his home – Bar under section 53 of ESI Act not attracted.

मोटरयान अधिनियम, 1988 - धारा 166

कर्मचारी राज्य बीमा अधिनियम, 1948 - धारा 53

कार्य स्थल से घर लौट रहे कर्मचारी की मोटर दुर्घटना में मृत्यु - क्या कर्मचारी राज्य बीमा अधिनियम की धारा 53 के वर्जन को देखते हुये मोटरयान अधिनियम की धारा 166 के अधीन प्रस्तुत याचिका प्रचलन योग्य है? अभिनिर्धारित, हाँ - ऐसा कहा जा सकता है कि जब तक कर्मचारी घर नहीं पहुंचता उसका नियोजन लगातार जारी रहता है - धारा 53 कर्मचारी राज्य बीमा अधिनियम का वर्जन आकर्षित नहीं होता है।

Iffco-Tokio General Insurance Co. Ltd. v. Asha Mishra and others
Judgment dated 10.11.2016 passed by the High Court of M.P. in M.P. No. 2421 of 2012, reported in 2018 ACJ 655 (MP)

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***283. MOTOR VEHICLES ACT, 1988 – Section 166**

(i) Whether registering of FIR is pre-condition for award of claim? Held, No – Non-filing may create doubt but is not essential.

(ii) Evidentiary value of MLC register – Official document maintained by Government hospital – Absence of proper maintenance – Cannot be a ground to doubt the evidence of claimant.

मोटरयान अधिनियम, 1988 - धारा 166

(i) क्या दावे के अधिनिर्णय हेतु प्रथम सूचना रिपोर्ट प्रस्तुत किया जाना पूर्व शर्त है? अभिनिर्धारित, नहीं - अप्रस्तुतिकरण केवल संदेह पैदा कर सकता है, परन्तु आवश्यक नहीं है।

(ii) एम.एल.सी. रजिस्टर का साक्ष्यिक मूल्य - सरकारी अस्पताल द्वारा संधारित विभागीय दस्तावेज - उचित रखरखाव का अभाव - दावाकर्ता के साक्ष्य में संदेह का आधार नहीं हो सकता।

Dropdi v. Deepak and ors.
Order dated 31.08.2016 passed by the High Court of Madhya Pradesh (Indore Bench) in M.A. No. 537 of 2005, reported in 2017 ACJ 2813

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284. MOTOR VEHICLES ACT, 1988 – Section 166

(i) Quantum – Whether addition on account of future prospects is permissible where minimum income is determined on guesswork in absence of proof of income? Held, Yes – There cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in the facts and circumstances of the case – Both situations stand at same footing.

(ii) Quantum – Whether tribunal can award higher percentage of addition for future prospects than the standard fixed in case of *National Insurance Co. v. Pranay Sethi, 2017 ACJ 2700 (SC)*? Held, Yes – If the evidence on record warrants so.

मोटरयान अधिनियम, 1988 - धारा 166

(i) **मात्रा - क्या जहाँ आहत की आय के प्रमाण के अभाव में उसकी न्यूनतम आय अनुमानित की गई हो, वहाँ भविष्य की संभावनाओं के लेखे की वृद्वि की जा सकती है? अभिनिर्धारित, हाँ - जहां आय की सकारात्मक साक्ष्य हो और जहां प्रकरण के तथ्यों एवं परिस्थितियों को देखते हुये आय अनुमानित की गई है, इन दोनो में कोई भेद नहीं है - दोनों अवस्थायें समान तल पर होती हैं।**

(ii) **मात्रा - क्या अधिकरण नेशनल इंश्योरेंस कंपनी विरूद्ध प्रणय सेठी, 2017ए.सी.जे. 2700 में अभिनिर्धारित प्रतिशत से अधिक प्रतिशत भविष्य की आय हेतु अधिनिर्णीत कर सकता है? अभिनिर्धारित, हाँ - यदि अभिलेख पर उपलब्ध साक्ष्य से ऐसा अपेक्षित है।**

Hem Raj v. Oriental Insurance Company and others
Order dated 22.11.2017 passed by the Supreme Court in SLP Civil No. 22134 of 2016 reported in 2018 ACJ 5

Relevant extracts from the order :

The contention raised on behalf of the appellants is that in the light of the said judgment 40 per cent increase on estimated income towards future prospects is required to be taken into account as the deceased was 40 years of age.

Learned counsel for the insurance company submitted that in absence of actual evidence of income the principle of adding on account of future prospects cannot be applied where income is determined by guess work.

We are of the view that there cannot be distinction where there is positive evidence of income and where minimum income is determined on guesswork in

the facts and circumstances of a case. Both the situations stand at the same footing. Accordingly, in the present case, addition of 40 per cent to the income assessed by the Tribunal is required to be made. The Tribunal made addition of 50 per cent while the High Court has deleted the same.

It is submitted that the view taken by this court in ***National Insurance Co. Ltd. v. Pranay Sethi, 2017 ACJ 2700 (SC)***, is no bar to future prospects being taken at level higher than 25 per cent in case the deceased above 40 years or 50 per cent in case the deceased was below 40 years if the evidence on record so warrants. It is submitted that standardization may be the increase (sic) based on presumption but when there is an actual evidence led to the satisfaction of the Tribunal/court that future prospects was higher than the standard percentage, there is no bar to the court/Tribunal awarding higher compensation on that basis. We find merit in the submission.

In the present case, the Tribunal has applied the correct principle of law and made the assessment of income by adding the component of future prospects higher than the standard percentage. The High Court held that the Tribunal could not have gone beyond the standard percentage. To that extent, the view taken by the High Court cannot be sustained.

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285. N.D.P.S. ACT, 1985 – Sections 50 and 54

(i) Reverse burden of proof upon accused, whether dispenses the prosecution to establish *prima facie* case – Held, mere registration of a case against accused under the Act will not *ipso facto* shift the burden upon accused from very inception – Prosecution has to *prima facie* establish the case against accused, thereafter the burden shifts upon accused.

(ii) Mere availability of FSL report on record in absence of seized contraband, whether confirms seizure of contraband?

Non-production of contraband *'Ganja'* before court – No explanation by prosecution for such non-production – Held, mere availability of FSL report in absence of such seized contraband does not confirm seizure or that what was seized was contraband.

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, 1985 - धाराएं 50 एवं 54

(i) अभियुक्त पर विपरीत प्रमाण भार होना, क्या अभियोजन को अपना प्रथम दृष्टया मामला स्थापित करने से अभिमुक्ति प्रदान करता है - अभिनिर्धारित, अभियुक्त के विरूद्ध अधिनियम के अधीन मामला पंजीबद्ध होना मात्र, अभियुक्त पर बिल्कुल प्रारंभ से भार अंतरित नहीं करता है - अभियोजन को अभियुक्त के विरूद्ध अपना प्रथमदर्शी प्रकरण स्थापित करना होगा, तभी अभियुक्त पर भार अन्तरित होगा।

(ii) अभिगृहीत की गई विनिषिद्ध वस्तु के बिना विधि विज्ञान प्रयोगशाला की रिपोर्ट अभिलेख में होने से क्या विनिषिद्ध वस्तु का अभिगृहीत किया जाना निश्चित होगा? - विनिषिद्ध वस्तु 'गांजा' को न्यायालय के समक्ष प्रस्तुत नहीं किया गया - अप्रस्तुतिकरण का अभियोजन की ओर से कोई स्पष्टीकरण नहीं दिया गया - अभिनिर्धारित, विनिषिद्ध वस्तु की अनुपस्थिति में विधि विज्ञान प्रयोगशाला की रिपोर्ट का अभिलेख में होना मात्र, विनिषिद्ध वस्तुत का अभिगृहीत किया जाना अथवा अभिगृहीत वस्तुत का विनिषिद्ध होना निश्चित नहीं करता है।

Gorakh Nath Prasad v. State of Bihar
Judgment dated 05.12.2017 passed by the Supreme Court in Criminal Appeal No. 2104 of 2017, reported in (2018) 2 SCC 305

Relevant extracts from the judgment:

The NDPS Act provides for a reverse burden of proof upon the accused, contrary to the normal rule of criminal jurisprudence for presumption of innocence unless proved guilty. This shall not dispense with the requirement of the prosecution to having first establish a prima facie case, only whereafter the burden will shift to the accused. The mere registration of a case under the Act will not ipso facto shift the burden on to the accused from the very inception. Compliance with statutory requirements and procedures shall have to be strict and the scrutiny stringent. If there is any iota of doubt the benefit shall have to be given to the accused.

In the facts of the present case, the independent witnesses with regard to the search and seizure, PW-2 and PW-3, having turned hostile deposing that their signatures were obtained on blank paper at the police station, the mere fact of a FSL Report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case.

The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being Ganja. No explanation has also been furnished by the prosecution for non-production of the Ganja as an exhibit in the trial. The benefit of doubt will have to be given to the appellant. (***Ashok v. State of MP, (2011) 5 SCC 123,*** relied)

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***286. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

Dishonour of cheque issued as an advance payment, whether constitutes criminal liability? Held, if purchase of goods and purchase order is not carried to its logical conclusion and goods are not supplied – Cheque cannot be said to have been drawn for

an existing debt or liability – Dishonour of such cheque do not constitute criminal liability but may create civil liability. (*Indus Airways Private Limited & other v. Magnum Aviation Private Limited & another, (2014) 12 SCC 539* relied on).

परक्राम्य लिखित अधिनियम, 1881 - धारा 138

अग्रिम भुगतान हेतु जारी चेक क्या अपराधिक दायित्व गठित करेगा? अभिनिर्धारित, यदि वस्तुओं का क्रय किया जाना और क्रयादेश अंतिम परिणाम तक नहीं पहंुचता और माल का परिदान नहीं होता - चेक को विद्यमान ऋण या दायित्व के लिए लिखा जाना नहीं कहा जा सकता है - ऐसे चेक का अनादरण अपराधिक दायित्व गठित नहीं करता है किन्तु सिविल दायित्व उत्पन्न हो सकता है। (***इण्डस एयरवेज प्रा.लि. और अन्य विरूद्ध मैगनम एविएशन प्रा.लि. और अन्य, (2014) 12 एससीसी 539,***अवलंबित)

Adarsh Stationary v. Shri Mahaveer Agency
Order dated 01.03.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 9656 of 2016, reported in 2018 (1) ANJ (MP) 156

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***287. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

Complaint in respect of cheque issued *in lieu* of compromise in earlier proceedings under Section 138 N.I.Act, whether maintainable? Second cheque not issued in discharge of debt or liability but issued on account of settlement arrived between the parties – Second complaint is not maintainable – Holder of the cheque is free to take appropriate action for enforcement of the settlement arrived at between the parties and is also at liberty to file a recovery suit. (*Lalit Kumar Sharma and another v. State of Uttar Pradesh and another, (2008) 5 SCC 638* relied on).

परक्राम्य लिखित अधिनियम, 1881 - धारा 138

क्या परक्राम्य लिखत अधिनियम की धारा 138 के अधीन पूर्व कार्यवाही में समझौते के संबंध में जारी चैक के बावत् परिवाद संधारणीय है? द्वितीय चैक किसी ऋण अथवा दायित्व के उन्मोचन हेतु जारी नहीं किया गया वरन् पक्षकारों के मध्य निपटारे बाबत् जारी किया गया - द्वितीय परिवाद संधारणीय नहीं है - चैक का धारक पक्षकारों के मध्य हुए समझौते को प्रभावी करने हेतु उपयुक्त कार्यवाही करने के लिए स्वतंत्र है और प्रत्युद्धरण वाद प्रस्तुत करने के लिये भी स्वतंत्र है। (***ललित कुमार ष्शर्मा एवं अन्य विरूद्ध स्टेट आफ उत्तरप्रदेश एवं अन्य, (2008) 5 एससीसी 638,*** अवलंबित)

Vrindavan Batham v. Madan Murari
Order dated 12.09.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C.No. 10223 of 2016, reported in 2018 (I) MPJR 109

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288. PARTNERSHIP ACT, 1932 – Sections 37 and 42(c)

Clause relating to death of a partner in partnership deed – Stipulation of purchase of the share of the deceased from legal heirs by other partners – Clause clearly provided for manner for calculating dues and intention to continue the partnership on death of a partner – Suit by legal heirs for dissolution of the firm and rendition of accounts – Section 37 providing for estate of the deceased partner being entitled to share of profits or to interest and section 42(c) providing for dissolution of the firm on the death of a partner not applicable as legal heirs are not entitled to any share after death of partner – Direction for dissolution and settlement of accounts set aside.

भागीदारी अधिनियम, 1932 - धाराएं 37 एवं 42(ग)

भागीदारी विलेख में भागीदार की मृत्यु के संबंध में अनुच्छेद - अन्य भागीदारों द्वारा मृत भागीदार के विधिक वारिसों से अंश क्रय करने संबंधी शर्तें - भागीदार की मृत्यु की दशा में शोध्यों की गणना एवं भागीदारी को जारी रखने के आशय के संबंध में अनुच्छेद में स्पष्ट उपबंध - विधिक वारिसों द्वारा फर्म के विघटन एवं लेखे हेतु वाद - मृत भागीदार की सम्पदा में लाभ के अंश और ब्याज का उपबंध करने वाली धारा 37 और भागीदार की मृत्यु की दशा में भागीदारी का विघटन करने संबंधी धारा 42(ग) प्रयोज्य नहीं क्योंकि विधिक वारिस मृत भागीदार की मृत्यु के पश्चात् किसी अंश के हकदार नहीं थे - विघटन और लेखे के निपटान विषयक निर्देश अपास्त किये गये।

Kodendera K. Uthaiah (D) by L.Rs. v. P. M. Medappa and others Judgment dated 04.10.2017 passed by the Supreme Court in Civil Appeal No. 2597 of 2016, reported in AIR 2017 SC 4833

Relevant extracts from the judgment

The father of the plaintiff i.e. P.M. Medappa, along with three others constituted a registered partnership firm, M/s. Rums & Co. The partnership deed dated 27.01.1971, in Clause 14, stipulated that in the event of death of a partner, the remaining partners shall have the option to give a written notice within three months of the death, to the legal heirs of the deceased partner, for purchase of the shares of the deceased. The purchase price was to be the amount of the share of the deceased as determined at the last annual general accounts, inclusive of interest @ 10% per annum, upto the date of purchase. P.M. Medappa was deceased on 27.07.1990. The surviving partners, defendants 1 to 3, gave notice on 15.10.1990 in terms thereof to the plaintiff and defendants 4 to 9, being the legal heirs of the deceased partner.

The plaintiff preferred a suit seeking dissolution of the firm and rendition of accounts, alleging refusal of the remaining partners to pay the legal heirs of the deceased partner, the due share under Clause 14. The suit was decreed in part by the Civil Judge holding that the plaintiff and defendants 4 to 9 as legal

heirs of the deceased partner, were entitled to 1/4th share to be worked out on basis of the last annual general accounts, together with interest @ 10% per annum from the date of death till the date of decree. Aggrieved by the grant of partial relief, the plaintiff preferred appeal in which the High Court, held that the notice dated 15.10.1990 had not been served on all the legal heirs of the deceased partner. Clause 14 therefore never became operational, directing dissolution of the firm and settlement of accounts "as of date" entitling the legal heirs to 1/4th share in the assets and profits of the firm with interest @ 6% per annum till settlement. Liberty was further granted to seek appointment of a receiver to take care and manage the assets of the partnership firm pending finalization of settlement of accounts. Aggrieved the defendant preferred the appeal to the Supreme Court.

Section 37 of the Act provides that if any member of a firm dies and the surviving partners carry on the business without any final settlement of accounts, the estate of the deceased partner is entitled to such share of the profits made as may be attributable to his share of the property or to interest @ 6% per annum on the amount of his share in the property of the firm. In our considered opinion, it will have no application in the facts of the case in view of Clause 14 of the partnership deed, which also provides for the manner of calculating the dues. Similarly, Section 42(c) of the Act, providing for dissolution of the firm on the death of a partner, will also have no application in view of the aforesaid clause evincing a clear intention to continue the partnership on the death of a partner.

The last audited accounts up to 31.03.1989 having been signed by the deceased as a partner, the only controversy is with regard to the period thereafter till his death on 27.07.1990. Clause 14 of the partnership deed provides for determination of the purchase price of the share of the deceased partner on the basis of the last annual general account with interest @ 10% per annum upto the date of the purchase.

The plea of the defendant, that delay in payment of the legitimate dues was attributable to the conduct of the plaintiff is not tenable from the facts and materials on record. The plaintiff has averred that after receipt of the notice dated 15.10.1990 he had contacted the surviving partners several times, held discussions with them, and requested for the accounts. Ultimately on 31.05.1991, he wrote to them asking for the balance-sheet. An incorrect reply was furnished that the accounts had not been audited when in fact they had already been filed on 31.10.1990. The defendant K.K. Uthaiah in his evidence has acknowledged discussions with the legal heirs of the deceased partner and that the share of the assets of the deceased partner had remained in the firm itself, even while the surviving three partners continued to take their share of the profits after accounting. Though he deposed that a copy of the audited report was sent to the plaintiff through his driver, neither was the date mentioned or any evidence led in support of the same.

It is not the case of the appellant that the Income-Tax Returns of the Partnership firm were not filed within statutory time. If the returns were so filed, naturally the share of the deceased partner payable under Clause 14 till his demise on 27.07.1990 posed no difficulty for payment. The plea that in view of the pending litigation the dues were not paid is unacceptable and not bona fide. The legal heirs of the deceased partner are, therefore, held entitled to 1/4th share with 10% interest per annum from 27.07.1990 till the date of purchase.

The finding that Clause 14 of the partnership deed was not complied with and, therefore, never became operational is held to be unsustainable and is set aside. The consequential direction for dissolution and settlement of accounts "as of date" for that reason, is also set aside. The legal heirs are held not to be entitled to any share in the profits after 27.07.1990.

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289. PREVENTION OF CORRUPTION ACT, 1988 – Sections 4, 11, 13, 27 and 28
EVIDENCE ACT, 1872 – Sections 3, 45, 60, 106 and 114
INCOME TAX ACT, 1961 – Sections 68 and 269
INDIAN PENAL CODE, 1860 – Sections 109, 120A and 120B
CRIMINAL PROCEDURE CODE, 1973 – Section 452
BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 2

(i) (a) The Prevention of Corruption Act, 1988; object of – The Act ensures a stricter legislation to combat and eradicate corruption in public life – It takes within its sweep, not only the public servants but also those who abet and conspire with them in the commission of offences, enumerated therein – Scheme of the Act with regard to the object discussed.

(b) Special Judge appointed under the Act; power of – The Special Judge has power to try not only offences punishable under the Act but also the charge of any conspiracy or attempt or abetment in the commission thereof.

(ii) Concept of conspiracy – Law relating to conspiracy summed up by reiterating law laid down in *Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji and another etc., (1969) 3 SCC 429, Noor Mohammad Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696, Saju v. State of Kerala, (2001) 1 SCC 378, Yash Pal Mittal v. State of Punjab, (1977) 4 SCC 540, Ram Narayan Popli v. Central Bureau of Investigation, (2003) 3 SCC 641, Regina v. Murphy, (1837) 173 ER 502, Firozuddin Basheeruddin & ors. v. State of Kerala, (2001) 7 SCC 596, Mir Nagvi Askari v. Central Bureau of Investigation, (2009) 15 SCC 643* and *Kehar Singh & ors. v. State (Delhi Administration), (1988) 3 SCC 609* and placing reliance on *Halsbury's Laws of England 4th Edition Volume XI* and *Russels on Crimes 12th Edition*.

(iii) Approach of Court in corruption cases – Corruption in a civilized society is a disease like cancer – It affects the economy and destroys the cultural heritage – It would be the duty of the Court to adopt that construction which would advance the object underlying the statute, namely to make effective the provision for the prevention of bribery and corruption and at any rate not to defeat it – The overall public interest and the social object is to be borne in mind while interpreting the various provisions thereof and in deciding cases under the same – Tracking down corrupt public servants and punishing such persons is a necessary mandate of the Act 1988 – Corruption cannot be justified in degrees.

(iv) Whether disclosure of income in income tax returns constitute the evidence of lawful income? Held, No – Orders in I.T. proceedings are not evidence of lawful income – Orders passed in tax proceedings do not certify or authenticate lawfulness of sources as contemplated in the explanation to Section 13(1)(e) and independent evidence would be required to account for the same.

(v) Receipt claimed as a gift – A receipt claimed as a gift from undisclosed sources is subjected to income tax but it is not sufficient to hold that it was from a lawful source in absence of any independent and satisfactory evidence to that effect.

(vi) Burden of proof and benefit of doubt – Burden of proof is on prosecution, but law does not require the prosecution to prove the impossible – All that was required is the establishment of such a degree of probability that a prudent man may on this basis believe in the existence of the fact in issue – For recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty but only beyond reasonable doubt.

(vii) (a) Expression "satisfactorily account" in the context of the offence of misconduct under Section 13(1)(e) of Act 1988; Interpretation of – It casts burden on the accused to offer a plausible and acceptable explanation as to acquisition of wealth.

(b) Burden of proving fact especially within knowledge – If a public servant is in possession assets beyond his legitimate means – Burden is on public servant to prove the source of income or the means by which he had acquired the assets

(viii) Probative worth of expert evidence – An expert is not a witness of fact and its evidence is really of an advisory character – Accused cannot be convicted on basis of expert opinion without any corroboration.

(ix) Hearsay evidence, use of – It can be used to corroborate substantive evidence.

(x) Death of sole public servant after commencement of proceedings, effect of – Trial of offences under the Act along with non-PC offences – Proceedings will not vitiate – Special Judge will still have jurisdiction to proceed with the prosecution of private individuals for abatement and conspiracy of criminal misconduct falling under S. 13(1)(e).

(xi) Applicability of Section 452 CrPC in corruption cases – The Section is applicable in absence of any provision in Prevention of Corruption Act – Property involved in an offence under Prevention of Corruption can be confiscated under the Section.

(xii) Benami transactions – Burden of proof – The burden of proving that a particular sale is Benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so – Guiding general circumstances for courts enumerated.

भ्रष्टाचार निवारण अधिनियम, 1988 - धाराएं 4, 11, 13, 27 एवं 28

भारतीय साक्ष्य अधिनियम, 1872 - धाराएं 3, 45, 60, 106 एवं 114

आयकर अधिनियम, 1961 - धाराएं 68 एवं 269

भारतीय दंड संहिता, 1860 - धाराएं 109, 120क एवं 120ख

दण्ड प्रक्रिया संहिता, 1973 - धारा 452

बेनामी संपत्ति (प्रतिषेध) अधिनियम, 1988 - धारा 2

(i) (अ) 1988 के अधिनियम का उद्देश्य - यह अधिनियम लोकजीवन में भ्रष्टाचार की रोकथाम एवं उन्मूलन करने के लिए कठोर विधायन सुनिश्चित करता है - इसकी परिधि में न केवल लोकसेवक वरन् इसमें प्रगणित अपराधों को कारित करने के लिए षड़यंत्र और दुष्प्रेरण करने वाले भी सम्मिलित हैं - अधिनियम की योजना विवेचित।

(ब) अधिनियम के अधीन नियुक्त विशेष न्यायाधीश की शक्तियां - विशेष न्यायाधीश को न केवल इस अधिनियम के अधीन दण्डनीय अपराधों वरन् उनके कारित किए जाने में षड़यंत्र, प्रयास अथवा दुष्प्रेरण के आरोप का विचारण करने की भी शक्ति है ।

(ii) षड़यंत्र की संकल्पना - मोहम्मद हुसैन उमर कोचरा आदि वि. के. एस. दलीपसिंहजी एवं अन्य, (1969) 3 एस.सी.सी. 429, नूर मोहम्मद यूसूफ मोमिन वि. महाराष्ट्र राज्य, (1970) 1 एस.सी.सी. 696, साजू वि. केरल राज्य, (2001) 1 एस.सी.सी. 378, यशपाल मित्तल वि. पंजाब राज्य, (1977) 4 एस.सी.सी. 540, रामनारायण पोपली वि. केन्द्रीय अन्वेषण ब्यूरो, (2003) 3 एस.सी.सी. 641, रेजीना वि. मर्फी, (1837) 173 इ.आर. 502, फिरोजुद्दीन बशरूद्दीन एवं अन्य

वि. केरल राज्य, (2001) 7 एस.सी.सी. 596, मीर नगवी असकरी वि. केन्द्रीय अन्वेषण ब्यूरो, (2009) 15 एस.सी.सी. 643 एवं केहर सिंह एवं अन्य वि. राज्य (दिल्ली प्रशासन), (1988) 3 एस.सी.सी. 609 में प्रतिपादित विधि की पुनरावृत्ति करते हुए एवं ''हॉल्सवरीज लॉज आफ इंग्लैण्ड'' चतुर्थ संस्करण, खण्ड 9 एवं रसेल आन क्राइम 12वां संस्करण पर विश्वास करते हुए षड़यंत्र से संबंधित विधि सारांशित की गई।

(iii) भ्रष्टाचार के मामलों में न्यायालय का दृष्टिकोण - सभ्य समाज में भ्रष्टाचार केंसर की बीमारी की भांति है - यह अर्थव्यवस्था को प्रभावित करता है और सांस्कृतिक विरासत को नष्ट करता है - न्यायालय का यह कर्त्तव्य होगा कि वह ऐसे अर्थान्वयन को स्वीकार करे जो संविधि में वर्णित उद्देश्य यथा भष्टाचार एवं रिश्वत के निवारण हेतु प्रभावी उपबंध करने और किसी भी मूल्य पर इसके पराजित न होने देने, को अग्रसर करता हो - इसके विविध उपबंधों के निवर्चन और उनके अधीन प्रकरण विनिश्चित करते समय समवेत लोकहित एवम् सामाजिक उद्देश्य को मस्तिष्क में रखना चाहिए - भ्रष्ट लोकसेवकों को खोज निकालने एवम् उन्हें दण्डित करना 1988 के इस अधिनियम का आवश्यक आदेश है - मात्रा के आधार पर भ्रष्टाचार को न्यायोचित नहीं ठहराया जा सकता है।

(iv) क्या आयकर विवरणियों में आय का प्रकटीकरण वैध आय की साक्ष्य गठित करता है? अभिनिर्धारित, नहीं - आयकर कार्यवाहियों के आदेश विधिपूर्ण आय की साक्ष्य नहीं है - कर कार्यवाहियों में पारित आदेश धारा 13(1)(ड़) के स्पष्टीकरण में अनुध्यात विधिपूर्ण स्रोत को सत्यापित या प्रमाणित नहीं करते हैं और इस हेतु स्वतंत्र साक्ष्य अपेक्षित है।

(v) प्राप्ति का दान के रूप में दावा - अप्रकटित स्रोत से दान के रूप में दावाकृत प्राप्ति आयकर के अधीन है परंतु किसी स्वतंत्र एवम् समाधानप्रद साक्ष्य के अभाव में यह अभिनिर्धारित करने के लिए पर्याप्त नहीं है कि यह विधिपूर्ण स्रोत से है।

(vi) प्रमाण का भार एवं संदेह का लाभ - प्रमाण का भार अभियोजन पर होता है परंतु विधि अभियोजन पक्ष से असम्भव साबित किए जाने की अपेक्षा नहीं करती है - इस कोटि की संभाव्यता स्थापित किया जाना अपेक्षित है जितनी एक प्रज्ञावान व्यक्ति के विवाद्यक तथ्य के अस्तित्व पर विश्वास करने के लिए आवश्यक है - अभियुक्त की दोषिता अभिलिखित करने के लिये अभियोजन से मामले को मात्र युक्तियुक्त संदेह के परे साबित किया जाना अनिवार्य है न कि पूर्ण या गणितीय सुनिश्चितता के साथ साबित किया जाना।

(vii) (अ) 1988 के अधिनियम की धारा 13(1)(ड़) के अतंर्गत अवचार के अपराध के संदर्भ में अभिव्यक्ति ''समाधानप्रद रूप से विवरण'' का निर्वचन - यह अभियुक्त पर संपदा के अर्जन के संबंध में विश्वसनीय एवं स्वीकार्य स्पष्टीकरण प्रस्तुत करने का भार डालता है।

(ब) विशेषतः ज्ञात तथ्य को साबित करने का भार - यदि लोकसेवक अपने वैध साधनों से परे संपत्ति के आधिपत्य में है - आय का स्रोत या साधन जिससे ऐसी सम्पत्ति अर्जित की गई है, को प्रमाणित करने का भार लोकसेवक पर है।

(viii) विशेषज्ञ साक्षी का साक्ष्यिक मूल्य - विशेषज्ञ तथ्य का साक्षी नहीं होता है और उसकी साक्ष्य वस्तुतः परामर्शकारी स्वरूप की होती है - अभियुक्त सम्पुष्टि के बिना विशेषज्ञ की राय के आधार पर दोषसिद्ध नहीं किया जा सकता है।

(ix) अनुश्रुत साक्ष्य का उपयोग - इसे सारभूत साक्ष्य की सम्पुष्टि हेतु प्रयुक्त किया जा सकता है।

(x) कार्यवाही आरम्भ होने के पश्चात एकमेव लोकसेवक की मृत्यु का प्रभाव - भ्रष्टाचार निवारण से भिन्न अपराधों के साथ इस अधिनियम के अधीन अपराधों का विचारण - कार्यवाहियां दूषित नहीं होंगी - विशेष न्यायाधीश को तब भी प्राइवेट व्यक्तियों के धारा 13(1)(ड़) के अंतर्गत आपराधिक अवचार के षड़यंत्र एवं दुष्प्रेरण हेतु अभियोजन को अग्रसर करने की अधिकारिता होगी।

(ix) भ्रष्टाचार के मामलों में दण्ड प्रक्रिया संहिता की धारा 452 की प्रयोज्यता - भ्रष्टाचार निवारण अधिनियम में किसी अन्य उपबंध के अभाव में यह धारा प्रयोज्य है - भ्रष्टाचार निवारण के अधीन किसी अपराध से सम्बद्ध संपत्ति इस धारा के अधीन समपहृत की जा सकती है।

(xii) बेनामी संव्यवहार - सबूत का भार - यह साबित करने का भार कि विनिर्दिष्ट विक्रय बेनामी है और दृश्यमान क्रेता वास्तविक स्वामी नहीं है, सदैव उस व्यक्ति पर होता है जो ऐसा दावा करता है - न्यायालयों के लिए मार्गदर्शी सामान्य परिस्थितियां प्रगणित की गईं।

State of Karnataka & others v. Selvi J. Jayalalitha
Judgment dated 14.02.2017 passed by the Supreme Court in Criminal Appeal No. 300 of 2017, reported in (2017) 6 SCC 263

Relevent extracts from the judgment :

1. The scheme of the Act 1988, ensure a stricter legislation to combat and eradicate corruption in public life and takes within its sweep, not only the public servants but also those who abet and conspire with them in the commission of offences, enumerated therein. The avowed objectives of the statute prompted by the compelling exigencies of time and the revealing contemporary realities, thus demand of a befitting curial approach to effectuate the same ***sans qua*** the rule of benefit of doubt on intangible and trivial omissions and deficiencies.

A plain perusal of the scheme of the Act presents several noticeable special features thereof in accord with the legislative intendment to achieve the objectives set therefor. Apart from the overwhelming backdrop demanding the necessity to consolidate and reinforce the anti corruption law, the main mission being to

achieve a catharsis in public office, the statute besides expanding the notion of "public servant" to effect maximum extension of its sweep as envisaged, has ordained the constitution of a court of Special Judge to try the offences thereunder and also the charge of any conspiracy or attempt or abetment in the commission thereof. Thus, an exclusive autonomous adjudicative regime has been put in place. *The provisions of the Code have been made applicable subject to the modifications contemplated and the special Judge in particular, while trying an offence punishable under the Act has been authorised to exercise all powers and functions invocable by a District Judge under the Ordinance.* Sections 7 to 12 of the Act correspond to Section 161 to 165A of the Indian Penal Code, thereby integrating the offences in the legislation to be tried by a special forum as envisaged. Resultantly, Sections 161 to 165A have been effaced from the Indian Penal Code for obvious reasons. Explanation to Section 13(i)(e) makes it limpid that the known sources of income of the public servant, to satisfactorily account the pecuniary resources or the property otherwise alleged to be disproportionate thereto, has to be from a lawful source and further that the receipt thereof had been intimated in accordance with the provisions of any law, rule or orders for the time being applicable to him/her, as the case may be. This prescription indubitably emphasizes the lawfulness or legitimacy of the income to enable the public servant to satisfactorily account for the pecuniary resources or property otherwise imputed to be disproportionate thereto. Not only the Act entertains presumption against the public servant, in the eventualities as comprehended in Section 20 of the Act, it is clarified in Section 28 that nothing in the statute would exempt any public servant from any proceeding which might apart from the Act, be instituted against him or her. Section 29, amongst others to reiterate, has substituted in paragraph 4A of the Ordinance, an offence punishable under the 1988 Act, in lieu of the offence under Section 5 of the 1947 Act. *The legislation thus is a complete code by itself, vibrant with the purpose therefor and animated with the spirit to effectuate the statutory goal. All these predicate a purposive explication of the provisions thereof to further the salutary legislative vision.*

2. While dwelling on the concept of conspiracy, this Court in ***Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji and another Etc., (1969) 3 SCC 429,*** held that in conspiracy, agreement *is the gist of the offence and a common design and common intention in furtherance of the common scheme is necessary. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. It was enounced that conspiracy may develop in successive stages and new techniques may be invented and new means may be devised, and a general conspiracy may be a sum up of separate conspiracies having a similar general purpose, the essential elements being collaboration, connivance, jointness in severalty and coordination.*

(Emphasis supplied)

Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra,(1970) 1 SCC 696, encountered a fact situation witnessing a clash between the neighbours on a very trivial incident of a cow blocking a passage. Murderous assaults followed

in which the appellant along with 4/5 associates were involved. The appellant along with others were found guilty under Section 302/34 IPC. This Court held that participation is the gravamen of common intention but Section 109, abetment can be attracted even if the abettor is not present. Qua conspiracy, it was exposited that it postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. It was elucidated, that conspiracy is of wider amplitude than abetment though there is a close association between the two. *It was ruled that conspiracy can be proved by circumstantial evidence and proof thereof is largely inferential founded of facts and this is because of the difficulty in securing direct evidence of criminal conspiracy. It was explicated that once a reasonable ground is shown to suggest that two or more persons have conspired, then anything done by one of them in reference to their common intention becomes relevant in proving the conspiracy and the offences committed pursuant thereto.*

(Emphasis supplied)

In ***Saju v. State of Kerala, (2001) 1 SCC 378,*** it was propounded that to attract Section 120B IPC, it is to be proved that all the accused had the intention and they had agreed to commit the crime. *It was assumed that conspiracy is hatched in private and in secrecy, for which direct evidence would not be readily available. It was ruled that it is not necessary that each member to a conspiracy must know all the details of all the conspiracy.*

(Emphasis supplied)

This Court recalled its observations in ***Yash Pal Mittal v. State of Punjab, (1977) 4 SCC 540,*** that there *may be so many devices and techniques adopted to achieve the common goal of the conspiracy, and there may be division of performances in the chain of actions with one object to achieve the real end, of which every collaborator need not be aware but in which each one of them would be interested. There must be a unity of object or purpose but there may be plurality of means, sometimes even unknown to one another, amongst the conspirators. The only relevant factor is that all means adopted and illegal acts done must be to fulfill the object of the conspiracy. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others, it will not affect the culpability of those others when they are associated with the object of the conspiracy.*

It was noted that as an exception to the settled position of law, an act or action of one of the accused cannot be used as evidence against another, Section 10 of the Evidence Act provided otherwise. *To attract the applicability of Section 10, the Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence and then the evidence of action or statement made by one of the accused could be used as evidence against the other.*

(Emphasis supplied)

In ***Ram Narayan Popli v. Central Bureau of Investigation,(2003) 3 SCC 641,*** the executives of the Maruti Udyog Limited were charged with criminal conspiracy to siphon off its funds in favour of A-5 and were prosecuted under Sections

13(1) (c) and 13(2) of the 1988 Act along with Sections 120B, 420, 409, 467 and 471 of the IPC. This Court reiterated that the essence of a Criminal conspiracy, is unlawful combination and ordinarily the offence is complete when the combination is framed and that *the law making conspiracy a crime, is designed to curb the immoderate power to do mischief which is gained by combination of the means.* It was held that the offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means.

The agreement which is the quintessence of criminal conspiracy can be proved either by direct or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.

The following excerpt from ***Halsbury's Laws of England 4th*** Edition Volume XI, page 54, para 58was relied upon:-

> *"The conspiracy arises and the offence is committed as soon as the agreement is made: and the offence continues to be committed so long as the combination persists that is, until the conspiratorial agreement is terminated* by completion of its performance or by abandonment or frustration or however, it may be the actus reus in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or at the same place. It is necessary to show the meeting of minds to a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with each other."

Reference was made to ***Regina v. Murphy, (1837) 173 ER 502,*** where Coleridge J, was of the view that although common design is the root of the charge, it is not necessary to prove that these two parties had come together and actually agreed in terms to have the common design and to pursue it by common means and so to carry it into execution, as in many cases of established conspiracy, there are no ways of proving any such thing. *If it is found that these two persons pursued by their acts, the same object, often by the same means, one performing one part of an act and the other another part of the same act so as to complete it, with a view to attain the object which they are pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object.*

(Emphasis supplied)

The overwhelming judicial opinion thus is that a conspiracy can be proved by circumstantial evidence as mostly having regard to the nature of the offending act, no direct evidence can be expected.

In ***Firozuddin Basheeruddin & ors. v. State of Kerala, (2001) 7 SCC 596,*** it was ruled that loosened standards prevail in a conspiracy trial regarding admissibility

of evidence. *Contrary to the usual rule, in conspiracy prosecution, any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. It was observed that thus the conspirators are liable on an agency theory for statements of co conspirators just as they are for the overt acts and crimes committed in their confederates.*

(Emphasis supplied)

In ***Mir Nagvi Askari v. Central Bureau of Investigation, (2009) 15 SCC 643,*** it was enounced that courts in deciding on the existence or otherwise, *of an offence of conspiracy must bear in mind that it is hatched in secrecy and that it is difficult, if not impossible to obtain direct evidence to establish the same. The manner and circumstances in which the offences have been committed and the accused persons had taken part are relevant. To prove that the propounders had expressly agreed to commit the illegal act or had caused it to be done, may be proved by adducing circumstantial evidence and or by necessary implications.*

(Emphasis supplied)

The following extract from Russels on Crimes 12th Edition, Volume I was quoted with approval:-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."

It recalled its conclusions in ***Kehar Singh & ors. v. State (Delhi Administration), (1988) 3 SCC 609***, that to establish the offence of criminal conspiracy, it is not required that a single agreement should be entered into by all the conspirators at one time. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. *Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or means by which the common purpose is to be accomplished.* On the touchstone of the above adumbrated legal postulations, the evidence on records would have to be assayed to derive the deduction as logically permissible.

(Emphasis supplied)

3. ***Qua*** the required orientation of a Court vis-a-vis offences under the Act, it has been inter alia emphatically observed in ***State of M.P. & ors. v. Ram Singh, (2000) 5 SCC 88,*** that *corruption in a civilized society is a disease like cancer, which if not detected in time is sure to afflict the polity of the country leading to disastrous consequences. It was ruled that corruption is like a plague which is not only contagious but if not controlled spreads like fire in a jungle. It was proclaimed that corruption is opposed to democracy and social order, being not only anti people but aimed and targeted against them. It*

affects the economy and destroys the cultural heritage and therefore, unless it is nipped in the bud at the earliest, it is likely to cause turbulence, shaking the socioeconomic- political system in an otherwise healthy, wealthy, effective and vibrating society.

The history of the enactment of the 1947 Act was traced in ***R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183,*** and a caveat was sounded to the effect that whenever a question of construction arises upon *ambiguity or if two views are possible of a provision of an anti corruption law (then Act 1947), it would be the duty of the Court to adopt that construction which would advance the object underlying the statute, namely to make effective the provision for the prevention of bribery and corruption and at any rate not to defeat it. It was underscored that procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the statute and the overall public interest and the social object is to be borne in mind while interpreting the various provisions thereof and in deciding cases under the same.*

(Emphasis supplied)

In ***Niranjan Hemchandra Sashittal & anr.v. State of Maharashtra, (2013) 4 SCC 642,*** this Court while dwelling on the same theme, exposited as herein below :

> "It can be stated without any fear of contradiction that corruption is not to be judged by decree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality."

A Constitution Bench of this Court in ***Subramanian Swamy v. Director, Central Bureau of Investigation & anr., (2014) 8 SCC 682,*** reiterated that corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the Act 1988.

In ***Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642,*** this Court, apart from elucidating the objective of the 1988 Act, ruled that the gravity of the offence thereunder is not to be judged on the measure of quantum of bribe, as corruption is not to be justified in degree. A serious concern was expressed noticing the permeating presence of the malady in the contemporary existence, so much so, that immoral acquisition of wealth visibly has the potential to destroy the morale of the people believing in honesty, destroying societal will to progress, aside corroding the sense of civility and enervating the marrows of governance.

4. Though the I.T. returns and the orders passed in the I.T. Proceedings in the instant case recorded the income of the accused concerned as disclosed in their returns, in view of the charge levelled against them, such returns and the orders in the I.T. Proceedings would not by themselves establish that such income had been from lawful source as contemplated in the explanation to Section 13(1)(e) and that independent evidence would be required to account for the same.

Though considerable exchanges had been made in course of the arguments, centering around Section 43 of the Indian Evidence Act, 1872, we are of the comprehension that those need not be expatiated in details. Suffice it to state that *even assuming that the income tax returns, the proceedings in connection therewith and the decisions rendered therein are relevant and admissible in evidence as well, nothing as such, turns thereon definitively as those do not furnish any guarantee or authentication of the lawfulness of the sources of income, the pith of the charge levelled against the respondents.* It is the plea of the defence that the income tax returns and orders, while proved by the accused persons had not been objected to by the prosecution and further it (prosecution) as well had called in evidence the income tax returns/orders and thus, it cannot object to the admissibility of the records produced by the defence. To reiterate, *even if such returns and orders are admissible, the probative value would depend on the nature of the information furnished, the findings recorded in the orders and having a bearing on the charge levelled. In any view of the matter, however, such returns and orders would not ipso facto either conclusively prove or disprove the charge and can at best be pieces of evidence which have to be evaluated along with the other materials on record.* Noticeably, none of the respondents has been examined on oath in the case in hand. Further, the income tax returns relied upon by the defence as well as the orders passed in the proceedings pertaining thereto have been filed/passed after the charge-sheet had been submitted. Significantly, there is a charge of conspiracy and abetment against the accused persons. In the overall perspective therefore *neither the income tax returns nor the orders passed in the proceedings relatable thereto, either definitively attest the lawfulness of the sources of income of the accused persons or are of any avail to them to satisfactorily account the disproportionateness of their pecuniary resources and properties as mandated by Section 13(1)(e) of the Act.*

In State of Tamil Nadu by Inspector of Police Vigilance and Anti-Corruption v. N. Suresh Rajan & ors., (2014) 11 SCC 709, the allegation against the respondent, who was the Minister of Tamil Nadu was acquisition of pecuniary resources and properties in his name and in the names of his family members, and friends, disproportionate to the known sources of income. Charge of abetment was also levelled against the family members and friends. Charge sheet was submitted under Section 109 IPC read with Section 13(1)(e) and 13(2) of the 1988 Act. All of them were discharged by the High Court.

This Court ruled that the fact that the accused, other than the two Ministers, had been assessed to income tax and had paid income tax could not have been relied upon to discharge the accused persons in view of the allegation made by

the prosecution that there was no separate income to amass such huge property. *It was underlined that the property in the name of the income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee and that if this proposition was accepted, it would lead to disastrous consequences. This Court reflected that in such an eventuality it will give opportunities to the corrupt public servant to amass property in the name of known person, pay income tax on their behalf and then be out from the mischief of law.*

(emphasis supplied)

In Commissioner of ***Income Tax, Gujarat v. S.C. Kothari, (1972) 4 SCC 402,*** the respondent S.C. Kothari was a registered firm and carrying on the business of commission agents and general merchants. During the assessment year 1958-59, the assessee claimed to have incurred a loss of Rs.3,40,443/- in certain transactions and pleaded that the above loss was allowable under Section 10(1) of the Income Tax Act, 1922 as a deduction against its other business income. The Income Tax Officer was of the view that the transactions in question were hit by the provisions of the Forward Contracts Regulation Act, 1852 and the Rules and Regulations of the Saurashtra Oil and Oilseeds Association Ltd. *The losses were thus held to have been incurred in illegal transactions and the Income Tax Officer, thus rejected the contention of the assessee that even on the assumption that the losses were incurred in illegal transactions, they would be allowed in the computation of the income.* The appellate Assistant Commissioner confirmed the order of the Income Tax Officer but the Tribunal held, in further appeal, that the transactions in question were not illegal contracts but were contracts which had been validly entered into under the Act and the bye-laws etc. The Tribunal remanded the matter to the Appellate Assistant Commissioner for a report and on the receipt thereof, it eventually held that such loss could not be set off against the other income but was of the view that the assessee was entitled to a set off of the loss against the profits in speculative transactions.

The High Court in the reference made, inter alia, held that *even though the disputed contracts were not validly entered into in accordance with the above mentioned Act, the loss of Rs.3,40,443 was liable to be taken into account in computing the business income of the assessee under Section 10 of the Act of 1922 and the assessee was entitled to set off against the profits from other speculative transactions. This Court in the above factual backdrop held that it is well settled that contracts which are prohibited by statute, the prohibition being either express or implied, would be illegal and unenforceable if they are entered into in contravention of the statute. If the business is illegal, neither the profits earned or the losses incurred would be enforceable in law. But that does not take the profits out of the taxing statute. Similarly the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as "profits" under Section 10(1) of the Act of 1922 and the Tax Collector cannot be heard to say that he will bring the gross receipts to tax.* He can only tax profits of a trade or business and that cannot be done without deducting the losses and the legitimate expenses of the business. The view of

the High Court that for the purpose of Section 10(1), the losses which have actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating to profits can be

(emphasis supplied)

The import of this decision is that *in the tax regime, the legality or illegality of the transactions generating profit or loss is inconsequential qua the issue whether the income is from a lawful source or not. The scrutiny in an assessment proceeding is directed only to quantify the taxable income and the orders passed therein do not certify or authenticate that the sources thereof to be lawful and are thus of no significance vis-à-vis a charge under Section 13(1)(e) of the Act.*

5. The process undertaken by the Income Tax authorities under Section 68 of the Act is only to determine as to whether the receipt is an income from undisclosed sources or not and is unrelated to the lawfulness of the sources or of the receipt. Thus *even if a receipt claimed as a gift is after the scrutiny of the Income Tax Authorities construed to be income from undisclosed sources and is subjected to income tax, it would not for the purposes of a charge under Section 13(1)(e) of the Act be sufficient to hold that it was from a lawful source in absence of any independent and satisfactory evidence to that effect.*

6. The burden of proof a charge is on the prosecution subject to the defence of insanity and any other statutory exception has been authoritatively proclaimed in ***Woolmington v. The Director of Public Prosecutions, (1935) AC 462,*** and testified by the following extract:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

In ***Shivaji Sahabrao Bobade & anr. v. State of Maharashtra, (1973) 2 SCC 793,*** Hon'ble Krishna Iyer J., in his inimitable expressional felicity cautioned against the dangers of exaggerated affinity to the rule of benefit of doubt as hereunder:

> "The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of

justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author (Glanville Williams in 'Proof of Guilt') has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty."

(emphasis supplied)

In ***Collector of Customs, Madras & ors. v. D. Bhoormall, (1974) 2 SCC 544,*** this Court had observed that in all human affairs, absolute certainty is a myth and the law does not require the prosecution to prove the impossible. It was highlighted that all that was required is the establishment of such a degree of probability that a prudent man may on this basis believe in the existence of the fact in issue. It was exposited that legal proof is thus not necessarily perfect proof and is nothing more than a prudent man's estimate as to the probability of the case.

That proof beyond reasonable doubt is only a guideline and not a fetish and that a guilty man cannot get away with it because truth suffers from infirmity, when projected through human processes, was underscored by this Court in ***Inder Singh & Anr. v. State (Delhi Administration), (1978) 4 SCC 161***. It was remarked that if a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is, too imperfect and thus whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape.

In the same vein, this Court in ***Ashok Debbarma alias Achak Debbarma v. State of Tripura, (2014) 4 SCC 747,*** expounded that in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty but only beyond

reasonable doubt and the criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt" even though the courts are convinced of the accused persons' guilt beyond reasonable doubt.

7. This Court in ***C.S.D. Swami v. The State, (1960) 1 SCR 461,*** was dealing with an appeal from a conviction under Sections 5(1) (a) and 5(1)(d) of Act 1947. In the textual facts this Court while examining the purport of Section 5(3) of Act 1947 observed that the said provision did not create a new offence but only laid down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances - a rule which was in complete departure from the established principles of criminal jurisprudence that the burden always lay on the prosecution to prove all the ingredients of the offence charged and that the burden never shifted on to the accused to disprove the charge framed against him. In this premise, it was held *that the test of plausible explanation was inapplicable, as under this statute, the accused person was required to satisfactorily account for the possession of the pecuniary resources or property disproportionate to its own sources of income and that the word "satisfactorily" used by the legislature deliberately did cast a burden on the accused not only to offer a plausible explanation as to how he came to acquire his large wealth but also to satisfy the Court that his explanation was worthy of acceptance*. This Court enunciated that "known sources of income" must have reference to sources known to the prosecution on a thorough investigation of the case and it cannot be the resources known to the accused. In further elaboration, it was elucidated that the affairs of an accused person would be a matter within his special knowledge in terms of the Section 106 of the Evidence Act and that the source of income of a particular individual would depend upon his position in life, with particular reference to its occupation or avocation in life and in case of government servant, the prosecution would naturally infer that his known source of income would be the salary earned by him during his active service. That however, it would be open to the accused to prove the other sources of income which have not been taken into account or brought into evidence by the prosecution was underlined.

(emphasis supplied)

It was emphasised that *the word "satisfactorily" did levy a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth but also to satisfy the Court that the explanation was worthy of acceptance.* The noticeable feature of this pronouncement thus is that the explanation offered by the accused to be acceptable has to be one not only plausible in nature and content but also worthy of acceptance.

In ***P. Nallammal & Anr. v. State, (1999) 6 SCC 559,*** this Court while elucidating that the 1988 Act does contemplate abetment of an offence under Section 13, proclaimed that *in terms of the explanation to Section 13(1)(e) of 1988 Act, the known sources of income of a public servant for the purpose of satisfying the Court should be*

"lawful source" and further the receipt thereof should have been intimated by him or her in accordance with the provisions of any law applicable to such public servant at the relevant time. It was underscored that a public servant cannot escape from the tentacles of Section 13(1) (e) of the 1988 Act, by showing other legally forbidden sources.

A Constitution Bench of this Court in ***K. Veeraswami v. Union of India & Ors., (1991) 3 SCC 655,*** again elaborating on an offence under Section 5(1) (e) read with Section 5(2) of the Act 1947 reaffirmed the view that clause (e) of Section 5(1) created a statutory offence which must be proved by the prosecution and when the onus is discharged by it, the accused has to account satisfactorily for the dis-proportionality of the properties possessed by him. It was noted that the Section did make available a statutory defence to the accused which he/she was to prove and that the public servant was required to account for the disparity of the assets qua the income. Though it was observed that the legal burden of proof placed on the accused was not so onerous as that of the prosecution, it was enunciated that it would not be enough to just throw some doubt on the prosecution version. *Referring to the expression "satisfactorily account", it was ruled that due emphasis must be accorded to the word "satisfactorily" which signified that the accused has to satisfy the Court that his explanation was worthy of acceptance.* Though it was marked that the procedure was contrary to the well known principle of criminal jurisprudence that the burden of proof lay always on *the prosecution and did never shift to the accused, the competence of the Parliament to shift such burden on certain aspects and particular in matters especially in the knowledge of the accused, was acknowledged.* The plea of the appellant therein that the possession of assets disproportionate to one's source of income is no offence, till the public servant was able to account for the excess thereof was not accepted. *It was held that if one possesses assets beyond his legitimate means, it goes without saying that the excess is out of ill-gotten gain observing that assets are not drawn like Nitrogen from the air and that have to be essentially acquired, for which means are necessary.* It was stressed upon that the public servant concerned was required to prove the source of income or the means by which he had acquired the assets. It was propounded that once the prosecution proved that the public servant possessed assets dis-proportionate to his known sources of income, the offence of criminal conduct was attributed to him but it would be open to him to satisfactorily account for such dis-proportionality.

In ***V. D. Jhingan v. State of Uttar Pradesh (1966) 3 SCR 736,*** it was expounded that when a statute places burden of proof on an accused person, it is not that he is not required to establish his plea, but a decree and character of proof which the accused was expected to furnish could not be equated with those expected from the prosecution.

In ***N. Ramakrishnaiah (dead) through LRs. v. State of Andhra Pradesh, (2008) 17 SCC 83,*** charge-sheet was submitted against the petitioner (since dead) under Section 5(1) (e) and 5(2) of the Act 1947 on the allegation of acquiring disproportionate assets compared to his known sources of income and he was

convicted by the Trial Court. In the appeal before the High Court, the dispute was restricted only to Item 26 of the assets (moveables) and agricultural income. It was pleaded that the former was over estimated and deserved to be reduced and the latter was under estimated and was to be enhanced. The High Court rejected the plea. This Court noted that whereas the prosecution in support of the agricultural income amongst others relied on the evidence of the Mandal Revenue Officer and the details furnished by the witness in the documents proved by him, the accused placed reliance on a document without disclosing as to who was the author thereof and on what basis the entries mentioned therein had been made. Placing reliance on the decision in ***State of M.P. v. Awadh Kishore Gupta and others(2004) 1 SCC 691,*** dealing with "income" of a public servant " known sources" of income" and "satisfactorily account", this Court affirmed the conviction. *It reiterated that by using the word "satisfactorily", the legislature had deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that his explanation was worthy of acceptance.*

8. *In re* the probative worth of experts evidence, a host of decisions in ***Mahmood v. State of U.P., (1976) 1 SCC 542, Chatt Ram v. State of Haryana, (1980) 1 SCC 460, State of H.P. v. Jai Lal & Ors., (1999) 7 SCC 280, Ramesh Chandra Agrawal v. Regency Hospital Limited & Ors., (2009) 9 SCC 709andDayal Singh & Ors. v. State of Uttaranchal, (2012) 8 SCC 263,*** have been cited at the Bar. As all these decisions postulate identical propositions, the gravamen of these authorities would only be referred to avoid inessential prolixity. These renderings explicate that *an expert is one who has made a subject upon which he speaks or renders his opinion, a matter of particular study, practice or observation and has a special knowledge thereof.* His knowledge must be within the recognized field of expertise and he essentially has to be qualified in that discipline of study. It has been propounded that *an expert is not a witness of fact and its evidence is really of an advisory character* and it is his duty to furnish to the Judge/Court the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge/Court to form his/its independent judgment by the application of such criteria to the facts proved by the evidence. Referring to Section 45 of the Evidence Act 1892, which makes the opinion of *an expert admissible, it has been underlined that not only an expert must possess necessary special skill and experience in his discipline, his opinion must be backed by reason and has to be examined and cross-examined to ascertain the probative worth thereof. That it would be unsafe to convict the person charged on the basis of expert opinion without any independent corroboration has also been indicated.* It has been held that the evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion has been reached. The decisions underline that the Court is not to subjugate its own judgment to that of the expert or delegate its authority to a third party but ought to assess the evidence of the expert like any other evidence.

9. In ***Pawan Kumar v. State of Haryana, (2003) 11 SCC 241,*** this Court had observed that hearsay evidence could be used to corroborate substantive evidence.

10. We have noticed that:

In ***State Through Central Bureau of Investigation, New Delhi v. Jitender Kumar Singh, (2014) 11 SCC 724,*** this Court held that *once the power has been exercised by the Special Judge under sub-section (3) of Section 4 of the P.C. Act to proceed against non-PC offences alongwith PC offences, the mere fact that the sole public servant dies after the exercise of powers under sub-section (3) of Section 4, will not divest the jurisdiction of the Special Judge or vitiate the proceedings pending before him. Therefore, we hold that as the sole public servant has died being A1 in this matter, in our opinion, though the appeals against her have abated, even then A2 to A4 are liable to be convicted and sentenced in the manner as has been held by the Trial Judge.*

The Trial Court held that even private individuals could be prosecuted for the offence under Section 109 of I.P.C. and we find that the Trial Court was right in coming to the conclusion relying on the decision of ***Nallammal*** (supra), wherein it was observed that acquisition and possession by a public servant was capable of being abetted, and observed that Under Section 3 of the 1988 Act, the Special Judge had the power to try offences punishing even abetment or conspiracy of the offences mentioned in the PC Act and in our opinion, the Trial Court correctly held in this matter that *private individuals can be prosecuted by the Court on the ground that they have abetted the act of criminal misconduct falling under Section 13(1)(e) of the 1988 Act committed by the public servant.*

Furthermore, the reasoning given by the Trial Court in respect of criminal conspiracy and abetment, after scrutinizing the evidence of this case, is correct in the face of the overwhelming evidence indicating the circumstances of active abetment and conspiracy by A2 to A4 in the commission of the above offences under Section 13(1)(e) of the 1988 Act.

In our opinion, the Trial Court correctly came to the conclusion on such reasoning and we hereby uphold the same.

11. Section 22 of the Act also makes the provisions of the Code of Criminal Procedure, 1973 applicable to a proceeding in relation to an offence punishable thereunder, subject to certain modifications as mentioned therein. Here as well, the applicability of Section 452 of the Code otherwise empowering a criminal court to order for disposal of the property at the conclusion of the trial before it, has not been excluded. While Section 27 recognises a special Judge under the Act to be a Court of Session qua the powers of appeal and revision, conferred by the Code of Criminal Procedure, 1973 available to the jurisdictional High Court, Section 28 ordains that the provisions of the Act would be in addition to and not in derogation of any other law for the time being in force and that nothing contained therein would exempt any public servant from any proceeding which might be instituted against him/her.

In the appeals, filed by the State of Karnataka pertaining to the release of the properties recorded in the name of the six companies involved, consequent upon the acquittal of the respondents, the parties are essentially at issue on the applicability or otherwise of Section 452 of the Code of Criminal Procedure, 1973 invoked by the Trial Court to order confiscation/forfeiture of the properties otherwise attached under the Ordinance. The other facets of the competing assertions being largely common and already addressed, are inessential for a fresh scrutiny.

Whereas it is urged on behalf of the State that having regard to the scheme of the Act and the mode of attachment of the property involved in a scheduled offence, the operation of Section 452 of the Code is not excluded, the plea on behalf of the respondents is that the Ordinance being a complete code by itself, the Trial Court was patently wrong in assuming to itself the power of disposal of the property under attachment by invoking the said provision of the Code. It has been urged in essence on behalf of the respondents that at the most, the Trial Court could have valued the property under attachment following its conclusion of guilt against them, leaving it thereafter to the forum under the Ordinance to comply with the procedure prescribed therein and further the process to its logical end. This is more so, as has been urged for the respondents, that the appeals against the orders making the ad interim attachment absolute are pending before the High Court as permissible under the Ordinance. Principally, reliance, amongst others has been placed by the respondents on the decision of a Constitution Bench of this Court in ***State of West Bengal v. S.K. Ghosh, AIR 1963 SC 255***.

In ***Mirza Iqbal Hussain through Askari Begum v. State of Uttar Pradesh, (1982) 3 SCC 516,*** two fixed deposit receipts and the cash amount of Rs.5200/- seized from the house of the appellant and proved to be the subject-matter of charge under Section 5(1)(e) of the 1947 Act, were ordered to be confiscated to the State. Responding to the plea of want of jurisdiction of the Special Court to order confiscation, this Court referring to Section 4(2) of Cr.P.C., held that in terms thereof, all offences under any law other than the Indian Penal Code have to be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Code but subject to any enactment for the time being in force regulating the manner or place of investigation, enquiry, trial or otherwise dealing with such offences. *It was observed that none of the provisions of the Prevention of Corruption Act provided for confiscation or prescribed the mode by which an order of confiscation could be passed and thus, it was ruled that the order of confiscation in the facts of the case could not be held to be de hors jurisdiction. The invocation of Section 452 of the Code, in absence of any provision in the Prevention of Corruption Act, excluding its operations to effect confiscation of the property involved in any offence thereunder, was thus affirmed.*

12. This Court in ***Jaydayal Poddar (deceased) through L.Rs. & Anr. v. Mst. Bibi Hazara, (1974) 1 SCC 3,*** enunciated that it is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the

real owner, always rests on the person asserting it to be so. The burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. It was propounded that the essence of a benami is the intention of the party or parties concerned and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. However such difficulties do not relieve the person asserting the transaction to be benami, of any part of the serious onus that rests on him nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. It was exposited that the reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. It was held that though the question, whether a particular sale is benami or not, is largely one of fact and for determining this question, no absolute formula or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by the following circumstances:

(1) The source from which the purchase money came;
(2) The nature of possession of the property, after the purchase;
(3) Notice, if any, for giving the transaction a benami colour;
(4) The position of the parties and the relationship, if any, between the claimant and the alleged benamdar;
(5) The custody of the title-deeds after the sale and
(6) The conduct of the parties concerned in dealing with the property after the sale.

That the above indicia are not exhaustive and their efficacy varies according to the facts of each case was however underlined. The emphasis of the decision on benami purchase, therefore, is that there has to be either some direct evidence or strong circumstantial evidence to raise an inference that the property alleged to be benami had been purchased with the funds/resources of someone other than the person in whose name the property is shown in the document.

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290. REGISTRATION ACT, 1908 – Section 17
LAND REVENUE CODE, 1959 (M.P.) – Section 169

(i) Lease of agricultural holdings, requirements of – Oral leases are permissible – But document transferring interest in immovable property of more than one hundred rupees must be registered – Unregistered document cannot be looked into for deciding whether it creates any right, title or interest.

(ii) Whether occupancy rights of a tenant can be declared in favour of a person who is not in personal cultivation possession? Held, No – Actual cultivation by that person is essential.

पंजीयन अधिनियम, 1908 - धारा 17

भू-राजस्व संहिता, 1959 (म.प्र.) - धारा 169

(i) कृषि भूमि के पट्टा की आवश्यकतायें - मौखिक पट्टा अनुज्ञात है - किन्तु जब लिखित दस्तावेज द्वारा एक सौ रूपये से अधिक मूल्य वाली अचल सम्पत्ति में किसी हित का अन्तरण किया जाता है तो पंजीयन अनिवार्य है - किसी अधिकार, स्वत्व या हित का सृजन अभिनिश्चित करने के लिए अपंजीकृत दस्तावेज को नहीं देखा जा सकता है।

(ii) क्या मौरूसी काश्तकार के अधिकार की घोषणा ऐसे व्यक्ति के पक्ष में की जा सकती है जो स्वयं कृषक आधिपत्य में न हो? अभिनिर्धारित, नहीं - उस व्यक्ति द्वारा वास्तविक कृषि किया जाना आवश्यक है।

Yashchandra (D) By L.Rs. v. State of Madhya Pradesh and ors. Judgment dated 20.09.2017 passed by the Supreme Court in Civil Appeal No. 5040 of 2009, reported in AIR 2017 SC 4572

Relevant extracts from the judgment:

Yashchandra, the plaintiff filed a suit for declaration of his occupancy rights in the suit land claiming that he was an occupancy tenant on the eastern part of the land of Phoolchand measuring 25 acres and claimed that this land had been leased out to him by Phoolchand vide lease deed dated 21st November, 1968 on a rental of Rs. 500/- per annum. He further claimed that since he was in occupation of the land he had got the rights of occupancy tenant under Section 169 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as 'the Code'). The trial court dismissed the suit. An appeal was filed by the State and the High Court came to the conclusion that the alleged deed was a sham transaction. This judgment is challenged before us.

When we carefully peruse the original document, we notice that by this document [Annexure P-2] Phoolchand states that he has received ` 2000/- from Yashchandra and that he has permitted Yashchandra to enclose and cultivate 1/3rd of his land measuring 24 acres and cultivate the same and only ` 500/- would be deducted. Even after payment of the full amount of ` 2000/-, Yashchandra would be entitled to cultivate the land for a period of 10 years. This document is signed only by Phoolchand and it is neither witnessed by anybody nor registered. This document transfers an interest in immovable property of more than rupees hundred. It may be true that under the provisions of the Code oral leases of agricultural holdings are permissible, but once the lease is created by a document then the same has to be registered under the Registration Act. This document is an unregistered document. The courts below have come to the conclusion that this document is an ante-dated document.

Therefore, this document cannot be looked into for deciding whether this document creates any right, title or interest in the appellants. In our view, in the absence of any registration or any attesting witness, the document could have easily been manipulated by Phoolchand and the plaintiff by ante-dating it.

One of the issues framed was whether the plaintiff had become a cultivating farmer of the land in question and while answering this issue the trial court has discussed the question whether the plaintiff was in possession of the land or not. It has been found that the plaintiff was not in possession of the land. In fact, the plaintiff himself had admitted that he is not in possession of the land and cultivation on his behalf is carried out by a servant. It was also stated that one relative was managing the cultivation of the land. The trial court held that the plaintiff had failed to prove that he was in possession because he failed to mention the name of the persons who were owning the neighbouring lands nor could he give any details thereof. The servant Buda and the relative Amlok Chand were not examined by the plaintiff. Therefore, even as per the stand of the plaintiff he was not in personal cultivating possession and hence, he could not have got occupancy rights of a tenant in the land which can only be given to a person who is actually cultivating the land.

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291. SPECIFIC RELIEF ACT, 1963 – Sections 34 and 39

Whether civil suit based upon agreement to sell, for declaration of transfer in favour of third party to be null and void and mandatory injunction for direction to transfer suit land, maintainable? Held, No – Proper remedy is to file suit for specific performance of agreement.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धाराएं 34 एवं 39

क्या तृतीय व्यक्ति के पक्ष में किये गए अन्तरण को शून्य व निष्प्रभावी घोषित करने और वादी के पक्ष में अन्तरण किये जाने के निर्देश सहित आज्ञापक व्यादेश जारी किये जाने हेतु, विक्रय संविदा पर आधारित वाद प्रचलन योग्य है? अभिनिर्धारित, नहीं - उचित उपचार संविदा के विनिर्दिष्ट पालन हेतु वाद प्रस्तुत करना है।

Suresh Kumar through GPA v. Anil Kakaria and ors.

Judgment dated 06.11.2017 passed by the Supreme Court in Civil Appeal No. 4383 of 2009 reported in AIR 2017 SC 5239

Relevant extracts from the judgment:

In the first place, the appellant had no title to the suit land. All that he had claimed to possess in relation to the suit land was an agreement dated 24.04.1980 to purchase the suit land from its owner (Shri Ved Prakash Kakaria). The appellant, as mentioned above, failed to prove the agreement. In this view of the matter, the appellant had no prima facie case in his favour to file a suit nor he had even any locus to file the suit in relation to the suit land once the agreement was held not proved.

Second, the proper remedy of the appellant in this case was to file a civil suit against respondent Nos.1 to 3 to claim specific performance of the agreement in question in relation to the suit land and such suit should have been filed immediately after execution of agreement in the year 1980 or/and within three years from the date of execution. It was, however, not done. The suit was, however, filed by the appellant almost after 12 years from the date of agreement and that too it was for declaration and mandatory injunction but not for specific performance of agreement. It was, in our opinion, a misconceived suit and was, therefore, rightly dismissed.

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292. SPECIFIC RELIEF ACT, 1963 – Section 34
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17
INDIAN SUCCESSION ACT, 1925 – Section 63
EVIDENCE ACT, 1872 – Sections 68 and 69
HINDU SUCCESSION ACT, 1956 – Sections 6 and 8

(i) Whether a suit simplicitor for relief of declaration of share of plaintiff in the suit property without seeking relief of partition and possession is maintainable? Held, Yes – Possession of one co-owner over the land is deemed to be possession of all co-owners.

(ii) Plea of ouster of co-owner, elements necessary to establish, explained – Declaration of hostile *animus*, uninterrupted and long possession and exercise of the right of ownership openly should be established.

(iii) Whether in such suit, the decree for partition and possession of suit property can be granted in favour of plaintiff, without these reliefs being claimed by him? Held, No.

(iv) Amendment to incorporate relief of partition and possession in such suit at appellate stage, considerations for – Held, amendment sought after a lapse of 11 years and plaintiff has not filed any cross-appeal and cross-objection – At this stage amendment cannot be allowed.

(v) Will, proof of execution – Attesting witness denying execution of Will – Deposing that his signatures obtained in blank paper by misrepresentation and document neither written before him nor signed by executant or other attesting witness before him – Held, alleged will become suspicious – Execution not proved.

(vi) How property acquired by application of proviso to Section 6 by a male Hindu would devolve after his death? Held, after notional partition and allocation of shares in Joint Family property in accordance with section 8 status of coparcenary

gets abolished and such male Hindu shall hold the property as tenant-in-common and not as joint tenant – Devolution shall take place according to section 8 of the Hindu Succession Act, 1956 (*Uttam v. Saubhag Singh, AIR 2016 SC 1169* relied on)

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 34

सिविल प्रक्रिया संहिता, 1908 - आदेश 6 नियम 17

भारतीय उत्तराधिकार अधिनियम, 1925 - धारा 63

साक्ष्य अधिनियम, 1872 - धाराएं 68 एवं 69

हिन्दू उत्तराधिकार अधिनियम, 1956 - धाराएं 6 एवं 8

(i) क्या विवादित सम्पत्तियों में विभाजन और कब्जे का अनुतोष चाहे बिना केवल वादी के अंश की घोषणा का वाद प्रचलन योग्य है? अभिनिधारित, हाँ - भूमि पर एक सह-स्वामी का कब्जा सभी सह-स्वामियों का कब्जा माना जाता है।

(ii) सह-स्वामी की बेदखली का अभिवाक् स्थापित किये जाने हेतु आवश्यक तत्व विवेचित विरोधी आशय की घोषणा, पक्षकार का बाधारहित और सुदीर्घ कब्जा और स्वामित्व के अधिकार का खुला प्रयोग स्थापित किया जाना चाहिए।

(iii) क्या इस प्रकार के वाद में विवादित भूमि के विभाजन और कब्जा का अनुतोष प्रदान करने वाली आज्ञप्ति पारित की जा सकती है, जबकि इन अनुतोषों का दावा नहीं किया गया है? अभिनिर्धारित, नहीं।

(iv) अपील के स्तर में विभाजन और कब्जा के अनुतोष जोड़े जाने हेतु संशोधन पर विचार किया गया - अभिनिर्धारित, 11 वर्ष व्यतीत होने के बाद संशोधन चाहा गया और वादी ने कोई प्रति - अपील या प्रत्याक्षेप प्रस्तुत नहीं किया था - इस स्तर पर संशोधन स्वीकार नहीं किया जा सकता है।

(v) वसीयत के निष्पादन का प्रमाण - अनुप्रमाणक साक्षी ने वसीयत के निष्पादन से इंकार किया - कथन किया कि प्रवंचना द्वारा उससे खाली कागज में हस्ताक्षर कराये गये और दस्तावेज को न तो उसके सामने लिखा गया और न निष्पादक या अनुप्रमाणक साक्षी ने उसके समक्ष हस्ताक्षर किये - अभिनिर्धारित, कथित वसीयत संदेहास्पद है - निष्पादन साबित नहीं हुआ।

(vi) धारा 6 के परंतुक द्वारा हिन्दू पुरूष द्वारा अर्जित सम्पत्ति उसकी मृत्यु के बाद किस प्रकार व्ययनित होगी? अभिनिर्धारित, धारा 8 के अनुसार संयुक्त परिवार की सम्पत्तियों के सांकेतिक विभाजन और अंशो के निर्धारण के बाद सहदायकी की स्थिति समाप्त हो जाती है और ऐसा हिन्दू पुरूष सम्पत्ति को 'सामान्विक अभिधारी' के रूप में धारित करता है न कि 'संयुक्त अभिधारी' के रूप में - अतः उसकी मृत्यु के बाद उसकी सम्पत्ति हिन्दू उत्तराधिकार

अधिनियम 1956 की धारा 8 के उपबन्धों के अनुसार व्ययनित और विभाजित होगी। (*उत्तम विरूद्ध सौभाग सिंह, एआईआर 2016 एससी 1169* अवलंबित)

Mukund v. Smt. Sulakshana Bokare
Judgment dated 15.05.2017 by the High Court of Madhya Pradesh in First Appeal No. 678 of 2000, reported in AIR 2017 MP 188.

Relevant extracts from the judgment:

The proviso to Section 34 of Specific Relief Act, makes it necessary to claim consequential relief in a suit for declaration where the plaintiff is able to seek such relief and omits to claim it. It is settled law that when plaintiff is not in exclusive possession of the property, the suit simplicitor for declaration of title to the property is not maintainable. The same principle is enunciated by Hon'ble Apex Court in case laws relied upon by learned counsel for the appellant ***Vinay Krisha v. Keshav Chandra, (1993) Supp (3) SCC 129 : AIR 1993 SC 957, Meharchand Das v. Lal Babu Siddique, (2007) 14 SCC 253 : AIR 2007 SC 1499 and Venkataraja v. Vidyane, (2014) 14 SCC 502 : 2013 AIR SCW 3063***.

Hon'ble Apex Court in case law ***Meharchad Das*** (supra) in para 12 observed that:-

> "if the plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable."

In present case, the plaintiff has constructive possession over the disputed property. Therefore, it cannot be said that she is not in possession of the property. This Court in ***Pheraniya and other v. Mauji Lal and others, 2012 (2) MPLJ 205***, observed as under:

> "The discretionary relief that can be granted under Section 34 of the Act is based upon principles contained in legal maxim *'ex debito justiciae'*. However, there is a rider in the nature of proviso appended to section 34 of the Act and that provides that no Court shall make a declaration contemplated by section 34 where the plaintiff omits to seek further relief than a mere declaration. The bar to the grant of relief contained in the proviso to section 34 would not apply to the facts of the present case because the respondent Nos. 2 and 3 who were the plaintiffs before the trial Court admittedly had one fourth undivided share each in the suit property on the date of filing of the suit. It is within the realm of the plaintiffs to formulate appropriate reliefs for them which may be necessary in a given factual matrix and they were not required to have necessarily

> prayed for relief of possession when they were satisfied by the declaration to be given by the Court in their favour that they were the owner of one fourth undivided share each in the suit property. Both the Courts below were absolutely right in their conclusion that the respondent Nos. 2 and 3 were not required to claim separate relief of possession while seeking a declaration regarding their right in the suit property. They were in deemed possession of their share on the date of the suit. It was the choice of respondent Nos. 2 and 3 being the plaintiffs in the suit to have simply made a prayer for declaration with consequential relief of mandatory injunction in the form of direction to the revenue authorities to delete the names of the appellants from khasra entries and to substitute their names to the extent of their shares in the suit property."

We are fortified by above view. As in the present suit the plaintiff is found in constructive possession of disputed joint family property in which she has got share, therefore a suit simplicitor for declaration of her share in the property is maintainable.

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Since plaintiff Smt. Sulakshana is daughter of Madhukar Pohankar, the disputed property is her ancestral property therefore, she is a co-owner having right and interest in the property. Her brother Mukund Rao, step mother late Smt. Ratna and sister of her father, Smt. Sudha were also co-owners of the property. It is admitted by plaintiff Smt. Sulakshana (PW-1) in para 18 of cross-examination that she is not in possession of the claimed property. It is settled law that the possession of co-owner over the land will be deemed to be the possession of all the co-owners over the land even if some of the co-owners are not in actual possession of the land. To establish plea of ouster in case of co-owner, three elements are necessary. Firstly, there should be declaration of hostile animus. Secondly, there must be uninterrupted and long possession of the party setting up the plea of ouster and thirdly, the right of ownership should be exercised openly by the party setting up the plea of ouster.

Hon'ble Supreme Court in ***P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314,*** wherein para 4 it was observed that : -

> ".....But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. The possession of one co-heir is considered, in law,

as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See ***Corea v. Appuhamy, 1912 AC 230 (C)***. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be interfered when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in ***N. Varada Pillai v. Jeevarathnammal, AIR 1919 PC 44 at p. 47(D***) quotes, apparently with approval, a passage from ***Culley v. Doed Taylerson (1840) 3 PandD 539 : 52 RR 566 (E)*** which indicates that such a situation may well lead to an inference of outster "if other circumstances concur". (See also ***Govindrao v. Rajabai, AIR 1931 PC 48 (F)***). It may be further mentioned that it is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

Hon'ble Apex Court in ***Annasaheb Babusaheb Patil v. Balwant Babusaheb Patil, AIR 1995 SC 895,*** observed that :-

"in the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenery property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse

possession to prove adverse character of his possession by establishing affirmatively that tothe knowledge of other members he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other."

In the present case, the defendant Mukund Rao accepts that he lived with his parents in ancestral house. His parents lived with him in their lifetime jointly. The present suit is filed in the year 1993. Prior to this, the plaintiff was living in Nagpur. It appears that only after the death of his father in 1990, the defendant has refused to give share of crop to his sister i.e., plaintiff. As he is now denying the right and share of the plaintiff, therefore, the plaintiff has brought the present suit. Simply, mutation of name of defendant in revenue record is not sufficient to presume the ouster of plaintiff. When the defendant Mukund Rao had denied the right of plaintiff is not stated by him in his statement. Hon'ble Apex Court in ***Annasaheb Babusahed Patil*** (supra) observed that one who holds possession on behalf of another, does not by merely denial of that others title make his possession adverse so as to give himself the benefit of statute of limitation, therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. Therefore, in present case, the ouster of plaintiff is not proved.

Thus, from the evidence available on record, it is established that the plaintiff is in constructive possession of the disputed property. The ouster of plaintiff is not proved.

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The last question arises for consideration is whether the decree for partition and possession of suit property can be granted in favour of plaintiff? From the pleadings and averments made in the plaint, it is clear that the plaintiffs have not claimed above relief in the suit.

It is not disputed that the plaintiff has not claimed the relief for partition and possession of suit property. No court fees has been paid on said relief. No pleadings regarding partition have been made. Hon'ble Apex court in ***Bachhaj Nahar v. Nilima Mandal and another, (2008) 17 SCC 491 :AIR 2009 SC 1103.*** It is observed that it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Civil Court cannot grant any relief ignoring the prayer.

Hon'ble Apex Court in paras 12 and 13 of above case law further observed that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during tiral. The object of issues is to identify from the pleadings, the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief.

In the present suit, it is not clearly mentioned that all the joint family properties have been incorporated in the suit. It is also admitted by plaintiff PW-1 in para 12 that leaving 16000-16000 sq.fts. of land, a remaining lands have been acquired by the Government. Defendant Mukund Rao (DW-1) also admitted that 25 acres of the land had been acquired in ceiling proceedings. The trial Court has also recorded the finding that some of the disputed properties have been acquired by the Government in ceiling proceedings. The copies of the proceedings Exs.D-2, D-3, D-4 and D-5 have been produced in evidence before the trial Court. Therefore, it is not clear how much lands have been acquired by Government from suit property? The decree for partition of the properties, which have been acquired by the Government, is not proper. Government is to be noticed in this regard. Therefore, in above facts and circumstances of the case, without proper pleadings and claim of relief, the learned trial Court has committed illegality in granting the decree of partition and possession in favour of plaintiff.

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In the present case, applying aforesaid principles to the facts of this case, it is clear that after the death of late Shri. Sadashiv Rao, joint family property be devolved by succession under Explanation 1 to Sec.6 r/w Sec.8 of Hindu Succession Act. We have to ascertain the share of deceased Sadashiv Rao in notional partition i.e., the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. Thus, Sadashiv Rao, his wife Yamuna Devi and son Madhukar Rao shall have equal 1/3-1/3 shares in the property. The 1/3 share of Sadashiv Rao shall again be divided between Yamuna Devi, Madhukar Rao and daughter Smt. Sudha and each Will get 1/9-1/9 share. Thus, after death of Sadashiv Rao, Yamuna Devi and Madhukar Rao shall have 4/9-4/9 shares and Smt. Sudha shall have 1/9 share. After the death of Yamuna Devi on 25.11.1987, as per Section 15 of Hindu Succession Act, her share shall devolve upon her son Madhukar Rao and daughter Smt. Sudha, equally. Thus, both will get 2/9-2/9 shares. Therefore, the total share of Madhukar Rao becomes 4/9+2/9=2/3 and share of Smt. Sudha becomes 2/9+1/9=1/3.

Late Madhukar Rao has wife Smt. Ratna Prabha, two sons Mukund Rao, Yashwant Rao and one daughter plaintiff Smt. Sulakshana. Yashwant Rao died on 07.05.1982. Madhukar Rao holds the property in his share by the application of Sec.6 proviso, such property would devolve only by intestacy and not survivorship. Hon'ble Apex Court in case law ***Uttam v. Saubhag Singh*** (supra), categorically enunciated the following principles:-

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

Thus, after notional partition and allocation of shares to Madhukar Rao, his mother and sister the status of coparcenery gets abolished and Madhukar Rao holds the property as tenants in common. Therefore, after the death of Madhukar Rao his property shall devolve and be partitioned according to the provision of Sec. 8 of Hindu Succession Act. Since Smt. Sulakshana, Mukund Rao and Smt. Ratna Prabha are all Class 1 heirs as per Schedule 1, therefore, they will get equal share i.e. 2/9-2/9 each. Now Smt. Ratna Prabha has expired living behind only heir Smt. Sulakshana and Mukund Rao, therefore, her share shall be equally divided between them. Thus, the share of Smt. Sulakshana shall be 2/9+1/9=1/3 and similarly, the share of Mukund Rao shall be 1/3. Thus, it is proved that plaintiff Smt. Sulakshana, defendant No.1 Mukund Rao and defendant No.4 Smt. Sudha are having equal 1/3-1/3 shares in the suit property. The trial Court has committed error in calculating the share of the parties in suit property.

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293. SPECIFIC RELIEF ACT, 1963 – Sections 38 and 41(g)

(i) Necessary ingredients to seek prohibitory injunction in respect of property declared to be in excess of ceiling limits by tribunal – Plaintiff neither holding the land nor is in lawful possession – Held, apart from establishing irreparable loss and injury, plaintiff must *prima facie* prove his legal possession over disputed property.

(ii) Suit between two private parties in relation to land which is subject matter of state ceiling laws, whether State is necessary party? Held, Yes.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 38 एवं 41(छ)

(i) **अधिकरण द्वारा उच्चतम सीमा से अधिक घोषित सम्पत्ति के सम्बन्ध में प्रतिषेधात्मक व्यादेश की वांछा हेतु आवश्यक तत्व - वादी न तो भूमि धारित करता था और न ही उसके विधिपूर्ण आधिपत्य में था - अभिनिर्धारित, अपूर्णनीय हानि एवं क्षति स्थापित करने के अतिरिक्त वादी द्वारा वादग्रस्त सम्पत्ति पर प्रथम दृष्टया अपना विधिक आधिपत्य साबित किया जाना चाहिए।**

(ii) **राज्य अधिकतम सीमा विधियों की विषयवस्तु से संबंधित भूमि के सम्बन्ध में दो प्राइवेट पक्षकारों के मध्य वाद, क्या राज्य आवश्यक पक्षकार है? अभिनिर्धारित, हाँ।**

Agnigundala Venkata Ranga Rao v. Indukura Ramachandra Reddy (dead) by L.Rs. and others

Judgment dated 13.04.2017 passed by the Supreme Court in Civil Appeal No. 5817 of 2012, reported in 2018 (1) MPLJ 260

Relevant extracts from the judgment:

It is a settled principle of law that in order to claim prohibitory (temporary or permanent) injunction, it is necessary for the plaintiff to prima facie prove apart from establishing other two ingredients, namely, irreparable loss and injury that his possession over the suit land is "legal". In this case, it was not so and nor it could be for the simple reason that as far back on 21.08.1976, the Tribunal had already declared the land held by the plaintiff to be in excess of the ceiling limits prescribed under the Act. In these circumstances, the plaintiff was neither holding the land nor could he be held to be in its lawful possession so as to enable him to exercise any ownership rights against any other private party over the suit land. The appellant had then very limited rights left to exercise under the Act in relation to the suit land and such rights were available to him only against the State. Such is not the case here.

Lastly, this being a simple suit for grant of permanent injunction between the two private parties in relation to the land which was subject matter of the State Ceiling Laws, was liable to be dismissed on the short ground apart from many others as detailed above that any order that may be passed by the Civil Court would adversely affect and interfere in the rights of the State under the Act, which had not been impleaded as party defendant.

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***294. TRANSFER OF PROPERTY ACT, 1882 – Section 54**

Mere execution of agreement to sale, whether to be treated as 'transfer' or 'alienation'? There is distinction between sale and agreement to sale – Agreement to sale does not create any interest –

Mere execution of agreement to sale cannot be treated as 'transfer' or 'alienation'.

सम्पति अन्तरण अधिनियम, 1882 - धारा 54

क्या विक्रय के करार का निष्पादन मात्र 'विक्रय' या 'समनुदेशन' माना जायेगा? विक्रय और विक्रय के करार में अन्तर है - विक्रय का करार किसी हित का सृजन नहीं करता - विक्रय के करार के निष्पादन मात्र को 'अन्तरण' या 'समनुदेशन' नहीं माना जा सकता है।

Balwant Vithal Kadam v. Sunil Baburoi Kadam

Judgment dated 05.12.2017 passed by the Supreme Court in Civil Appeal No. 6069 of 2008, reported in (2018) 2 SCC 82

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295. TRANSFER OF PROPERTY ACT, 1882 – Section 123

INDIAN SUCCESSION ACT, 1925 – Sections 332 and 336

STAMP ACT, 1899 – Sections 17 and 48-B, Schedule I-A and Article 31

Deed of Assent' and 'Gift Deed' differentiated.

lifRr vUrj.k vf/kfu;e] 1882 & /kkjk 123

Hkkjrh; mRrjkf/kdkj vf/kfu;e] 1925 & /kkjk,a 332 ,oa 336

LVkEi vf/kfu;e] 1899 & /kkjk,a 17 ,oa 48&[k] vuqlwph I&d ,oa vuqPNsn 31

^^lEefr foy[k^^ ,oa ^^nku foy[k^^ foHkfnrA

Trustees of H.C. Dhanda Trust, Indore v. State of M.P. and others

Order dated 30.03.2017 passed by the High Court of M.P. (Indore Bench) in W.P. No. 8888 of 2011, reported in 2018 (1) MPLJ 318

Relevant extracts from the order:

The Will of Late Shri H.C. Dhanda was in two parts. In Part-I he has given the details of his all moveable and immoveable properties. In Part-II, he appointed the beneficiaries. The intention behind to create Trust to run both Hotels by the Trustees. In meeting dated 6th April, 2005 the resolution was passed to transfer these properties namely Lantern Hotel and Jahaz Mahal by meets and bounds between Jogesh Dhanda

and Ishan Dhanda and the Deed of Assent was executed. It was titled as “Deed of Assent” but its nature is like a Gift. Mr. H.C.Dhanda has intention to create Trust of his property otherwise he could have executed simple Will in favour of Jogesh Dhanda and Ishan Dhanda. There was restriction of sale of the properties in Will hence same were gifted by Deed in the name of Assent. The Collector as well as the Board of Revenue rightly came to the conclusion that the Trust has gifted the property to Jogesh Dhanda and Ishan Dhanda. Complete title has been transferred by way of this deed to them. Under Section 123 of the Transfer of Property Act stipulates that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. The duty of executor was that to transfer the property to the legatees except Lantern Hotel and Shab-E-Malwa and the land there with. But by way of this so called Deed of Assent, these properties have been transferred to Jogesh and Ishan Dhanda. Since no consideration was given by them to the Trust, therefore, it has rightly been treated as a Gift Deed. The so called Deed of Assent was executed by the Trust to transfer the properties to the legatees. All the Trustees were made executor by way of Will to manage the Trust. The Trust was not required to execute a deed to transfer the properties to the beneficiaries to complete the legatees title. These 3 persons were specifically kept in the Trust with the instructions not to sell but run and manage these properties from income received from it. Had it been a transfer of these properties to the legatees, like other properties, the executors could have simply have completed the legatees title. Since these properties vested in the Trust, therefore, they executed the deed in the name of Deed of Assent, specially for these two hotels. Therefore, there is no detail of other properties for which the title of legatees was required to be completed. When special deed was executed for these properties entrusted to the Trust, then it was rightly terms as a gift in favour of Jogesh Dhanda and Ishan Dhanda by the Trust. Therefore, the orders passed by the Collector and Board of Revenue are not required to be interfered.

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PART - II A

GUIDELINES REGARDING SUMMONING THE WITNESS UNDER SECTION 311 OF CR.P.C.

The Apex Court in the case of ***Rajaram Prasad Yadav v. State of Bihar, (2013)14 SCC 461*** after considering law laid down in various judgments summarised following principles to be borne in mind by the Courts while dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act -

1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?
2. The exercise of the widest discretionary power under Section 311 Criminal Procedure Code should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.
3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.
4. The exercise of power under Section 311 Criminal Procedure Code should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
6. The wide discretionary power should be exercised judiciously and not arbitrarily.
7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
8. The object of Section 311 Criminal Procedure Code simultaneously imposes a duty on the Court to determine the truth and to render a just decision.
9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

10. Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.
11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
14. The power under Section 311 Criminal Procedure Code must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

Following principles are also to be kept in mind while considering the provision of Section 311:

1. Court has power under Section 311 Criminal Procedure Code to recall prosecution witness on the request of victim of crime.
   (***Sister Mina Lalita Baruwa v. State of Orissa, AIR 2014 SC 782***)
2. A witness can be recalled and re-examined any number of times if required for just decision of case. Section 311 Cr.P.C. does not prevent further re-call.
   (***Mannan Sk. v. State of West Bengal, (2014) 13 SCC 59***)
3. (i) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel.
   (ii) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed.

(iii) Mere change of counsel cannot be ground to recall the witnesses.

(iv) Fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society.

(***AG v. Shiv Kumar Yadav, AIR 2015 SC 3501***)

4. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

(***Ratanlal v. Prahlad Jat, AIR 2017 SC 5006***)

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When the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears.

– Justice Dipak Misra in ***State of Haryana v. Ram Mehar, AIR 2016 SC 3942***

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Justice cannot be for one side alone, but must be for both.

– Eleanor Roosevelt

PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MADHYA PRADESH ACT

No. 27 of 2017

THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2017

[Received the assent of the Governor on the 29th August, 2017; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 1st September, 2017]

An Act further to amend the Court-fees act, 1870 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-eighth year of the Republic of India as follows:-

1. Short title – This Act may be called the Court fees (Madhya Pradesh Amendment) Act, 2017.

2. Amendment of Central Act No VII of 1870, in its application to the State of Madhya Pradesh – The Court fees Act, 1870 (hereinafter referred to as the principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 13 – In section 13 of the principal Act, for the words "the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector or the full amount of fee paid on the memorandum of appeal", the words "the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, the full amount of fee paid on the memorandum of appeal" shall be substituted.

4. Amendment of Section 14 – In section 14 of the principal Act, for the words "grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day", the words "grant him a certificate authorising him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day" shall be substituted

5. Amendment of Section 15 – In section 15 of the principal Act, for the words "the applicant shall be entitled to certificate from the court authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee payable on any other application to such Court under the second schedule to this Act, No. 1, clause (b) or clause (d)", the words "the

applicant shall be entitled to certificate from the Court authorizing him to receive back from the Collector or by way of electronic transfer in such manner as may be prescribed, so much of the fee paid on the application as exceeds the fee payable on any other application to such court under the second schedule to this Act, No. 1, clause (b) or clause (e) or clause (f)" shall be substituted.

6. Amendment of Section 16 – In section 16 of the principal Act, for the words "the plaintiff shall be entitled to a certificate from the Court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint", the words "the plaintiff shall be entitled to a certificate from the Court authorizing him to receive back from the Collector or by way electronic transfer in such manner as may be prescribed, the full amount of the fee paid in respect of such plaint" shall be substituted.

7. Amendment of Section 25 – In section 25 of the principal Act, for the words "stamps", the words "stamps or electronic transfer of payment to State Government in such manner as may be prescribed" shall be substituted.

8. Amendment of Section 27 – In section 27 of the principal Act, clause (a) shall be renumbered as clause (aa) and before clause (aa) as so renumbered, the following new clause shall be inserted, namely:-

> "(a) the manner of electronic transfer of payment of court-fee and refund thereof-,".

9. Amendment of Section 27 – In section 30 of the principal Act, in second paragraph, for full stop, colon shall be substituted and thereafter the following proviso shall be added, namely:

> "Provided that, where court-fee is paid by electronic transfer of payment, the officer competent to cancel stamp shall verify the genuineness of the payment and after satisfying himself that the court-fee is paid, shall lock the entry in the computer and make an endorsement under his signature on the document that the court-fee is paid and the entry is locked.".

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