150 YEARS OF CELEBRATING THE MAHATMA

MADHYA PRADESH STATE JUDICIAL ACADEMY • HIGH COURT OF M.P. •

सत्यमेव जयते

Silver Jubilee Year 1994-2019

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MADHYA PRADESH STATE JUDICIAL ACADEMY

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

EDITORIAL

Esteemed Readers,

This endmost issue of JOTI Journal of 2019 gives us an opportunity to introspect our activities throughout the year as well as to reset the goal that is to be achieved in the next twelve months in consonance with the new and emergent needs.

We are exultant that Hon'ble Shri Justice Ajay Kumar Mittal has assumed the charge as the 25th Chief Justice of Madhya Pradesh. We look forward to His Lordship, as Patron of this Academy, for motivating us to reflect in administration of justice. His Lordship's keen interest in the Academy will certainly make the Academy more object-oriented.

We also welcome Hon'ble Shri Justice Sanjay Yadav, as the Judge In-charge, Judicial Education. His Lordship's cavernous involvement in the affairs of the Academy shall be a source of inspiration.

Education and training are vital to the efficiency and overall effectiveness of any organization. Since the herculean responsibility of exacting justice in the largest democracy lies in the hands of the justice dispensation system, judicial education and training becomes imperative for everyone who takes up this task. With this in mind, the Academy had organized as many as 56 programmes including induction level and in service or continuing education programmes during the year 2019 for the Judges of the District Judiciary as well as for other stakeholders of the justice delivery system. In all, more than 1790 Judges of District Judiciary and approximately 550 other stakeholders *viz.* Advocates, Prosecution Officers, Presiding Officers of Labour Courts, Ministerial Staff of District Courts etc. Were imparted training in the year 2019. We have had the pleasure of hosting a diverse set of faculties and resource persons who with their brilliance and expertise enlightened the participants. We are extremely grateful to all of them.

By the time this issue reaches your hands, we shall be celebrating the advent of Year 2020. This change of calendar is a crossroad from where we may start with new challenges, new strategies and of course, new hopes. One such challenge that the Academy faces is to conduct induction training for newly inducted Civil Judges (Junior Division) and Foundation and Advance courses for newly appointed District Judges (Entry Level) direct from the Bar and promoted from the Civil Judges, Senior Division.

The Academy shall be conducting Workshops on diverse range of subjects at the Academy as well as at regional levels. Two Colloquia shall also be organized aimed at the functioning of the District & Sessions Judges and Chief Judicial Magistrates during the year 2020. A Specialized Educational Programme on recently established Commercial Courts shall also be conducted in the next year. Furthermore, keeping up with the digital trend, the Academy shall organize learning programmes through video-conferencing every month in which the legal topics identified by Judges of the District Judiciary may be addressed.

The Academy proposes to conduct all the programmes on interactive lines. We are of the view that all kinds of academic trainings should be designed in such a manner that makes interaction amongst the participants invigorating by simulation, group discussion, presentation etc. As these modes can make the training more participative. Additionally, with little despair, I would like to highlight that the haughtiness of the judges has become an issue. This needs to be resolved in an owlish manner. Thus, the Academy wishes to run a campaign to overcome this judicial arrogance.

It has been rightly said, "To keep the body in good health is a duty… otherwise we shall not be able to keep the mind strong and clear." Although the Academy is equipped with a fitness centre, the participant Judges seldom use it. The Academy shall strive to focus on the physical and mental health of the Judges through regular Yoga, meditation and physical exercises.

Lastly, as we are aware, the year 2019, marks the 70th year of the adoption of our supreme legislation, the Constitution of India. It has been decided by the Government of India to run an awareness campaign focused on Citizens' Duties including Fundamental Duties enshrined in the Constitution from 26th November, 2019 to 2020. We may join this cause by adhering to our core duty of serving the people by dispensing quick, qualitative and inexpensive justice.

We look forward for your kind comments and suggestions for improving our future issues.

At last, with warm greetings of the upcoming year, hope-fully bringing a hankering for new achievements, I would like to end this editorial.

Happy New Year!

Ramkumar Choubey
Director

APPOINTMENT OF HON'BLE MR. JUSTICE SHARAD ARVIND BOBDE AS CHIEF JUSTICE OF INDIA

Hon'ble Mr. Justice Sharad Arvind Bobde was sworn in as the 47th Chief Justice of India by His Excellency the President of India at Rashtrapati Bhawan on 18th November, 2019.

His Lordship was born on 24th April, 1956 at Nagpur. His Lordship passed Higher Secondary School Examination from SFS School, Nagpur in 1972, obtained Bachelors Degree of Arts from SFS College in 1975 and Law Degree from Nagpur University in 1978.

His Lordship was enrolled as an Advocate with the Bar Council of Maharashtra on 13th September, 1978 and practiced at the Nagpur Bench of Bombay High Court for over 21 years. His Lordship had also practiced in the Supreme Court of India and was designated as Senior Advocate in the year 1998.

His Lordship is a keen sports person and has special interest in Tennis and had played tennis representing University College of Law at the intercollegiate Championship. His Lordship has also played for Nagpur University in the All India Inter-Universities Tournament.

His Lordship was elevated to the Bench of Bombay High Court on 29th March, 2000 as Additional Judge and thereafter, as permanent Judge on 29th April 2002.

After rendering more than ten years of valuable services as a Judge in the High Court of Maharashtra, His Lordship was appointed as the Chief Justice of High Court of Madhya Pradesh on 16th October, 2012.

His Lordship was elevated as a Judge, Supreme Court of India on 12th April, 2013. His Lordship was appointed as Chief Justice of India and took oath of this highest office of Indian Judiciary on 18th November, 2019.

We, on behalf of JOTI Journal, wish His Lordship a very happy and successful tenure.

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WELCOME TO HON'BLE THE CHIEF JUSTICE
SHRI AJAY KUMAR MITTAL

Hon'ble Shri Justice Ajay Kumar Mittal has been appointed as the Chief Justice of High Court of Madhya Pradesh.

His Lordship was born on 30th September, 1958 at Chandigarh in the family of distinguished lawyers. His Lordship's grandfather Shri Shamair Chand, an eminent jurist of his times was Barrister-at-Law at Lahore and later at Chandigarh. After obtaining degrees of B.Com (Hons.) from Shri Ram College of Commerce at the Delhi University in the year 1977 and Law from the Faculty of Law, Delhi University in the year 1980, was enrolled as an Advocate in Punjab and Haryana High Court in July 1980 and practiced in Punjab and Haryana High Court in Constitutional, Civil, Taxation, Company and Service matters. His Lordship worked for the Department of Income Tax in the Punjab and Haryana High Court for almost ten years. His Lordship was elevated as Judge of Punjab and Haryana High Court on 9th January, 2004. His Lordship functioned as Acting Chief Justice of Punjab and Haryana High Court from 4th May, 2018 to 2nd June, 2018 and also performed the functions of Executive Chairman of Punjab and Haryana State Legal Services Authority. His Lordship was appointed as the Chief Justice of High Court of Meghalaya on 28th May, 2019

On appointment as 25th Chief Justice of Madhya Pradesh High Court, His Lordship was administered oath of office at Raj Bhavan, Bhopal by the Governor of Madhya Pradesh on 3rd November, 2019. His Lordship was accorded welcome ovation on 4th November, 2019 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

We on behalf of JOTI Journal wish His Lordship a very happy and successful tenure.

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APPOINTMENT OF HON'BLE SHRI JUSTICE RAVI SHANKAR JHA AS CHIEF JUSTICE OF PUNJAB AND HARYANA HIGH COURT

Hon'ble Shri Justice Ravi Shankar Jha, who occupied the august office of the Judge of the High Court of Madhya Pradesh for approximately fourteen years, has been appointed as the Chief Justice of Punjab & Haryana High Court.

His Lordship was born on 14th October, 1961. His Lordship obtained LL.B. degree in 1986 from University Teaching Department of Rani Durgawati Vishwavidyalaya, Jabalpur. His Lordship initiated practice as junior to Hon'ble Shri Justic P.P. Naolekar, Judge, Supreme Court of India. His Lordship was appointed as Government Advocate in the year 1994 and worked in this capacity till 1996. His Lordship was appointed as Deputy Advocate General in the year 1996. His Lordship was also standing counsel for the High Court of Madhya Pradesh, Bhilai Steel Plant and Food Corporation of India. His Lordship was designated as Senior Counsel on 26th April, 2003.

His Lordship was appointed as an Additional Judge of the High Court of Madhya Pradesh on 18th October, 2005 and Permanent Judge on 2nd February, 2007. His Lordship assumed the charge of Office of Acting Chief Justice of the High Court of M.P. on 10th June, 2019.

During tenure in the High Court of Madhya Pradesh, His Lordship rendered invaluable services as Acting Chief Justice, Judge, Chairman/Judge In-charge Judicial Education, Executive Chairman, Madhya Pradesh State Legal Services Authority and also Member of various Administrative Committees of the High Court.

His Lordship has been a constant source of inspiration for the Judges of Madhya Pradesh. His Lordship took keen interest in the academic activities of the Academy and provided wholesome motivation, support and guidance for diversifying the academic activities of the Academy. The Academy is deeply indebted for His Lordship's kind support and benevolent guidance.

His Lordship was accorded farewell ovation on 4th October, 2019 at the High Court of Madhya Pradesh, Jabalpur.

We on behalf of JOTI Journal, wish His Lordship a very happy and successful tenure at Punjab and Haryana.

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APPOINTMENT OF HON'BLE SHRI JUSTICE JITENDRA KUMAR MAHESHWARI
AS CHIEF JUSTICE OF ANDHRA PRADESH HIGH COURT

Hon'ble Shri Justice Jitendra Kumar Maheshwari, who occupied the august office of the Judge of the High Court of Madhya Pradesh for fourteen years, has been appointed as the Chief Justice of Andhra Pradesh High Court.

His Lordship was born on 29th June, 1961 and after completion of education enrolled as an Advocate and practiced in the High Court of Madhya Pradesh at Gwalior Bench for over 19 years. His Lordship dealt with Civil, Constitutional, Taxation, Labour, Company, Service and Criminal matters. His Lordship was a Member of the State Bar Council and Member of Advisory Committee, Mahatma Gandhi College of Law, Gwalior. His Lordship was standing counsel for M.P. State Mining Corporation, M.P. Housing Board, State Bank of India and National Seeds Corporation.

His Lordship was elevated as Additional Judge of the High Court of Madhya Pradesh on 25th November, 2005 and took oath as permanent Judge on 25th November, 2008.

During His Lordship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Judge and Member of various Administrative Committees of the High Court.

His Lordship was accorded farewell ovation on 4th October, 2019 at the High Court of Madhya Pradesh, Jabalpur.

We on behalf of JOTI Journal, wish His Lordship a happy and successful tenure at Andhra Pradesh.

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TRANSFER OF HON'BLE SHRI JUSTICE VIVEK AGRAWAL TO ALLAHABAD HIGH COURT

Hon'ble Shri Justice Vivek Agrawal, who occupied the august office of the Judge of the High Court of Madhya Pradesh for approximately three and half years, has been transferred to the High Court of Allahabad.

His Lordship was born on 28th June 1967 in Kasganj, Uttar Pradesh. After completion of education, His Lordship enrolled as an Advocate in August 1992 and practiced at Civil, Criminal and Constitutional sides.

His Lordship was appointed as Additional Judge of High Court of M.P. on 7th April, 2016 and Permanent Judge on 17th March, 2018.

During His Lordship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Judge and Member of various Administrative Committees of the High Court.

His Lordship was accorded farewell ovation on 15th October, 2019 at Gwalior Bench of High Court of Madhya Pradesh.

We on behalf of JOTI Journal wish His Lordship a very happy and successful tenure at Allahabad.

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

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

Specialized Educational Programme For Judicial Officers
At State Medico Legal Institute Bhopal 03th To 05th October 2019

Workshop on – Negotiable Instruments Act, 1881
(04.10.2019 & 05.10.2019)

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

Workshop on – Cyber Laws & Electronic Evidence
(18.10.2019 & 19.10.2019)

Workshop on – Key Issues & Challenges under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989
(19.10.2019 & 20.10.2019)

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

Workshop on – Motor Accident Claim cases &
Key Issues Relating to Criminal Revisions
(02.11.2019 & 03.11.2019)

Workshop on – N.D.P.S. Act
(09.11.2019 & 10.11.2019)

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

Specialised Educational Programme for the
Presiding Officer of Labour Courts
(16.11.2019 & 17.11.2019)

Workshop on – Key Issues under the Anti-Corruption Laws
(23.11.2019 & 24.11.2019)

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

Third Phase Induction Course for the newly appointed
Civil Judge Class-II from 2019 Batch
(25.11.2019 to 20.12.2019)

धारा 29 एवं 30 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012: वैधानिक स्थिति

प्रदीप कुमार व्यास

जिला एवं सत्र न्यायाधीश, धार

दांडिक विधिशास्त्र का मूलभूत सिद्धांत यह है कि अभियोजन को उसका मामला युक्ति-युक्त संदेह से परे प्रमाणित करना होता है। कभी-कभी अपराध ऐसी परिस्थितियों में किया जाता है और ऐसे पीड़ित के साथ किया जाता है कि अभियोजन के लिए प्रमाण लाना लगभग असंभव हो जाता है। विधायिका ने इसी कठिनाई को ध्यान में रखते हुए उपधारणाओं के बारे में व्यवस्था की है। ये उपधारणाएं तब लागू होती हैं जब अभियोजन कुछ मूलभूत तथ्य स्थापित कर देता है। उसके बाद खंडन का भार अभियुक्त पर अंतरित हो जाता है। धारा 29 एवं धारा 30 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 (एतस्मिन् पश्चात् 'अधिनियम, 2012') में उपधारणा विषयक प्रावधान किये गये हैं।

अधिनियम, 2012 की धारा 29 एवं धारा 30 इस प्रकार हैं-

धारा 29. कतिपय अपराधों के बारे में उपधारणा - जहां किसी व्यक्ति को इस अधिनियम की धारा 3, धारा 5, धारा 7, धारा 9 के अधीन किसी अपराध को करने या दुष्प्रेरण करने या उसको करने का प्रयत्न करने के लिए अभियोजित किया गया है वहां विशेष न्यायालय तब तक यह उपधारणा करेगा कि ऐसे व्यक्ति ने, यथास्थिति, वह अपराध किया है, दुष्प्रेरण किया है या उसको करने का प्रयत्न किया है जब तक कि इसके विरूद्ध साबित नहीं कर दिया जाता है।

धारा 30. आपराधिक मानसिक दषा की उपधारणा - (1) इस अधिनियम के अधीन किसी अपराध के लिए अभियोजन में, जो अभियुक्त की ओर से आपराधिक मानसिक स्थिति की अपेक्षा करता है, विशेष न्यायालय ऐसी मानसिक दशा की विद्यमानता की उपधारणा करेगा, किन्तु अभियुक्त के लिए यह तथ्य साबित करने के लिए प्रतिरक्षा होगी कि उस अभियोजन में किसी अपराध के रूप में आरोपित कृत्य के संबंध में उसकी ऐसी मानसिक दशा नहीं थी।

(2) इस धारा के प्रयोजनों के लिए किसी तथ्य का साबित किया जाना केवल तभी कहा जाएगा जब विशेष न्यायालय उसके युक्तियुक्त संदेह से परे विद्यमान होने पर विश्वास करता है और केवल तब नहीं जब इसकी विद्यमानता संभाव्यता की प्रबलता द्वारा स्थापित होती है।

स्पष्टीकरण - इस धारा में आपराधिक मानसिक दशा के अंतर्गत आशय, हेतुक, किसी तथ्य का ज्ञान और किसी तथ्य में विश्वास किए जाने का कारण भी है।

अधिनियम, 2012 के अधीन उपधारणाओं की प्रकृति

जो उपधारणाएं न्यायालय के विवेकाधिकार का विषय होती हैं वे तथ्य की उपधारणाएं हैं जैसे धारा 114 भारतीय साक्ष्य अधिनियम, 1872 के अधीन उपधारणा। लेकिन जो उपधारणाएं आज्ञापक होती हैं उन्हें विधि की उपधारणा कहा जाता है जैसे धारा 139 परक्राम्य लिखत अधिनियम, 1881 के अधीन उपधारणा। अधिनियम, 2012 की धारा 29 एवं 30 के अधीन उपधारणाएं आज्ञापक स्वरूप की है अर्थात् यह विधि की उपधाराणाएं हैं। अभियोजन द्वारा प्राथमिक तथ्य सिद्ध किये जाने पर न्यायालय उपधाराणा करने के लिये बाध्य हैं। उपधारणाओं की आज्ञापक प्रकृति को न्यायालय को ध्यान में रखना चाहिए।

धारा 29 एवं धारा 30 किन अपराधों पर लागू होती है?

धारा 29 से ही यह स्पष्ट है कि इसके अधीन उपधारणा अधिनियम, 2012 की धारा 3, 5, 7 और 9 में परिभाषित अपराध क्रमशः प्रवेशन लैंगिक हमला, गुरुत्तर प्रवेशन लैंगिक हमला, लैंगिक हमला एवं गुरुत्तर लैंगिक हमला के अपराधों एवं उनके दुष्प्रेरण और प्रयत्न के बारे में लागू होती है जो क्रमशः अधिनियम की धारा 4, 6, 8, 10, 17 एवं 18 में दंडनीय हैं। शेष अपराधों के बारे में धारा 29 की उपधारणा लागू नहीं होती है।

धारा 3 और धारा 5 में परिभाषित 'प्रवेशन लैंगिक हमला' और 'गुरुत्तर प्रवेशन लैंगिक हमला' के अपराधों में अधिनियम की धारा 30 की उपधारणा लागू नहीं होगी क्योंकि अधिनियम की धारा 30 'आपराधिक मानसिक दशा' की उपस्थिति का प्रावधान करती है और धारा 30 के स्पष्टीकरण में आपराधिक मानसिक दशा के अंतर्गत आशय, हेतुक, किसी तथ्य का ज्ञान और किसी तथ्य में विश्वास या विश्वास किए जाने का कारण होने का प्रावधान है जबकि धारा 3 और 5 में परिभाषित 'प्रवेशन लैंगिक हमला' और 'गुरुत्तर प्रवेशन लैंगिक हमला' के लिए किसी भी प्रकार की आपराधिक मानसिक दशा अर्थात् आशय या ज्ञान या हेतुक या विश्वास करने के कारण होना आवश्यक नहीं हैं।

इस प्रकार जहां धारा 29 की उपधारणा केवल धारा 3, 5, 7 और 9 में परिभाषित अपराधों पर लागू होती है, शेष अपराधों पर धारा 29 लागू नहीं होती है, वहीं धारा 30 की उपधारणा अधिनियम की धारा 3 और 5 में परिभाषित अपराधों पर लागू नहीं होती है, शेष अपराधों पर लागू होती है।

धारा 29 एवं धारा 30 के लागू होने की शर्तें

धारा 29 को पढ़ने से प्राथमिक रूप से ऐसा प्रतीत होता है कि अभियुक्त को अभियोजित करते ही यह उपधारणा लागू हो जाती है लेकिन स्थिति ऐसी नहीं है। अभियोजन को प्राथमिक तथ्य स्थापित

करने होते हैं, तभी धारा 29 की उपधारणा लागू होती है। धारा 30 केवल आपराधिक मानसिक स्थिति की अपेक्षा करती है और इसके लिए भी प्राथमिक तथ्य अभियोजन को स्थापित करने होते हैं। उदाहरण के लिए, धारा 8क दहेज प्रतिषेध अधिनियम, 1961 में भी इसी प्रकार की उपधारणा का प्रावधान है जो इस प्रकार है:-

8क. कुछ मामलों में सबूत का भार -

जहां कोई व्यक्ति धारा 3 के अधीन कोई दहेज लेने या दहेज का लेना दुष्प्रेरित करने के लिए या धारा 4 के अधीन दहेज मांगने के लिए अभियोजित किया जाता है वहां यह साबित करने का भार उसी पर होगा कि उसने उन धाराओं के अधीन कोई अपराध नहीं किया है।

इस प्रावधान में भी अभियुक्त को अभियोजित करने के बाद उपधारणा लेने के प्रावधान हैं लेकिन माननीय कर्नाटक उच्च न्यायालय की पूर्ण पीठ ने न्यायदृष्टांत ***हरि कुमार विरूद्ध स्टेट, (1994) डीएमसी (कर्नाटक) (पूर्णपीठ)*** में प्रतिपादित किया है कि धारा 8क को ध्यानपूर्वक पढ़ने से यह दर्शित होता है कि अभियुक्त को धारा 3 एवं 4 अधिनियम, 1961 के अपराधों में आरोपित किया गया है, मात्र इस कारण प्रारंभिक भार, जो अपराध के घटक साबित करने का अभियोजन पर रहता है, वह समाप्त नहीं होता है। धारा 8क को धारा 2 में वर्णित दहेज की परिभाषा के साथ पढ़ना चाहिए।

इस प्रकार धारा 8क दहेज प्रतिषेध अधिनियम, 1961 में दी गई उक्त उपधारणा पर विचार करें जो धारा 29 अधिनियम, 2012 के समान है, तब भी उक्त न्यायदृष्टांत **हरि कुमार** के अनुसार अभियोजन पर प्रारंभिक तथ्यों को प्रमाणित करने का भार होता है जो धारा 8क की उपधारणा के कारण समाप्त नहीं होता है। इस विधिक स्थिति से मार्गदर्शन लेने पर भी यह कहा जा सकता है कि प्राथमिक तथ्यों का प्रमाण भार सदैव अभियोजन पर रहता है।

न्यायदृष्टांत ***नवीन डी. बारिये विरूद्ध स्टेट ऑफ महाराष्ट्र, 2018 सीआरएलजे 3393,*** में बाम्बे उच्च न्यायालय ने यह प्रतिपादित किया है कि धारा 29 अधिनियम, 2012 की अभियुक्त के विरूद्ध उपधारणा निरपेक्ष नहीं है बल्कि खंडनयोग्य है। यह उपधारणा तब लागू होती है जब अभियोजन प्रथमतः प्राथमिक तथ्य स्थापित करने में समर्थ हो जाता है। इस संबंध में निर्णय का चरण क्रमांक 17 अवलोकनीय है।

प्रारंभिक तथ्यों में सर्वप्रथम इस संबंध में निष्कर्ष देना चाहिए कि क्या पीड़ित घटना के समय 'बालक' था या थी? या घटना के समय पीड़ित की आयु क्या 18 वर्ष या इससे कम थी?

न्यायदृष्टांत मिस ईरा द्वारा डॉ. मंजूलता विरूद्ध स्टेट, एनसीटी देहली, एआईआर 2017 एससी 3457, के अनुसार धारा 02 (1)(डी), अधिनियम, 2012 के अनुसार 'बालक' से तात्पर्य उसकी भौतिक आयु से है न कि मानसिक आयु से है। 18 वर्ष तक की आयु का व्यक्ति बालक की परिभाषा

में आता है। आयु के निष्कर्ष के बाद अपराध को प्रमाणित करने के लिए दी गई साक्ष्य पर विचार करना चाहिए।

इस प्रकार न्यायालय के लिए यह आवश्यक है कि इन उपधारणाओं को लेते समय पहले अभियोजन की साक्ष्य पर विचार करें और यह देखें कि क्या अभियोजन ने प्राथमिक तथ्य स्थापित कर दिए हैं, उसके बाद निर्णय में उपधारणा का उल्लेख करते हुए उसे लेने के बारे में उल्लेख करें।

खंडन के भार का स्तर

धारा 30 (2) से यह स्पष्ट है कि अभियुक्त को युक्तियुक्त संदेह से परे यह प्रमाणित करना होता है कि अपराध कारित करने में उसकी आपराधिक मानसिक स्थिति नहीं थी। अतः धारा 30, अधिनियम, 2012 की उपधारणा को खंडित करने का भार युक्तियुक्त संदेह से परे स्तर का होता है। प्रश्न यह उत्पन्न होता है कि क्या धारा 29 की उपधारणा के खंडन का भार भी इसी स्तर का होना चाहिए जबकि धारा 29 में धारा 30 (2), के समान कोई प्रावधान नहीं हैघ

धारा 30 की उपधारणा अधिनियम की धाराएं 7, 9, 11, 13, 15, 16, एवं 18 में वर्णित अपराधों पर लागू होती हैं, धारा 3 और 5 में परिभाषित अपराधों पर लागू नहीं होती हैं।

धारा 3 में परिभाषित 'प्रवेशन लैंगिक हमला' का दंड धारा 4 में हैए जो प्रावधान इस प्रकार हैः-

> **धारा 4. प्रवेशन लैंगिक हमला के लिए दंड** - जो कोई प्रवेशन लैंगिक हमला करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास तक की हो सकेगी, दंडित किया जाएगा और जुर्माने से भी दंडनीय होगा।

धारा 5 में परिभाषित 'गुरुत्तर प्रवेशन लैंगिक हमले' का दंड धारा 6 में है, जो प्रावधान इस प्रकार है:-

> **धारा 6. गुरुतर प्रवेशन लैंगिक हमले के लिए दंड** - जो कोई, गुरुतर प्रवेशन लैंगिक हमला करेगा वह कठोर कारावास से जिसकी अवधि बीस वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास, जिसका अभिप्राय उस व्यक्ति के शेष प्राकृत जीवनकाल के लिए कारावास होगा, तक की हो सकेगी, दंडित किया जाएगा और जुर्माने का भी दायी होगा या मृत्यु से दंडित किया जाएगा।

इस प्रकार धारा 3 और 5 में वर्णित अपराधों का दंड और धारा 7 और 9 में वर्णित अपराधों का भी दंड अधिनियम के शेष अपराधों से अधिक है जिन पर धारा 30 लागू होती है जिसमें खंडन का भार युक्तियुक्त संदेह से परे स्तर का है। ऐसे में अधिक गंभीर अपराध की उपधारणा के प्रावधान धारा 29 में प्रमाण भार का स्तर, एक सामान्य प्रज्ञावान व्यक्ति की तरह विचार करें तो,

युक्तियुक्त संदेह से परे स्तर का ही होना चाहिए, चाहे धारा 29 के साथ धारा 30 (2) की तरह कोई प्रावधान न भी जोड़ा गया हो। अतः, धारा 29 की उपधारणा में प्राथमिक तथ्य स्थापित हो जाने के बाद अभियुक्त पर जो खंडन का भार होता है, वह अधिसंभावनाओं की प्रबलता के स्तर का न होकर युक्तियुक्त संदेह से परे के स्तर का होना चाहिए।

इसके अतिरिक्त न्यायदृष्टांत ***जगर सिंह विरूद्ध स्टेट ऑफ हिमाचल प्रदेश, 2015 (2) आरसीआर (क्रिमिनल) 320 (एचपी),*** में यह प्रतिपादित किया गया है कि यह स्थापित विधि है कि न्यायालय अवयस्क का संरक्षक होता है और यह भी स्थापित विधि है कि जहां दो अर्थान्वयन संभव हों वहां न्यायालय को न्यायहित में वह मत मानना चाहिए जो अवयस्क के हित का हो।

क्या जमानत के स्तर पर भी ये उपधारणाएं लागू होती हैं?

न्यायदृष्टांत ***स्टेट ऑफ बिहार विरूद्ध राजबल्लव प्रसाद उर्फ राजबल्ल्व प्रसाद यादव, 2017 (1) एएनजे (एससी) (सप्लीमेन्ट) 10: एआईआर 2017 एससी 630,*** में माननीय उच्च न्यायालय ने अभियुक्त को जमानत प्रदान की थी, जिसे माननीय सर्वोच्च न्यायालय ने निरस्त कर दिया और इस मामले में माननीय सर्वोच्च न्यायालय ने यह अभिलिखित किया कि उच्च न्यायालय ने विधि का एक साधारण कथन कि अभियुक्त को निर्दोष समझा जाता है जब तक कि अपराध प्रमाणित न हो जाए, करते समय धारा 29 अधिनियम, 2012 के प्रावधानों को विचार में नहीं लिया।

इस प्रकार माननीय सर्वोच्च न्यायालय के उक्त कथन पर विचार करें तो इन मामलों में जमानत के स्तर पर भी धारा 29 की उपधारणा विचार में लेना चाहिए और इस न्यायदृष्टांत से मार्गदर्शन लेते हुए धारा 30 की उपधारणा भी विचार में ली जानी चाहिए।

इस मामले में माननीय सर्वोच्च न्यायालय ने जमानत को निरस्त किया, जो अपवाद स्वरूप परिस्थितियों में ही किया जाता है और उस जमानत निरस्ती के साथ धारा 29 की उपधारणा को विचार में न लेने को उचित नहीं माना। इन तथ्यों के प्रकाश में यह सुरक्षित रूप से कहा जा सकता है कि जमानत के स्तर पर भी धारा 29 और धारा 30 की उपधारणाएं ध्यान में रखना चाहिए।

विविध

1. न्यायदृष्टांत ***छितु सिंह गौड़ विरूद्ध स्टेट ऑफ एम.पी., आईएलआर (2015) एमपी 1343 (डी.बी.),*** के मामले में अभियुक्त 5 से 6 वर्ष की अभियोक्त्री को उसके घर के अंदर ले गया। अभियुक्त ने उसका पायजामा और उसकी पैंटी उतार दी थी और उसे पलंग पर उठा रखा था। इन तथ्यों के प्रकाश में धारा 30 अधिनियम, 2012 के तहत यह उपधारणा ली गई कि किया गया हमला लैंगिक आशय से था और अभियुक्त को धारा 8 के तहत दोषसिद्ध किया गया। प्रवेशन लैंगिक हमला प्रमाणित नहीं माना गया था। इस मामले में अभियोक्त्री के धारा 164 दं.प्र.सं. के कथन भी लेखबद्ध नहीं किए गए थे। चूंकि अनुसंधान अधिकारी के अनुसार

अभियोक्त्री बोलने में असमर्थ थी, ऐसे में उसके कथन लेखबद्ध न करने का कोई प्रतिकूल प्रभाव नहीं माना गया।

2. कभी-कभी अभियुक्त प्रारंभिक स्तर पर ही आपराधिक मनःस्थिति का अभाव का पक्ष रखते हुए उन्मोचन की मांग करता है लेकिन ये तथ्य प्रारंभिक स्तर पर निर्णीत नहीं किए जा सकते हैं। ये तथ्य दोनों पक्षों को उनके पक्ष समर्थन में साक्ष्य का अवसर देने के बाद गुण-दोष पर ही निराकृत किए जा सकते हैं। इस संबंध में न्यायदृष्टांत ***जगर सिंह विरूद्ध स्टेट ऑफ हिमाचल प्रदेश, (पूर्वोक्त)*** अवलोकनीय है।

3. धारा 30 के तहत अभियुक्त पर ये भार होता है कि वह यह प्रमाणित करे कि उसकी आपराधिक मनःस्थिति नहीं थी। इस संबंध में उक्त न्यायदृष्टांत जगर सिंह अवलोकनीय है।

4. न्यायदृष्टांत ***सागर दीनानाथ जाधव विरूद्ध स्टेट ऑफ महाराष्ट्र, 2018 सीआरएलजे 4271, बाम्बे उच्च न्यायालय,*** में ये प्रतिपादित किया गया है कि पक्षों के मध्य घटना के एक दिन पहले विवाद हुआ था जिस तथ्य की पुष्टि बचाव साक्षी ने की। घटना के समय अभियुक्त उसके परिवार के सदस्यों के साथ सत्संग में उपस्थित था, ये तथ्य अन्य बचाव साक्षी ने स्थापित किया था। मेडिकल साक्ष्य से 'लैंगिक हमला' दर्शित नहीं होता था। आहत के कपड़ों पर रक्त या वीर्य के कोई निशान नहीं पाये गये थे, ऐसे में धारा 29 की उपधारणा खंडित होना माना गया।

5. न्यायदृष्टांत ***सुब्रमन्यम विरूद्ध स्टेट, 2017 सीआरएलजे 946 (डी.बी.), मद्रास उच्च न्यायालय*** के मामले में 'प्रवेशन लैंगिक हमला' का आरोप था। अभियुक्त के विरूद्ध धारा 29 की उपधारणा ली गई थी जिसे अभियुक्त ने प्रत्यक्ष या परिस्थिजन्य साक्ष्य से खंडित नहीं किया था। अखंडित उपधारणा से दोषसिद्धि का समर्थन होना पाया गया। निर्णय चरण 27 अवलोकनीय है।

6. न्यायदृष्टांत ***इंद्र कुमार प्रधान विरूद्ध स्टेट ऑफ सिक्किम, 2017 सीआरएलजे 4066 सिक्किम उच्च न्यायालय,*** के मामले में 5 वर्षीय अवयस्क के साथ अभियुक्त ने 'गुरुतर लैंगिक हमला' दुकान के अंदर कारित किया था। बाल संरक्षण अधिकारी के समक्ष आहत ने पूरी घटना बताई थी और दो पूर्व की घटनाएं भी बताई थीं। छोटे विरोधाभास महत्वपूर्ण नहीं माने गये थे। अभियुक्त के विरूद्ध 'गुरुतर लैंगिक हमले' की उपधारणा धारा 29, अधिनियम, 2012 के तहत ली गई। प्रथम सूचना प्रतिवेदन में 17 दिन का विलंब घातक नहीं माना गया। निर्णय चरण 10 अवलोकनीय है।

7. न्यायदृष्टांत ***परेश मोंदल विरूद्ध स्टेट ऑफ वेस्ट बंगाल, 2016 सीआरएलजे 5091, कलकत्ता उच्च न्यायालय,*** के मामले में अभियुक्त पर साक्ष्य के आधार पर आहत के कपड़ों के उपर से निजी अंग छूना स्थापित हुआ था। धारा 29 अधिनियम, 2012 की उपधारणा ली गई। निर्णय चरण 11 अवलोकनीय है।

8. न्यायदृष्टांत ***दशरथ विरूद्ध स्टेट, 2018 सीआरएलजे 4226 डीबी, मद्रास उच्च न्यायलय,*** के मामले में 7 वर्षीय लड़की के साथ अभियुक्त पर लैंगिक हमला कारित करने और उसकी हत्या के अभियोग थे। अभियुक्त के मोबाईल फोन में अश्लील वीडियो और अश्लील सामग्री की हिस्ट्री थी अभियुक्त अश्लील सामग्री देखने का अभ्यस्थ पाया गया था और उसने अभियुक्त परीक्षण में भी अश्लील सामग्री देखने के तथ्य स्वीकार किए थे। हेतुक स्थापित हुआ था। अभियुक्त की आपराधिक मानसिक अवस्था की उपधारणा ली गई थी जिसे खंडित करने में अभियुक्त असफल रहा था। निर्णय चरण 102, 104 एवं 105 अवलोकनीय हैं।

9. न्यायदृष्टांत ***नीम तशेरिंग लेप्चा विरूद्ध स्टेट ऑफ सिक्किम, 2017 सीआरएलजे 3168, सिक्किम उच्च न्यायालय,*** में यह प्रतिपादित किया गया है कि अभियुक्त के विरूद्ध अवयस्क आहत को 'सदोष अवरोध' करने और 'प्रवेशन लैंगिक हमला' कारित करने का अभियोग था। आहत के पालक और दो अन्य गवाह आहत को ढूंढने निकले। आहत मिली। उसने अभियुक्त के विरूद्ध घटना का वर्णन किया। कपड़ों पर रक्त पाया गया जिसका आहत के ब्लड ग्रूप से मिलान हुआ। आहत 7 वर्षीय अवयस्क थी। धारा 29 की उपधारणा ली गई व अभियुक्त की दोषसिद्धि उचित मानी गई।

10. न्यायदृष्टांत ***अच्चुत तुरी उर्फ बाबातू विरूद्ध स्टेट ऑफ असम, 2019 सीआरएलजे 1235, गोहाटी उच्च न्यायालय,*** के मामले में 11 वर्षीय आहत के साथ उसके पिता द्वारा 'लैंगिक हमला' करने का अभियोग था। आहत और उसकी माता ने साक्ष्य दी। झूठा फंसाने का कोई हेतुक नहीं था। धारा 29 और 30 अधिनियम की उपधारणाएं ली गई। दोषसिद्धि उचित मानी गई।

11. न्यायदृष्टांत ***दिनेश चंद विरूद्ध एनसीटी दिल्ली, 2019 एससीसी ऑनलाईन दिल्ली 7802,*** के मामले में अभियुक्त के विरूद्ध धारा 29 की उपधारणा ली गई। 'प्रवेशन लैंगिक हमला' प्रमाणित पाया गया।

12. न्यायदृष्टांत ***लखपा दोरजी तमंग विरूद्ध स्टेट ऑफ सिक्किम, दांडिक अपील 33/17 निराकृत दिनांक 21.02.2019, सिक्किम उच्च न्यायालय,*** के मामले में अभियुक्त के विरूद्ध, अवयस्क आहत को जो स्कूल के बाद आ रही थी जंगल में ले जाने और उस पर लैंगिक हमला कारित करने के अभियोग था आहत ने विस्तार से घटना बताई और अभियुक्त के द्वारा पूर्व में भी 4 अवसरों पर लैंगिक हमला कारित करना बतलाया। आहत के मित्रगण, जो उसकी तलाश में आये थे, उन्होंने भी घटना की पुष्टि की। केवल दृश्यमान चोटें आहत के शरीर पर न होना आरोप को असत्य प्रमाणित नहीं करतीं। आहत के कपड़ों पर शुक्राणू पाये गये। अभियुक्त धारा 29 और 30 की उपधारणाएं खंडित करने में असफल रहा। दोषसिद्धि उचित पाई गई।

13. न्यायदृष्टांत ***स्टेट ऑफ एम.पी. विरूद्ध गंगाराम अहिरवार, 2016 लॉ सूट (एमपी) 1248,*** के मामले में विशेष न्यायाधीश के समक्ष धारा 302, 511, 450 एवं 354 भा.दं.सं. एवं धारा 18 अधिनियम, 2012 का अभियोग पत्र पेश किया गया। विशेष न्यायाधीश ने अनुसंधानकर्ता को अभियोगपत्र सक्षम न्यायालय में पेश करने के लिए लौटा दिया उनके अनुसार अधिनियम, 2012 का कोई अपराध नहीं बनता था। यह प्रतिपादित किया गया कि उभयपक्ष को सुनकर आरोप विरचित करते समय यह देखा जा सकता था कि अधिनियम, 2012 का कोई अपराध आकर्षित होता है या नहीं। अभियोग पत्र लौटाने में न्यायालय ने त्रुटि की है, ऐसा माना गया।

इस न्यायदृष्टांत से यह मार्गदर्शन लिया जा सकता है कि विशेष न्यायाधीश को अभियोग पत्र पेश होने के बाद उभयपक्ष को सुनकर यह अभिमत देना चाहिए कि अधिनियम का अपराध बनता है या नहीं बनता है।

14. न्यायदृष्टांत ***सचिन विरूद्ध स्टेट ऑफ एच.पी., 2015 सी.आर.एल.जे. (एनओसी) 157 (एचपी),*** के मामले में दो अभियोक्त्रियों के धारा 164 दं.प्र.सं. के कथनों में घटनास्थल के बारे में विरोधाभास थे। यह प्रतिपादित किया गया कि इन कथनों का उपयोग विचारण के समय पुष्टि या खंडन के उद्देश्य से किया जा सकता है। जमानत के स्तर पर इन कथनों का उपयोग उचित नहीं माना गया।

इस प्रकार न्यायालय के समक्ष जमानत के समय यदि धारा 164 दं.प्र.सं. के कथनों को आधार बनाकर तर्क किए जाते हैं, तब इस विधिक स्थिति को ध्यान में रखना चाहिए कि इन पूर्ववर्ती कथनों का प्रयोग अभियोक्त्री के कथन की पुष्टि या खंडन के लिए किया जा सकता है।

उपसंहार

धारा 29 एवं 30 अधिनियम, 2012 की उपधारणाएं आज्ञापक हैं। यदि अभियोजन प्रारंभिक तथ्य स्थापित कर देता है तो ये उपधारणाएं लेना अनिवार्य होता है। धारा 29 की उपधारणा, धारा 3, 5, 7 एवं 9 अधिनियम, 2012 में वर्णित अपराधों एवं उनके दुष्प्रेरण एवं प्रयत्न के अपराधों के बारे में लागू होती हैं, अधिनियम के शेष अपराधों पर लागू नहीं होती हैं, वहीं धारा 30 की उपधारणा धारा 3 एवं 5 में वर्णित अपराधों और उनके प्रयत्न एवं दुष्प्रेरण के अपराधों के अलावा अधिनियम में दंडनीय शेष अपराधों पर लागू होती हैं। इन उपधारणाओं के खंडन का भार युक्तियुक्त संदेह के परे स्तर का होता है। जमानत के स्तर पर भी ये उपधारणाएं ध्यान में रखनी होती हैं।

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PART – II
NOTES ON IMPORTANT JUDGMENTS

***263. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (c) and (f)**

(i) Denial of title – Pleadings in the written statement denying the ownership of plaintiff – Sufficient for eviction under Section 12 (1) (c).

(ii) Insertion of the ground of *bonafide* requirement through amendment – Can be allowed during the pendency of suit – Section 12 (1) does not rule out induction of additional ground after the institution of suit [*Chhotelal v. Akbarali and another, 1982 MPLJ 754 (FB)* relied on]

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) - धाराएं 12 (1) (c) एवं (f)

(i) स्वत्व से इंकार - वादी के स्वामित्व से इंकार/खंडन करते हुए लिखित कथन में अभिवचन - धारा 12 (1) (ग) के अंतर्गत निष्कासन/बेदखली के लिए पर्याप्त।

(ii) संशोधन के माध्यम से सद्भाविक आवश्यकता के आधार को सम्मिलित करना - वाद के लम्बित रहते अनुमति दी जा सकती है - धारा 12 (1) वाद की प्रस्तुति के बाद अतिरिक्त आधार को शामिल करने से इंकार नहीं करती है। [***छोटेलाल वि. अकबरअली एवं अन्य, 1982 एमपीएलजे 754*** (पूर्ण पीठ) अवलंबित]

Young Birds v. Bhagwandas

Judgment dated 28.02.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in F.A. No.79 of 2012, reported in 2019 (3) MPLJ 223

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264. CIVIL PROCEDURE CODE, 1908 – Section 96, Order 9 Rule 13 and Order 43 Rule 1
LIMITATION ACT, 1963 – Section 5

(i) *Ex-parte* decree; remedy as to – Defendant can either file an application to set aside the decree before trial Court or file regular appeal from the decree – Even if application for setting aside *ex-parte* decree is dismissed, regular appeal can still be filed to challenge *ex-parte* decree on merits – Defendant cannot be deprived of statutory right of appeal merely on the ground that the application filed by him has been dismissed.

(ii) Condonation of delay – Defendant should not be deprived of the statutory right of appeal in challenging the decree on merits – Time spent in pursuing the remedy under Order 9 CPC generally be condoned in filing the first appeal – It may only

be declined if the defendant has adopted dilatory tactics or where there is lack of *bonafide* in pursuing the two remedies consecutively.

सिविल प्रक्रिया संहिता, 1908 – धारा 96, आदेश 9 नियम 13 एवं आदेश 43 नियम 1

परिसीमा अधिनियम, 1963 – धारा 5

(i) एक पक्षीय डिक्री के संबंध में उपचार – प्रतिवादी या तो विचारण न्यायालय के समक्ष इस डिक्री को अपास्त किए जाने के संबंध में आवेदन प्रस्तुत कर सकता है या इस डिक्री से नियमित अपील प्रस्तुत कर सकता है – भले ही एक पक्षीय डिक्री अपास्त किए जाने का आवेदन अस्वीकार कर दिया गया हो एक पक्षीय डिक्री को गुणदोष पर चुनौती देने के लिए अपील तब भी प्रस्तुत की जा सकती है – प्रतिवादी, उसके द्वारा प्रस्तुत इस आवेदन की अस्वीकृति मात्र के आधार पर अपील के संविधिक अधिकार से वंचित नहीं किया जा सकता है।

(ii) विलंब का उपमर्षण – प्रतिवादी को डिक्री को गुणदोष पर चुनौती देने के अपील के संविधिक अधिकार से वंचित नहीं किया जाना चाहिए – सिविल प्रक्रिया संहिता के आदेश 9 नियम 13 के अधीन उपचार प्राप्त करने में व्यतीत समय प्रथम अपील की प्रस्तुति में साधारणतः उपमर्षित (क्षमा) कर दिया जाना चाहिए – इससे केवल तभी मना किया जाना चाहिए जब प्रतिवादी ने विलंब कारित करने की रणनीति अपनाई हो अथवा जहाँ इन दोनों उपचारों की क्रमानुसार प्राप्त करने में सद्भावना का अभाव हो।

Bhivchandra Shankar More v. Balu Gangaram More and ors.

Judgment dated 07.05.2019 passed by the Supreme Court in Civil Appeal No. 4669 of 2019, reported in (2019) 6 SCC 387

Relevant extracts from the judgment:

A conjoint reading of Order 9 Rule 13 CPC and section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:-

(i) either to file an application under Order 9 Rule 13 CPC to set aside the *ex-parte* decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing;

(ii) to file a regular appeal from the original decree to the first appellate court and challenge the *ex-parte* decree on merits.

It is to be pointed out that the scope of Order 9 Rule 13 CPC and section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing

when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the *ex-parte* decree and restore the suit to its original position.

In terms of section 96(2) CPC, the appeal lies from an original decree passed *ex-parte*. In the regular appeal filed under section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree.

The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed. The right of appeal under section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order 9 Rule 13 CPC has been dismissed.

In ***Bhanu Kumar Jain v. Archana Kumar and another, (2005) 1 SCC 787,*** the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order 9 Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

> **"36.** ... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. [See ***Deepal Girishbhai Soni and others v. United India Insurance Co. Ltd., (2004) 5 SCC 385*** and ***Chandravathi P.K. and others v. C.K. Saji and others, (2004) 3 SCC 734***]."
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> x x x
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> **"38.** The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex-parte* hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code

shall receive a strict construction as was held by this Court in ***Rani Choudhury v. Lt. Col. Suraj Jit Choudhary, (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar and others, (2002) 5 SCC 161*** and ***Shyam Sundar Sarma v. Pannalal Jaiswal and others, (2005) 1 SCC 436.***"

After referring to its own judgment in ***Jotiba Limbaji Kanashenavar v. Ramappa Jotiba Kanashenavar, 1937 Vol. XL Bom. Law Reporter 957***, the High Court held that after the appeal from the order of the lower court refusing to set aside the *ex-parte* decree, the defendant may think of applying to the High Court in revision and in that process, considerable time might be lost. After referring to other judgments, in the impugned judgment, the High Court held as under:-

> "... An unscrupulous defendant may file the application under Order 9 Rule 13 CPC and carry the order to the highest forum irrespective of the merit in it and thereafter still file appeal against the decree. Considerable time would be lost for the plaintiff in that case. Every provision under the law of procedure is aimed at justness, fairness and full opportunity of hearing to the parties to the court proceedings. It caters to every conceivable situation. But at the same time, the law expects a litigant to be straight, honest and fair. The two remedies provided against *ex-parte* decree are in respect of two different situations and are expected to be resorted to only if the facts of the situation are available to a litigant. The remedies provided as simultaneous and cannot be converted into consecutive remedies."

The above observation of the High Court that "the remedies provided as simultaneous and cannot be converted into consecutive remedies" cannot be applied in a rigid manner and as a straitjacket formula. It has to be considered depending on the facts and circumstances of each case and whether the defendant in pursuing the remedy consecutively has adopted dilatory tactics. Only in cases where the defendant has adopted dilatory tactics or where there is lack of bonafide in pursuing the two remedies consecutively, the court may decline to condone the delay in filing the first appeal. If the court refuses to condone the delay in the time spent in pursuing the remedy under Order 9 Rule 13 CPC, the defendant would be deprived of the statutory right of appeal in challenging the decree on merits.

It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence or want of bonafide could be imputable to the appellant. After referring to various judgments, in ***B. Madhuri Goud v. B. Damodar Reddy, (2012) 12 SCC 693,*** this Court held as under:-

"The expression "sufficient cause" used in section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

Observing that the rules of limitation are not meant to destroy the rights of the parties, in ***N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123,*** this Court held as under:-

"Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

As pointed out earlier, an appeal under section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay.

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265. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10

Impleadment of daughters as necessary parties – Suit for partition of ancestral property on death of their parents – Property devolved upon sons on execution of Will by parents – Due execution of Will yet to be proved – Held, if due execution of Will is not proved,

daughters shall be entitled for share in properties being Class-I heirs – Daughters being necessary parties, ought to be impleaded.

सिविल प्रक्रिया संहिता, 1908 – आदेश 1 नियम 10

पुत्रियों का आवश्यक पक्षकार के रूप में संयोजन – उनके माता-पिता की मृत्यु पर पैतृक संपत्ति के विभाजन हेतु वाद – माता-पिता द्वारा निष्पादित वसीयत के कारण संपत्ति पुत्रों में न्यागमित हुई – वसीयत का सम्यक् निष्पादन अभी तक साबित नहीं हुआ – अभिनिर्धारित, यदि वसीयत का सम्यक् निष्पादन साबित नहीं होता है तो पुत्रियाँ वर्ग I की उत्तराधिकारी होने के नाते संपत्ति में अंश की हकदार होंगी – पुत्रियों को आवश्यक पक्षकार होने के नाते संयोजित किया जाना चाहिए।

Shailndra Kumar Jain and others v. Maya Prakash Jain and others

Judgment dated 09.04.2019 passed by the Supreme Court in Civil Appeal No. 3587 of 2019, reported in AIR 2019 SC 1900

Relevant extracts from the judgment:

On the death of the father and mother, if they died intestate, then under the principles of the Hindu Succession Act, every Class-I heir including the daughters, would be entitled to a share in the property left behind by their parents. It is precisely on this count that the applicant Srikanta Jain claims to be entitled to have a share in the properties which were allocated to Amba Prasad Jain and Smt. Devi Jain. The partition effected pursuant to decree in 1966 suit cannot, in any way, disentitle her from claiming a share in the properties of her father and mother. In the aforesaid premises, Srikanta Jain was definitely a necessary and proper party to be impleaded in the subsequent suit which was filed by Maya Prakash Jain.

It was, however, contended by learned Senior Advocate appearing for Respondent No.1 that the father and the mother, namely, Amba Prasad Jain and Smt. Devi Jain had left behind Wills under which their properties had devolved upon the sons exclusively. The due execution of the Wills is yet to the proved by the Respondents. If the Wills are not proved, the daughters would be entitled to a share in the properties, being Class-I heirs. The daughters are, therefore, necessary parties to the proceedings. In the present case, if the Wills so propounded are proved, they will chart a course of succession other than the normal mode of succession and to the prejudice of the daughters. In such an action or proceeding, the daughters being Class-I heirs are necessary and proper parties and are required to be impleaded.

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266. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 and Order 9 Rule 13

HINDU MARRIAGE ACT, 1955 – Section 13

Matrimonial dispute – *Ex-parte* decree for dissolution of marriage passed in favour of husband – After expiry of period of appeal,

husband remarried – First wife filed application to set aside *ex-parte* decree which was dismissed – Appeal under Order 43 Rule 1(d) preferred by first wife without impleading second wife – Appellate Court while setting aside *ex-parte* decree, directed husband to live with both the wives – Held, such an order is legally unsustainable because it was passed without noticing and hearing the second wife, who is also affected.

सिविल प्रक्रिया संहिता, 1908 – आदेश 1 नियम 10 एवं आदेश 9 नियम 13

हिन्दू विवाह अधिनियम, 1955 – धारा 13

वैवाहिक विवाद – पति के पक्ष में विवाह विच्छेद की एक पक्षीय आज्ञप्ति पारित की गई – अपील अवधि के अवसान के पश्चात् पति ने पुनर्विवाह किया - प्रथम पत्नी ने एक पक्षीय आज्ञप्ति को अपास्त कराने हेतु आवेदन प्रस्तुत किया जो खारिज हो गया – प्रथम पत्नी द्वारा द्वितीय पत्नी को संयोजित किए बिना आदेश 43 नियम 1(घ) के अधीन अपील संस्थित की गई – अपीलीय न्यायालय ने एक पक्षीय आज्ञप्ति को अपास्त करते हुए पति को दोनों पत्नियों के साथ रहने का आदेश दिया – अभिनिर्धारित, इस प्रकार का आदेश विधिक रूप से अरक्षणीय है क्योंकि यह द्वितीय पत्नी को सूचना दिए बिना तथा उसे सुने बिना पारित किया गया है, जिससे वह भी प्रभावित हुई है।

Karuna Kansal v. Hemant Kansal and anr.

Judgment dated 09.05.2019 passed by the Supreme Court in Civil Appeal No. 4847 of 2019, reported in AIR 2019 SC 2341

Relevant extracts from the judgment:

The appellant herein is the second wife of respondent No.1 (husband). It is the case of the appellant that after passing of the *ex-parte* decree for dissolution of marriage of respondent No.1 with respondent No. 2 and expiry of period of limitation for filing appeal, respondent No.1(husband) entered into matrimony with her (appellant). On the other hand, respondent No. 2 (first wife of respondent No.1) filed the aforesaid appeal of which the appellant had no knowledge, but the fact of respondent No.1 having married the appellant was indeed stated before the High Court. However, when respondent No.1 stated that she was having no problem with the appellant, the High Court set aside the *ex-parte* decree passed on 23.08.2003 in C.S. No.09-A of 2002 and directed that, "the parties shall live together as husband and wife." The appellant herein (second wife of respondent No.1), on coming to know of the aforesaid order dated 09.08.2011 passed by the Single Judge of the High Court in M.A. No.709/2005, filed review petition (R.P. No.48 of 2014) before the High Court. The Division Bench of the High Court, by order dated 17.10.2014, dismissed the said review petition. Challenging both the orders, the appellant has filed the present appeals by way of special leave in this Court.

On perusal of the impugned order dated 09.08.2011, we find that the High Court, even after taking note of the *factum* of the marriage of the appellant with

respondent No.1, has not adverted to the consequences thereof and has given such directions, which may not be capable of due performance.

In such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving such directions, which may not be capable of being carried out, the impugned order, in our view, is wholly without jurisdiction and legally unsustainable and it has to be set aside on this short ground alone.

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267. CIVIL PROCEDURE CODE, 1908 – Order 2 Rule 2

LIMITATION ACT, 1963 – Article 109

(i) Bar to suit – Whether different periods of limitation for challenging two different sale deeds would constitute two different causes of action? Held, No.

(ii) Plaintiff's father executed two different sale deeds in favour of defendant's predecessor one? The first one on 21.01.1959 and the second one on 11.02.1959 – Plaintiffs challenged first sale deed in 1963 – Suit dismissed and attained finality – Second sale deed was challenged in 1970 – Held, period of limitation for second suit, though commenced from 11.02.1959 and is 12 years, yet plaintiffs ought to have included second sale deed in first suit.

सिविल प्रक्रिया संहिता, 1908 – आदेश 2 नियम 2

परिसीमा अधिनियम, 1963 – अनुच्छेद 109

(i) वाद का वर्जन – क्या दो भिन्न विक्रय विलेखों को चुनौती देने के लिए भिन्न परिसीमा काल दो भिन्न वाद-हेतुक गठित करते हैं? अभिनिर्धारित, नहीं।

(ii) वादी के पिता ने प्रतिवादी के पूर्वाधिकारी के पक्ष में दो भिन्न विक्रय विलेख निष्पादित किए – एक दिनांक 21.01.1959 को तथा दूसरा दिनांक 11.02.1959 को – वादी ने प्रथम विक्रय विलेख को 1963 में चुनौती दी – वाद खारिज किया गया और निर्णय अंतिम हो चुका था – द्वितीय विक्रय विलेख को वर्ष 1970 में चुनौती दी गई – अभिनिर्धारित, द्वितीय वाद हेतु परिसीमा काल यद्यपि 11.02.1959 से चलना प्रारंभ हुआ और 12 वर्ष है, तथापि वादी को द्वितीय विक्रय विलेख को प्रथम वाद में सम्मिलित करना चाहिए था।

Pramod Kumar and anr. v. Zalak Singh and ors.

Judgment dated 10.05.2019 passed by the Supreme Court in Civil Appeal No. 1055 of 2019, reported in AIR 2019 SC 2465

Relevant extracts from the judgment:

Let us first consider the argument of the learned counsel for the respondent that under Article 109 of the Limitation Act, the period of limitation commences from the date of possession obtained by alienee, and therefore, the cause of

action for the second suit, in respect of the sale deed dated 21.02.1959, would be different from the earlier suit, as in respect of the sale deed of an earlier date, it would have a different period of limitation. We are of the view that, the period of limitation under Article 109 is different from the period of limitation in respect of the first sale deed, cannot operate so as to exclude the bar under Order II Rule 2. The principle underlying Order II Rule 2 is that no man can be vexed twice over the same cause of action. All claims and reliefs, which arise from a cause of action, must be comprehended in one single suit. Order II Rule 2 provides for the principle of repose. If this be the underlying object of Order II Rule 2, the fact that at the time when the first suit was filed even though the second alienation could be challenged and it stemmed from one single cause of action and not two different causes of action, the mere fact that a different period of limitation is provided, cannot stand in the way of the bar under Order II Rule 2.

We are of the view that in such circumstances, this is a case where the plaintiff ought to have included relief in the form of setting aside the second sale deed also. This is not a case where the second sale deed had not been executed when the plaintiff instituted the first suit. We are not, for a moment, declaring the effect of the sale deed having been executed subsequently to the institution of the suit as we do not have to pronounce on the effect of such a sale. We are only emphasizing that it was open to the respondent/plaintiff to seek relief in respect of the second sale executed by their predecessor-in-interest and what is more important in favour of the same parties (defendants) who are the appellants before us.

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

BENAMI TRANSACTION (PROHIBITION) ACT, 1988 – Section 4

Rejection of plaint – Application under Order 7 Rule 11(d) CPC alleging that suit is barred by law [Benami Transaction (Prohibition) Act, 1988] – Held, whether any transaction is benami transaction or not, cannot be assessed at the stage of considering application under Order 7 Rule 11 – Such disputed question of fact has to be adjudicated on the basis of evidence led by the parties.

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 11

बेनामी संव्यवहार (प्रतिषेध) अधिनियम, 1988 – धारा 4

वादपत्र का नामंजूर किया जाना – सीपीसी के आदेश 7 नियम 11 (घ) के अंतर्गत अभिकथित आवेदन कि वाद विधि ख्बेनामी संव्यवहार (प्रतिषेध) अधिनियम, 1988, द्वारा वर्जित है – अभिनिर्धारित, क्या कोई संव्यवहार बेनामी संव्यवहार है अथवा नहीं आदेश 7 नियम 11 के अंतर्गत आवेदन पर विचार के प्रक्रम पर निर्धारित नहीं किया जा सकता है – इस विवादित तथ्य के प्रश्न का न्यायनिर्णयन पक्षकारों द्वारा दी गई साक्ष्य के आधार पर किया जाना चाहिए।

Pawan Kumar v. Babulal since deceased through Legal Representatives and others

Judgment dated 02.04.2019 passed by the Supreme Court in Civil Appeal No. 3367 of 2019, reported in (2019) 4 SCC 367

Relevant extracts from the judgment:

In the present case, the controversy has arisen in an application under Order VII Rule 11 CPC. Whether the matter comes within the purview of Section 4(3) of the Act is an aspect which must be gone into on the strength of the evidence on record. Going by the averments in the Plaint, the question whether the plea raised by the appellant is barred under Section 4 of the Act or not could not have been the subject matter of assessment at the stage when application under Order VII Rule 11 CPC was taken up for consideration. The matter required fuller and final consideration after the evidence was led by the parties. It cannot be said that the plea of the appellant as raised on the face of it, was barred under the Act. The approach must be to proceed on a demurrer and see whether accepting the averments in the plaint, the suit is barred by any law or not. We may quote the following observations of this Court in ***Popat and Kotecha Property v. State Bank of India Staff Association, (2005) 7 SCC 510:***

> "10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

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

Whether plaint can be rejected in part or only against one of the defendants? Held, No – Plaint, as presented, must proceed as a whole or can be rejected as a whole but not in part.

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 11

क्या वादपत्र प्रतिवादियों में से केवल एक के विरूद्ध या अंशतः नामंजूर किया जा सकता है? अभिनिर्धारित, नहीं – वादपत्र जैसा प्रस्तुत किया गया है वैसा ही पूर्णतः अग्रसर किया जाना चाहिए अथवा पूर्णतः नामंजूर किया जाना चाहिए न कि अंशतः।

Madhav Prasad Aggarwal and anr. v. Axis Bank Ltd. and anr.

Judgment dated 01.07.2019 passed by the Supreme Court in Civil Appeal No. 5126 of 2019, reported in (2019) 7 SCC 158

Relevant extracts from the judgment:

The relief of rejection of plaint in exercise of powers under Order 7 Rule 11

(d) of CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order 7 Rule 11 (d) of CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in the case of ***Sejal Glass Limited v. Navilan Merchants Private Limited, (2018) 11 SCC 780*** is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11 (d) of CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the director's defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against defendant No.1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11 (d) of CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint *qua* any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11 (d) of CPC will have no application at all, and the suit as a whole must then proceed to trial.

Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule 11 (d) of CPC on account of noncompliance of mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 Order 7 of CPC. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part.

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

Limitation for filing counter claim – Counter claim filed after closing of plaintiff's evidence – Held, counter claim can only be filed as per the provisions of Order 8 Rule 6A i.e. before defendant had delivered his defence or before the time limited for delivering his defence has expired – The term 'defence' connotes to 'written statement' only and cannot be extended to the stage of leading evidence in support of such written statement [*Mahendra Kumar v. State of M.P., (1987) 3 SCC 265*, relied on]

सिविल प्रक्रिया संहिता, 1908 – आदेश 8 नियम 6क

प्रतिदावा संस्थित करने हेतु परिसीमा – वादी साक्ष्य की समाप्ति पश्चात् प्रतिदावा संस्थित किया गया – अभिनिर्धारित, प्रतिदावा मात्र आदेश 8 नियम 6क के प्रावधानों के अनुसार ही संस्थित किया जा सकता है अर्थात् प्रतिवादी द्वारा अपनी

प्रतिरक्षा परिदत्त किये जाने के पूर्व अथवा उसकी प्रतिरक्षा परिदत्त करने के लिए परिसीमित समय के अवसान के पूर्व – शब्द 'प्रतिरक्षा' से मात्र लिखित कथन अभिप्रेत है और इसका विस्तार ऐसे लिखित कथन के समर्थन में प्रस्तुत साक्ष्य के प्रक्रम तक नहीं हो सकता। [***महेन्द्र कुमार वि. म.प्र. राज्य, (1987) 3 एससीसी 265, अवलंबित***]

Sainik Mining Allied Services Ltd. (M/s) v. Northern Coal Fields Ltd. & ors.

Order dated 03.07.2018 passed by the High Court of Madhya Pradesh in Writ Petition No. 12016 of 2017, reported in ILR (2018) MP 1925

Relevant extracts from the order:

In the present case, admittedly the written statement was filed by the defendant on 20.08.2014, on 22.04.2017 plaintiff closed its evidence and no evidence was led by the defendant on the next date i.e. on 06.05.2017 however, a counter claim was filed on that day only, claiming its cause of action accrued on 06.05.2015 when this Court passed the order in M.A. No.1614/2014 between the parties. The learned Judge of the trail Court, in the impugned order has laid emphasis on the fact that the evidence was not led by the defendant till the date on which the counter claim was filed.

The, cause of action had accrued to the defendant on 06.05.2015 i.e. after the written statement was filed on 20.08.2014 which in the considered opinion of this Court could not have been allowed by the learned Judge of the trial Court as the same falls outside the purview of Rule 6A of C.P.C. for the counter claim. A perusal of the impugned order reveals that the learned Judge of the trial Court has misinterpreted and misread the word "defence" to be "evidence". The word "defence" occurred in Rule 6A connotes to the written statement only and cannot be said to be extended to the stage of leading the evidence in support of such written statement.

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271. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13

Ex-parte **decree; setting aside of – Whether an** ***ex-parte*** **decree can be set aside on an application of a defendant against whom no relief is granted? Held, No – Decree should be** ***ex-parte*** **against the defendant applying to set it aside.**

सिविल प्रक्रिया संहिता, 1908 – आदेश 9 नियम 13

एकपक्षीय आज्ञप्ति; अपास्त किया जाना - क्या एकपक्षीय आज्ञप्ति एक ऐसे प्रतिवादी के आवेदन पर अपास्त की जा सकती है, जिसके विरूद्ध कोई अनुतोष नहीं दिया गया हो? – अभिनिर्धारित, नहीं – आज्ञप्ति उस प्रतिवादी के विरूद्ध एकपक्षीय होनी चाहिए जिसने अपास्त कराने का आवेदन दिया हो।

Sangam Sahakari Grih Nirman Samiti Mydt. v. Smt. Jethibai Purushwani & ors.

Order dated 14.09.2017 passed by the High Court of Madhya Pradesh in Civil Revision No. 161 of 2008, reported in ILR (2017) MP 2548

Relevant extracts from the order:

A plain reading of this provision shows that a defendant against whom *ex-parte* decree is passed may apply to the Court for setting it aside. Since, objection raised by Mr. Pranay Verma, goes to the root of the matter i.e. regarding maintainability of application filed by present applicant, I deem it proper to deal with this aspect at the out set. Admittedly, the present applicant was defendant No.2 before the trial Court. It is also not in dispute between the parties that the judgment and decree was passed against the defendant No.1 and not against the defendant no. 2/applicant. Thus, the spinal issue is whether the application preferred by the applicant/defendant No. 2 under Order 9 Rule 13 CPC was tenable. This aspect was dealt with by Delhi High Court in the case of ***(Smt. Santosh Chopra v. Teja Singh & another, AIR 1977 Del 110)***. The Court opined as under:

> "Indeed, even a person who is formally a party but against whom nothing is said in the operative portion of the decree or who has been expressly exempted from a decree cannot apply under the Rule to set aside an ex parte decree."

The Apex Court in ***Bank of India v. Mehta Brothers, (2008) 13 SCC 466*** opined that:

> "a reading of Order 9 Rule 13 of the Code would clearly show that under this provision it was clarified that an *ex-parte* decree was ordinarily to be set aside only against the defendant against whom the decree was passed *ex-parte* and the suit was to be revived only *qua* the said defendant applying for setting aside the *ex-parte* decree. It is true that the heading of Order 9 Rule 13 of the Code starts with the expression "setting aside an *ex-parte* decree". But if we examine this provision under Order 9 Rule 13 of the Code as well as its proviso in depth and in detail, it would not be difficult for us to come to a conclusion that under Order 9 Rule 13, it has been clarified that an *ex-parte* decree is ordinarily to be set aside only as against the defendants against whom the decree has been passed *ex-parte* and the suit is to be revived only *qua* the defendant who applied for setting aside the *ex-parte* decree".

In the same judgment it was further held that the only requirement for applicability of this order is that the decree should be *ex-parte* against the defendant applied to for its setting aside.

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***272. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 7**

Inspection, purpose of – To keep on record the existing condition of the property so that any change or its effect can be looked into and determined subsequently – Collection of evidence to prove the case of a party is even impermissible under Order 39 Rule 7.

सिविल प्रक्रिया संहिता, 1908 – आदेश 39 नियम 7

निरीक्षण का उद्देश्य – संपत्ति की मौजूदा स्थिति का अभिलेख तैयार रखना ताकि किसी परिवर्तन या प्रभाव को पश्चातवर्ती प्रक्रम पर दृष्टिगत रखते हुये अभिनिश्चित किया जा सके – किसी पक्षकार के मामले को प्रमाणित करने के लिए साक्ष्य एकत्रित करना आदेश 39 नियम 7 के अंतर्गत भी अननुज्ञेय है।

Gopaldas Khatri v. Dr. Tarun Dua & anr.

Order dated 02.08.2018 passed by the High Court of Madhya Pradesh in Writ Petition No. 3835 of 2016, reported in ILR (2018) MP 1934

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273. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 19

First Appeal – Dismissed in default – Held, such dismissal attracts provisions of Order 41 Rule 19 CPC – Therefore, appeal can be re-admitted subject to sufficient cause shown for non-appearance when appeal was called on for hearing – Also, First Appeal is a valuable right of the appellant – If the appellant's Advocate did not appear may be for myriad reasons, the Court could have imposed some costs on them for restoration of their appeal to compensate the respondent.

सिविल प्रक्रिया संहिता, 1908 – आदेश 41 नियम 19

प्रथम अपील – अनुपस्थिति में खारिज – अभिनिर्धारित, ऐसी खारिजी आदेश 41 नियम 19 सीपीसी के प्रावधान आकर्षित करती है – अतः, अपील वापस सुनवाई में ली जा सकती है यदि जिस दिन अपील सुनवाई में ली गई उस दिन अनुपस्थिति का पर्याप्त कारण दर्शित किया जाता है – यह भी की, प्रथम अपील अपीलार्थी का मूल्यवान अधिकार है – और यदि अपीलार्थी अधिवक्ता असंख्य कारणों से उपस्थित नहीं हुये, न्यायालय उन पर उनकी अपील पुर्नस्थापित करने हेतु व्यय अधिरोपित कर प्रत्यर्थी की क्षतिपूर्ति कर सकती थी।

Commissioner, Mysore Urban Development Authority v. S.S. Sarvesh

Judgment dated 05.02.2019 passed by the Supreme Court in Civil Appeal No. 1463 of 2019, reported in (2019) 5 SCC 144

Relevant extracts from the judgment:

Vivian Bose J., speaking for the Bench, in his distinctive style of writing made the following observations while dealing with the case arising out of Order 9 and reminded the Courts of their duty while deciding the case. The observations are apt and read as under:

> "A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

Keeping the aforementioned statement of law in consideration and applying the same to the facts of this case, we have no hesitation in allowing this appeal and set aside the impugned order.

In our view, the Courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellant Authority was entitled for an opportunity to prosecute their appeal on merits. If the appellant's advocate did not appear may be for myriad reasons, the Court could have imposed some cost on them for restoration of their appeal to compensate the respondent (plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits. This is what Justice Vivian Bose has reminded to the Courts while dealing with the cases of this nature in ***Sangram Singh v. Election Tribunal, AIR 1955 SC 425*** to do substantial justice to both the parties to the *lis*. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.

We have perused the application made by the appellant Authority for recalling of the order and we find that it constitutes a sufficient cause within them earning of Order 41 Rule 19 of the Code. The application, therefore,

deserves to be allowed. However, it is subject to payment of cost of ₹ 10,000/- payable by the appellant Authority to the respondent (plaintiff). Let the cost be paid before hearing of the appeal.

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274. CRIMINAL PROCEDURE CODE, 1973 – Sections 125 and 127

(i) Whether maintenance allowance granted u/s 125 of the Code can be altered without recording any evidence? Held, No – For alteration in allowance, the person seeking alteration has to prove the change in circumstances by leading evidence.

(ii) Income Tax Return, evidentiary value in cases u/s 125 of the Code – Income Tax Return is a matter between assessee and revenue department and is not a public document – Court cannot take judicial notice of such document while considering application u/s 125 of the Code – Income has to be proved by leading evidence.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 125 एवं 127

(i) क्या धारा 125 के अंतर्गत प्रदत्त भरणपोषण भत्ता बिना किसी साक्ष्य के अभिलिखित किये परिवर्तित किया जा सकता है? अभिनिर्धारित, नहीं – भत्ते में परिवर्तन करने के लिए परिवर्तन की वांछा करने वाले व्यक्ति को साक्ष्य प्रस्तुत कर परिस्थितियों में परिवर्तन प्रमाणित करना होता है।

(ii) धारा 125 के प्रकरणों में आयकर विवरणी का साक्ष्यिक मूल्य – आयकर विवरणी कर निर्धारक तथा राजस्व विभाग के बीच का मामला है तथा यह एक लोक दस्तावेज नहीं है – संहिता की धारा 125 के अंतर्गत आवेदन पर विचार करने के दौरान न्यायालय ऐसे दस्तावेज की न्यायिक अवेक्षा नहीं कर सकता है – आय को साक्ष्य प्रस्तुत कर साबित किया जाना चाहिए।

Anubhav Ajmani v. Smt. Garima Ajmani

Order dated 14.05.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 2151 of 2018, reported in ILR (2018) MP 2043

Relevant extracts from the order:

Proviso II to Section 125(1) of Cr.P.C provides that the Magistrate can grant reasonable interim maintenance and the expenses of such proceedings. Thus, for ascertaining the amount of interim maintenance or the expenses of proceedings, the Magistrate is not required to record any evidence and considering the status of the parties as well as other relevant factors, any reasonable amount can be fixed by the Magistrate for the subsistence of the wife during the pendency of the application filed under Section 125 of Cr.P.C. However, for alteration in allowance, the person seeking alteration has to prove that there is change in the circumstances because the opening words of Section 127(1) of Cr.P.C. are on proof of a change in the circumstances", therefore, the

person seeking alteration in allowance has to prove that the amount fixed by the Magistrate by way of interim maintenance is required to be altered in the light of the changed circumstances. The word 'proof' denotes that it has to be proved by leading evidence. Thus, the submission made by the counsel for the applicant that the allowance can be altered under Section 127 of Cr.P.C. without recording of any evidence is misconceived and is hereby rejected.

The Income Tax Return of the applicant cannot be treated as a public document and the Court cannot take judicial notice of the same and the Income Tax Return of the applicant is required to be proved like any other document. Furthermore, whether ad the applicant has correctly disclosed his income in his Income Tax Return or not is also a question of fact which requires to be considered by the Magistrate. So far as the Income Tax Return is concerned, it is of the matter between the assessee and the revenue and the Income Tax Return filed by the applicant is not binding on the Magistrate and the Magistrate after considering the circumstances may adjudicate upon income of the applicant. Since the Income Tax Return of the applicant is not a public document, therefore, the Court cannot take judicial notice of the same while considering the application under Section 125 of Cr.P.C. and the applicant is required to prove his income by leading evidence.

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275. CRIMINAL PROCEDURE CODE, 1973 – Section 125 (3)

(i) Recovery of arrears of maintenance – Mode of – There are two methods – First, by issuing levy warrant and second, by sentencing the respondent for each month's allowance remaining unpaid – This second alternative can also be exercised after the execution of levy warrant.

(ii) Recovery of arrears of maintenance – Whether defaulting respondent can be sentenced to imprisonment for maintenance remaining unpaid for more than one year? Held, No – Limitation of one year as prescribed in the proviso to Section 125 (3) applies to sentence of imprisonment also. [*Poongodi and anr. v. Thangavel, (2013) 10 SCC 618* followed]

(iii) Recovery of arrears of maintenance – Sentence of imprisonment – Held, is not a mode of discharge of liability – Order of maintenance can be discharged only by recovery/payment of maintenance.

दण्ड प्रक्रिया संहिता, 1973 – धारा 125 (3)

(i) भरण-पोषण के बकाया की वसूली – रीति – इसकी दो रीति हैं – प्रथम, वसूली वारंट जारी कर के और द्वितीय, प्रत्येक माह की अदत्त राशि के लिए अनावेदक को कारावास भेजकर – यह दूसरा विकल्प वसूली वारंट के निष्पादन के उपरांत भी प्रयोग किया जा सकता है।

(ii) भरण-पोषण के बकाया की वसूली – क्या एक वर्ष से अधिक पुरानी भरण-पोषण की अवशेष राशि के लिए व्यतिक्रम करने वाले अनावेदक को कारावासीय दण्ड दिया जा सकता है? – अभिनिर्धारित, नहीं – धारा 125(3) के प्रावधानानुसार एक वर्ष की परिसीमा अवधि कारावासीय दण्ड पर भी लागू होती है। [***पूंगोदी एवं अन्य थंगावेल, (2013) 10 एससीसी 618*** अनुसरित]

(iii) भरण पोषण के आदेश का निर्वाह केवल भरण पोषण की राशि की वसूली/भुगतान द्वारा निर्वाह किया जा सकता है।

Preeti Jain (Smt.) and ors. v. Manish Jain

Order dated 10.08.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 19503 of 2016, reported in ILR (2017) MP 2378

Relevant extracts from the order:

A microscopic reading of Section 125 shows that two methods/alternatives are available to the Magistrate in cases of non-compliance of earlier order passed under Section 125 Cr.P.C. First one, as noticed by Allahabad High Court is to issue a warrant for levying the amount due in the manner provided for levying fines and second is to sentence such person for the whole or any part of each month's allowance remaining unpaid. A careful reading of this provision makes it clear that even second alternative can be used by the Court after the execution of the warrant. The expression "after the execution of the warrant" in the second part of aforesaid provision is very important and significant. As per my judgment, the second alternative can be exercised only "after the execution of the warrant". The proviso makes it clear that no warrant shall be issued for the recovery of any amount due under this section unless application is made to the Court to levy such amount within a period of one year from the date on which it becomes due.

I have no scintilla of doubt that second alternative can also be exercised after the execution of warrant. Since a limitation of one year is prescribed as per the proviso aforesaid for issuance of warrant, second alternative can also be exercised only within the time frame prescribed in the said proviso.

Pertinently, in ***Poongodi and anr. v. Thangavel, (2013) 10 SCC 618,*** the Apex Court held that:

> "What the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) Cr.P.C., namely, by construing the same to be and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued.''

In ***Kuldip Kaur v. Surinder Singh and another, (1989) 1 SCC 405,*** it was held that sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make payment. It was further held that sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharge liability. The order for monthly allowance can be discharged only upon the monthly allowance being recovered.

The facts of the present case have great similarity with that of ***Poongodi*** *(supra)*. The maintenance amount not been paid by the husband for some period for which the present petitioner preferred applications. Hence, I deem it proper to follow the course adopted by the Supreme Court in ***Poongodi*** *(supra)*. Accordingly, the respondent is directed to pay the entire unpaid amount of maintenance due to the petitioner commencing from the date of basic order of the Court below dated 14.05.2013. The arrears of such amount shall be paid to the petitioner within six months from today. The amount shall be paid till the date it is due in accordance with law. If this order is not complied with by the respondent, the learned trial Court shall issue a warrant for the arrest of respondent and ensure that the same is executed and the respondent is taken into custody to suffer imprisonment as mandated in Section 125 (3) of Cr.P.C.

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276. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 227 and 239
EVIDENCE ACT, 1872 – Section 65 B

(i) Electronic evidence; admissibility of – Whether it is necessary to produce certificate under Section 65B (4) of the Evidence Act at the time of taking cognizance? Held, No – The need for production of such certificate would arise when the electronic record is sought to be produced in evidence at the trial – Further held, absence of certificate accompanying electronic record is a curable defect.

(ii) Preliminary inquiry – Corruption cases – Investigating officer handed over spy cameras to complainant a day prior to registration of FIR – Whether steps taken by investigating officer before registering FIR amounts to investigation before FIR and are fatal to prosecution? Held, No – This is a preliminary enquiry to ascertain whether any cognizable offence is made out – Such preliminary enquiry is permissible. [*P. Sirajuddin v. State of Madras, AIR 1971 SC 520* followed].

(iii) Application for discharge – Parameters governing – Explained – Court must assume that material brought by prosecution is true – Accordingly evaluate it to determine whether it discloses the essential ingredients to constitute offence.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 154, 227 एवं 239

साक्ष्य अधिनियम, 1872 – धारा 65ख

(i) इलेक्ट्रॉनिक साक्ष्य की ग्राह्यता – क्या संज्ञान लेने के प्रक्रम पर साक्ष्य अधिनियम की धारा 65बी (4) का प्रमाण पत्र प्रस्तुत किया जाना आवश्यक है? अभिनिर्धारित, नहीं – ऐसा प्रमाण पत्र प्रस्तुत करने की आवश्यकता विचारण के दौरान इलेक्ट्रॉनिक अभिलेख को साक्ष्य में प्रस्तुत किए जाने पर उत्पन्न होती है – आगे अभिनिर्धारित, इलेक्ट्रॉनिक अभिलेख के साथ प्रमाण पत्र संलग्न न किया जाना एक सुसाध्य त्रुटि है।

(ii) प्रारंभिक जाँच – भ्रष्टाचार के मामले – अन्वेषण अधिकारी ने जासूसी कैमरा प्रथम सूचना रिपोर्ट पंजीबद्ध करने के एक दिन पूर्व परिवादी को सौंपा था – क्या अन्वेषण अधिकारी द्वारा प्रथम सूचना रिपोर्ट पंजीबद्ध किए जाने के पूर्व उठाए गए कदम प्रथम सूचना रिपोर्ट के पूर्व अन्वेषण की कोटि में आते हैं तथा अभियोजन के लिये घातक हैं? अभिनिर्धारित, नहीं – यह सुनिश्चित करने के लिए कि क्या कोई संज्ञेय अपराध बनता है, यह प्रारंभिक जाँच है – ऐसी प्रारंभिक जाँच अनुज्ञेय है।

(iii) उन्मोचन हेतु आवेदन – शासित करने वाले मापदण्ड – स्पष्ट किए गए – न्यायालय को मानना चाहिए कि अभियोजन द्वारा लाई गई सामग्री सही है – तदनुसार यह निर्धारित करने के लिए उनका मूल्यांकन करना चाहिए कि क्या यह अपराध के गठन हेतु आवश्यक तत्व प्रकट करते हैं।

State by Karnataka Lokayukta Police Station, Bengaluru v. M.R. Hiremath

Judgment dated 01.05.2019 passed by the Supreme Court in Criminal Appeal No. 819 of 2019, reported in AIR 2019 SC 2377

Relevant extracts from the judgment:

The provisions of Section 65 B came up for interpretation before a three judge Bench of this Court in ***Anvar P.V. v. P.K. Basheer, AIR 2015 SC 180.*** Interpreting the provision, this Court held :

> "Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer."

The same view has been reiterated by a two judge Bench of this Court in ***Union of India and others v. CDR Ravindra V. Desai, AIR 2018 SC 2754***. The Court emphasised that non-production of a certificate under Section 65B on an earlier

occasion is a curable defect. The Court relied upon the earlier decision in ***Sonu alias Amar v. State of Haryana, AIR 2017 SC 3441,*** in which it was held :

> "The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency."

Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

That leads us to the next limb of a significant submission which has been made on behalf of the respondent by Mr. Basava Prabu Patil, learned senior counsel, which merits close consideration. It was urged on behalf of the respondent that the exercise of the investigating officer handing over a spy camera to the complainant on 15 November 2012 would indicate that the investigation had commenced even before an FIR was lodged and registered on 16 November 2012. This, it has been submitted, is a breach of the parameters which have been prescribed by the judgment of the Constitution Bench of this Court in ***Lalita Kumari v. Government of Uttar Pradesh, (2014) 2 SCC1***.

Before we advert to the decision of the Constitution Bench, it is necessary to note that in the earlier decision of this Court in ***P. Sirajuddin v. State of Madras, AIR 1971 SC 520. P. Sirajuddin*** *(supra)* emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. The basis of a first information report under Section 154 of the CrPC is information relating to the commission of a cognizable offence which is furnished to an officer-incharge of the police station. It is with a view to ascertain whether a cognizable offence seems to have been implicated in a case involving an alleged act of corruption by a public servant that a preliminary inquiry came to be directed in the judgment of this Court in ***P. Sirajuddin***. The decision in ***P. Sirajuddin*** *(supra)* was recognized and followed by the Constitution Bench in ***Lalita Kumari*** *(supra)*. The Constitution Bench held that while Section 154 of the CrPC postulates mandatory registration of a first information report on the receipt of information indicating the commission of a cognizable offence yet there could be situations where a preliminary inquiry may be required. Indicating the cases where a preliminary inquiry may be warranted.

The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In the ***State of Tamil Nadu v. N. Suresh Rajan, 2014 AIR SCW 942,*** adverting to the earlier decisions on the subject; this Court held :

> "... At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

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277. CRIMINAL PROCEDURE CODE, 1973 – Sections 195 and 340

(i) Whether mere incorrect statement in *vakalatnama* can be a ground for prosecution u/s 340 of the Code? Held, No – A *vakalatnama* is only a document which authorizes an advocate to appear on behalf of party – It has no effect upon merits of the case – Further, to prosecute a party u/s 340 of the Code, it must *prima facie* be shown that the party had intention to make misrepresentation. [*Amarsang Nathaji v. Hardik Harshadbhai Patel, (2017) 1 SCC 117* and *Chintamani Malviya v. High Court of M.P., (2018) 6 SCC 15,* relied on]

(ii) Complaint by Court on perjury – Before lodging of a complaint, the Court must be satisfied and record reasons that it is expedient in the interest of justice to lodge complaint – Complaint cannot be lodged on mere allegations or to vindicate personal vendetta.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 195 एवं 340

(i) क्या मात्र वकालतनामा में किये गये असत्य कथन संहिता की धारा 340 के अधीन अभियोजन का आधार हो सकता है? अभिनिर्धारित, नहीं – वकालतनामा मात्र एक ऐसा दस्तावेज है जो किसी अधिवक्ता को किसी पक्षकार की ओर से उपसंजात होने के लिये प्राधिकृत करता है – इसका मामले के गुणदोष पर कोई प्रभाव नहीं होता है – आगे यह भी कि, किसी पक्षकार को संहिता की धारा 340 के अंतर्गत अभियोजित करने के लिये यह प्रथम दृष्टया दर्शित किया जाना चाहिए कि पक्षकार का दुर्व्यपदेशन का आशय था। [***अमरसंग नाथजी विरूद्ध हार्दिक हर्षदभाई पटेल, (2017) 1 एससीसी 117*** तथा ***चिंतामणि मालविय विरूद्ध म.प्र. उच्च न्यायालय, (2018) 6 एससीसी 15***, अवलंबित]

(ii) मिथ्या साक्ष्य के लिये न्यायालय द्वारा परिवाद – परिवाद दायर करने के पूर्व, न्यायालय को इस बात से संतुष्ट होना चाहिए तथा कारण अभिलिखित किया जाना चाहिए कि न्यायहित में परिवाद दायर किया जाना समीचीन है – मात्र दोषारोपणों अथवा व्यक्तिगत झगड़े के आधार पर परिवाद संस्थित नहीं किया जा सकता।

Sasikala Pushpa and others v. State of Tamil Nadu

Judgment dated 07.05.2019 passed by the Supreme Court in Criminal Appeal No. 855 of 2019, reported in 2019 (2) Crimes 279 (SC)

Relevant extracts from the judgment:

It is fairly well settled that before lodging of the complaint, it is necessary that the Court must be satisfied that it was expedient in the interest of justice to lodge the complaint. It is not necessary that the Court must use the actual words of Section 340 Cr.P.C.; but the Court should record a finding indicating its satisfaction that it is expedient in the interest of justice that an enquiry should be made.

Even assuming that the version in the vakalatnama is wrong, mere incorrect statement in the vakalatnama would not amount to create a forged document and it cannot be the reason for exercising the jurisdiction under Section 340 Cr.P.C. for issuance of direction to lodge the criminal complaint against the appellants.

In ***Amarsang Nathaji v. Hardik Harshadbhai Patel, (2017) 1 SCC 117,*** this Court held that before proceeding under Section 340 Cr.P.C., the Court has to be satisfied about the deliberate falsehood on a matter of substance and there must be a reasonable foundation for the charge. Observing that some inaccuracy in the statement or mere false statement may not invite a prosecution, it was held as under:-

> "The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always

sufficient to justify a prosecution under Sections 199 and 200 of the Indian Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the Court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution.(See ***K.T.M.S. Mohd. v. Union of India, (1992) 3 SCC 178***)."

The Court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case. The same view was quoted with approval in ***Chintamani Malviya v. High Court of M.P., (2018) 6 SCC 15***.

Applying the ratio of the above decisions, in our view, there is no prima facie evidence to show that the appellants had intended to cause damage or injury or any other acts. Since the disputed version in the *vakalatnama* appears to be an inadvertent mistake with no intention to make misrepresentation, in our view, the direction of the High Court to lodge a criminal complaint against the appellants cannot be sustained and the same is liable to be set aside.

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***278. CRIMINAL PROCEDURE CODE, 1973 – Section 197**

Sanction to prosecute Government officer, when required? Held, only if alleged offence has *nexus* with official duty.

दण्ड प्रक्रिया संहिता, 1973 – धारा 197

सरकारी अधिकारी के अभियोजन हेतु मंजूरी कब आवश्यक है? अभिनिर्धारित, केवल तब जब अभिकथित अपराध पदीय कर्तव्य से संबंद्ध हो।

Devendra Prasad Singh v. State of Bihar and another

Judgment dated 02.04.2019 passed by the Supreme Court in Criminal Appeal No. 579 of 2019, reported in AIR 2019 SC 1671

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279. CRIMINAL PROCEDURE CODE, 1973 – Section 197

CRIMINAL TRIAL:

(i) Whether manager of nationalized bank can claim protection under Section 197 Cr.P.C.? Held, No – Section 197 of the Code is applicable to only those public servants, who are not removable from their office except by or with sanction of Government. [*K.C. Prasad v. Smt. J. Vanalatha Devi and others, (1987) 2 SCC 52,* relied on]

(ii) Duty of Magistrate during trial – Magistrate, at any stage prior to final trial should avoid any conclusive opinion regarding evidence collected during investigation.

दण्ड प्रक्रिया संहिता, 1973 – धारा 197

आपराधिक विचारणः

(i) क्या एक राष्ट्रीयकृत बैंक का प्रबंधक धारा 197 दं.प्र.सं. के अंतर्गत संरक्षण की माँग कर सकता है? अभिनिर्धारित, नहीं – संहिता की धारा 197 केवल उन लोक सेवकों पर लागू होती है जिन्हें सरकार द्वारा या उसकी मंजूरी के बिना पद से नहीं हटाया जा सकता है। [***के.सी. प्रसाद विरूद्ध श्रीमती जे. वनलता देवी और अन्य,*** *(1987) 2* ***एससीसी*** *52,* अवलंबित]

(ii) विचारण के दौरान मजिस्ट्रेट के कर्तव्य – मजिस्ट्रेट को, अंतिम विचारण के पूर्व किसी भी प्रक्रम पर अन्वेषण के दौरान एकत्रित किसी साक्ष्य के संबंध में किसी निश्चायक मत से बचना चाहिए।

S.K. Miglani v. State NCT of Delhi

Judgment dated 30.04.2019 passed by the Supreme Court in Criminal Appeal No. 744 of 2019, reported in 2019 (2) Crimes 290 (SC)

Relevant extracts from the judgment:

The question as to whether a manager of nationalized bank can claim benefit of Section 197 Cr.P.C., 1973 is not *res integra*. This Court in ***K.Ch. Prasad v. Smt. J. Vanalatha Devi and others, (1987) 2 SCC 52*** had occasion to consider the same very question in reference to one, who claimed to be a public servant working in a nationalized bank. The application filed by appellant in above case questioning the maintainability of the prosecution for want of sanction under Section 197 Cr.P.C., 1973 was rejected by Metropolitan Magistrate and revision to the High Court also met the same fate. This Court while dismissing the appeal held that even though a person working in a nationalized bank is a public servant still provisions of Section 197 are not attracted at all. In paragraph No.6 of the judgment, following has been held:-

> "6. It is very clear from this provision that this section is attracted only in cases where the public servant is such who is not removable from his office save by or with the sanction of the Government. It is not disputed that the appellant is not holding a post where he could not be removed from service except by or with the sanction of the government. In this view of the matter even if it is held that appellant is a public servant still provisions of Section 197 are not attracted at all."

The observation made by CMM as extracted above, by giving opinion using the expression that appellant has committed forgery ought to have been avoided. The Magistrate, at any stage prior to final trial, is to avoid any conclusive opinion regarding any evidence collected during investigation. It is true that evidence

collected in the investigation can be looked into to form an opinion as to whether ***prima facie*** charge is made out against an accused and what is the nature of offence alleged against him.

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280. CRIMINAL PROCEDURE CODE, 1973 – Sections 203, 227, 239 and 245
INDIAN PENAL CODE, 1860 – Sections 504 and 506

(i) Discharge; application for – Ambit and scope of powers of Court, explained – Principles governing order of discharge reiterated – Held, only *prima facie* satisfaction of Court is required and Court is not to hold mini trial by marshalling the evidence.

(ii) Private complaint; registration of – Issuance of process – Factors governing satisfaction of Magistrate, explained – Held, Magistrate at this stage is not expected to discuss merits or demerits of case in detail – But is only to consider the inherent probabilities of complainant's version – He has to decide the question purely from the point of view of the complainant without adverting to any defence.

(iii) Section 504 IPC – Intentional insult with intent to provoke breach of peace – Essential ingredients enunciated – Held, one of the essential elements of this offence is that there should be an act or conduct amounting to intentional insult – Mere fact that accused abused complainant is not sufficient to constitute offence under Section 504 IPC.

(iv) Section 506 IPC – Criminal intimidation – Essential ingredients enunciated – Held, threat must be with intention to cause alarm to the complainant – Mere expression of some words is not sufficient – Material has to be placed on record to show that intention.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 203, 227, 239 एवं 245

भारतीय दण्ड संहिता, 1860 – धाराएं 504 एवं 506

(i) उन्मोचन हेतु आवेदन – न्यायालय की शक्तियों का क्षेत्र एवं विस्तार – स्पष्ट किया गया – उन्मोचन आदेश को शासित करने वाले सिद्धांत पुनरोद्धरित – अभिनिर्धारित, न्यायालय का मात्र प्रथम दृष्टया समाधान अपेक्षित है तथा न्यायालय को साक्ष्य क्रमबंधन के द्वारा इस प्रक्रम पर लघु विचारण नहीं करना है।

(ii) प्राईवेट परिवाद पंजीबद्ध किया जाना – आदेशिका जारी करना – मजिस्ट्रेट के समाधान को शासित करने वाले कारकों की व्याख्या की गई – अभिनिर्धारित, इस प्रक्रम पर मजिस्ट्रेट से मामले के गुण-दोषों की विस्तार से समीक्षा किया जाना अपेक्षित नहीं है – अपितु मात्र परिवादी के मामले की अंतर्निहित संभाव्यता पर विचार किया जाना चाहिए – उसे प्रश्न का निराकरण बिना किसी बचाव का उल्लेख करते हुए विशुद्ध रूप से परिवादी के दृष्टिकोण से करना चाहिए।

(iii) धारा 504 भा.द.सं. – लोकशांति भंग कराने के आशय से साशय अपमान – आवश्यक तत्व प्रतिपादित किए गए – अभिनिर्धारित, इस अपराध का एक आवश्यक घटक यह है कि कोई कृत्य अथवा आचरण होना चाहिए जिससे साशय अपमान होता हो – केवल यह तथ्य कि अभियुक्त ने परिवादी को अपशब्द कहे, धारा 504 का अपराध सृजित करने हेतु पर्याप्त नहीं है।

(iv) धारा 506 भा.द.सं. – आपराधिक अभित्रास – आवश्यक तत्व प्रतिपादित किए गए – अभिनिर्धारित, धमकी परिवादी को संत्रास कारित करने के आशय से होनी चाहिए – मात्र कुछ शब्दों की अभिव्यक्ति पर्याप्त नहीं है – अभिलेख पर यह दर्शित करने के लिए सामग्री होनी चाहिए कि आशय परिवादी को संत्राश कारित करने का रहा है।

Vikram Johar v. State of Uttar Pradesh and anr.

Judgment dated 26.04.2019 passed by the Supreme Court in Criminal Appeal No. 759 of 2019, reported in AIR 2019 SC 2109

Relevant extracts from the judgment:

This Court in ***Union of India v. Prafulla Kumar Samal and another, AIR 1979 SC 366*** had occasion to consider Section 227 Cr.P.C., which is Special Judge's power to pass order of discharge. After noticing Section 227 in paragraph No.7, this Court held following:-

> "7. The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

After considering the earlier cases of this Court, in paragraph No.10, following principles were noticed:-

> "10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence.

Section 504 of I.P.C. came up for consideration before this Court in ***Fiona Shrikhande v. State of Maharashtra and another, AIR 2014 SC 957***. In the said case, this Court had occasion to examine ingredients of Section 504, which need to be present before proceeding to try a case. This Court held that at the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused. In paragraph No.11, following principles have been laid down:-

"11. We are, in this case, concerned only with the question as to whether, on a reading of the complaint, a *prima facie* case has been made out or not to issue process by the Magistrate. The law as regards issuance of process in criminal cases is

well settled. At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to *prima facie* satisfy whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine *prima facie* the truth or falsehood of the allegations made in the complaint. The Magistrate is not expected to embark upon a detailed discussion of the merits or demerits of the case, but only consider the inherent probabilities apparent on the statement made in the complaint. In ***Nagawwa v. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947,*** this Court held that once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher Courts to substitute its own discretion for that of the Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all adverting to any defence that the accused may have."

In paragraph No.13 of the judgment, this Court has noticed the ingredients of Section 504, which are to the following effect:-

"13. Section 504 IPC comprises of the following ingredients *viz.* (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted, and (c) the accused must intend or know that such provocation would cause another to break the public peace or to commit any other offence. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give provocation to any other person and such provocation will cause to break the public peace or to commit any other offence, in such a situation, the ingredients of Section 504 are satisfied. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under Section 504 IPC."

Now, we revert back to the allegations in the complaint against the appellant. The allegation is that appellant with two or three other unknown persons, one of whom was holding a revolver, came to the complainant's house and abused him in filthy language and attempted to assault him and when some neighbours

arrived there, the appellant and the other persons accompanying him fled the spot. The above allegation taking on its face value does not satisfy the ingredients of Sections 504 and 506 as has been enumerated by this Court in the above two judgments. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The mere allegation that appellant came and abused the complainant does not satisfy the ingredients as laid down in paragraph No.13 of the judgment of this Court in ***Fiona Shrikhande*** *(supra)*.

Now, reverting back to Section 506, which is offence of criminal intimidation, the principles laid down by ***Fiona Shrikhande*** *(supra)* has also to be applied when question of finding out as to whether the ingredients of offence are made or not. Here, the only allegation is that the appellant abused the complainant. For proving an offence under Section 506 IPC, what are ingredients which have to be proved by the prosecution? Ratanlal and Dhirajlal on Law of Crimes, 27th Edition with regard to proof of offence states following: -

> "...The prosecution must prove:
>
> (i) That the accused threatened some person.
>
> (ii) That such threat consisted of some injury to his person, reputation or property; or to the person, reputation or property of some one in whom he was interested;
>
> (iii) That he did so with intent to cause alarm to that person; or to cause that person to do any act which he was not legally bound to do, or omit to do any act which he was legally entitled to do as a means of avoiding the execution of such threat."

A plain reading of the allegations in the complaint does not satisfy all the ingredients as noticed above.

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281. CRIMINAL PROCEDURE CODE, 1973 – Section 227

(i) Framing of charge and discharge; considerations for – Court has to find out whether *prima facie* case is made out by sifting and weighing material on record – Even in case of grave suspicions, discharge may be denied – However, Court will be justified in discharging the accused only if a case of suspicion is made out.

(ii) Application for discharge; duty of Sessions Judge as to – While examining the discharge application, it is expected from Sessions Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not – The Court is not supposed to hold a mini trial in such proceedings.

दण्ड प्रक्रिया संहिता, 1973 – धारा 227

(i) आरोप की विरचना तथा उन्मोचन के विचारणीय कारक – अभिलेख पर उपलब्ध सामग्री की अन्वीक्षा और मूल्यांकन द्वारा न्यायालय को यह ज्ञात करना है कि क्या प्रथमदृष्टया मामला बनता है – गंभीर संदेह के मामलों में उन्मोचन अस्वीकार भी किया जा सकता है – हालांकि जहाँ केवल संदेह का मामला बनता हो वहीं न्यायालय अभियुक्त का उन्मोचन करने में न्यायानुमत होंगे।

(ii) उन्मोचन के लिऐ आवेदन के संबंध में सत्र न्यायाधीश का कर्त्तव्य – उन्मोचन के लिए आवेदन की परीक्षा करते समय सत्र न्यायाधीश से इस निर्धारण के लिए न्यायिक मस्तिष्क का अनुप्रयोग अपेक्षित है कि क्या विचारण के लिए मामला बनता है या नहीं – न्यायालय से इस प्रक्रिया में अल्प विचारण करना अपेक्षित नहीं है।

Asim Shariff v. National Investigation Agency

Judgment dated 01.07.2019 passed by the Supreme Court in Criminal Appeal No. 949 of 2019, reported in (2019) 7 SCC 148

Relevant extracts from the judgment:

It is settled that the Judge while considering the question of framing charge under section 227 CrPC, 1973 in sessions cases (which is akin to section 239 CrPC, 1973 pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under section 227 CrPC, 1973 it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.

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***282.CRIMINAL PROCEDURE CODE, 1973 – Section 227**

APPRECIATION OF EVIDENCE:

Stage to appreciate evidence, when arises? Stage for framing of charge is not a stage for appreciation of evidence – Stage to appreciate evidence to find fault or/and inconsistencies in two medical reports would arise only when prosecution leads evidence by examining the Doctor in support of medical reports.

दण्ड प्रक्रिया संहिता, 1973 – धारा 227

साक्ष्य का मूल्यांकनः

साक्ष्य का मूल्यांकन किस प्रक्रम पर उद्भूत होता है – आरोप विरचना का प्रक्रम साक्ष्य मूल्यांकन का प्रक्रम नहीं है – दो चिकित्सीय प्रतिवेदन में त्रुटियों अथवा/एवं विसंगतियों को खोजने एवं उनका मूल्यांकन करने का प्रक्रम केवल तब उद्भूत होगा जब अभियोजन चिकित्सीय प्रतिवेदन के समर्थन में चिकित्सक के परीक्षण के माध्यम से साक्ष्य प्रस्तुत करता है।

Bihari Lal v. State of Rajasthan and others

Judgment dated 15.04.2019 passed by the Supreme Court in Criminal Appeal No. 676 of 2019, reported in AIR 2019 SC 1995

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283. CRIMINAL PROCEDURE CODE, 1973 – Sections 228 and 464
INDIAN PENAL CODE, 1860 – Section 376 (2) (g) (Prior to amendment of 2013)
Omission to frame charge; effect of – Charges framed under Section 376 r/w/s 120B IPC – Victim was subjected to rape by both accused; proved – Accused convicted under Section 376 (2) (g) for gang rape – Held, considering the evidence of prosecutrix, no serious prejudice can be said to have been caused to accused by conviction under Section 376 (2) (g).

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 228 एवं 464

भारतीय दण्ड संहिता, 1860 – धारा 376 (2) (छ) (2013 के संशोधन के पूर्व)

आरोप विरचना में लोप का प्रभाव – धारा 376 सहपठित धारा 120ख भा.दं.सं. के अधीन आरोप विरचित किए गए – दोनों अभियुक्तों द्वारा अभियोक्त्रि का बलात्संग किया जाना साबित हुआ – अभियुक्त धारा 376 (2) (छ) के अंतर्गत सामूहिक बलात्संग के लिये दोषसिद्ध ठहराया गया – अभिनिर्धारित, अभियोक्त्रि की साक्ष्य पर विचार करने पर धारा 376 (2) (छ) के अंतर्गत दोषसिद्ध ठहराये जाने पर अभियुक्त को कोई गंभीर अन्याय कारित होना नहीं कहा जा सकता है।

Thaongam Tarun Singh v. State of Manipur

Judgment dated 30.04.2019 passed by the Supreme Court in Criminal Appeal No. 805 of 2019, reported in AIR 2019 SC 2456

Relevant extracts from the judgment:

By perusal of the charges framed against the accused, it clearly shows that charges were framed against the accused under Section 376 IPC read with Section 120B IPC. In this regard, learned counsel appearing on behalf of the respondent - State of Manipur has drawn our attention to Section 464 Cr.P.C. and submitted that no finding, sentence or order by a Court of Competent Jurisdiction shall be deemed invalid merely on the ground that no charge was framed unless failure of justice has in fact been occasioned thereby.

From the evidence of PW-5 and the materials adduced by the prosecution, it is clearly brought in evidence that the victim was subjected to rape both by accused No.1 as well as accused No. 2. Referring to the evidences of PW-5 and the owner of the Hotel (PW-3), the High Court has clearly recorded clear concurrent findings of fact that the victim was subjected to rape by both the appellants. When the evidence adduced by the prosecution is very clear that she was subjected to sexual intercourse by more than one person, in our view, the act clearly falls within Explanation 1 to Section 376 (prior to the Amendment Act, 2013) which reads as under:

> *"Explanation 1 to Section 376* Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

Considering the evidence of PW-5 and other evidences, in our considered view, even though no charge was framed under Section 376(2)(g) IPC, the conviction of the appellants under Section 376(2)(g) IPC cannot be faulted. Considering the evidence adduced by the prosecution in particular evidence of the victim (PW-5), We are of the view that no serious prejudice has been caused to the appellants by conviction under Section 376(2)(g) IPC.

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***284. CRIMINAL PROCEDURE CODE, 1973 – Sections 273, 299 and 317**

Recording of evidence in absence of accused – Permissible only where it has been expressly provided in the Code i.e. Section 299, Section 317 and latter part of Section 273 of the Code – Examination of witnesses in the presence of advocate of accused particularly, where he is in judicial custody and not produced before the Court – Cannot be said to be dispensation with the presence of accused as per latter part of Section 273.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 273, 299 एवं 317

साक्ष्य का अभिलेखन – अभियुक्त की अनुपस्थिति में – केवल तब अनुज्ञेय है जहां कि संहिता में यह अभिव्यक्त रूप में अर्थात् धारा 299, धारा 317 तथा धारा 273 के द्वितीय भाग में उपबंधित है – साक्षियों का अभियुक्त के अधिवक्ता की उपस्थिति में परीक्षण विशिष्टितः तब जब वह न्यायिक अभिरक्षा में है तथा न्यायालय के समक्ष प्रस्तुत नहीं किया गया है - यह नहीं कहा जा सकता कि धारा 273 के द्वितीय भाग के अनुसार अभियुक्त को उपस्थिति से अभिमुक्ति दे दी गई है।

Atma Ram and others v. State of Rajasthan

Judgment dated 11.04.2019 passed by the Supreme Court in Criminal Appeal No. 656 of 2019, reported in AIR 2019 SC 1961

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***285. CRIMINAL PROCEDURE CODE, 1973 – Section 311**

Recall of prosecutrix – Powers under Section 311 cannot be exercised to recall a prosecutrix to compel her to change her earlier statement.

दण्ड प्रक्रिया संहिता, 1973 – धारा 311

अभियोक्त्री का पुनः बुलाया जाना – धारा 311 के अंतर्गत शक्तियों का प्रयोग अभियोक्त्री को उसके पूर्व कथनों को परिवर्तित करने के लिए विवश करने हेतु पुनः बुलाने के लिये नहीं किया जा सकता है।

Shyam @ Bagasram v. State of M.P.

Order dated 11.07.2018 passed by the High Court of Madhya Pradesh in Criminal Revision No. 2771 of 2018, reported in ILR (2018) MP 1805

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286. CRIMINAL PROCEDURE CODE, 1973 – Section 319

(i) Whether Court can exercise power u/s 319 of the Code to summon an accused merely on the basis of statement made in examination-in-chief of witness? Held, Yes – Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross examination.

(ii) Summoning of additional accused – Where Court has not impleaded a person whose name has been mentioned in FIR as accused on the basis of protest petition filed by complainant, the Court by virtue of Section 319 of the Code, can still implead him.

दण्ड प्रक्रिया संहिता, 1973 – धारा 319

(i) क्या साक्षी के मात्र मुख्य परीक्षण के कथनों के आधार पर न्यायालय किसी अभियुक्त को समन करने हेतु संहिता की धारा 319 के अंतर्गत शक्ति का प्रयोग कर सकता है? अभिनिर्धारित, हां – न्यायालय को समन हेतु प्रस्तावित अभियुक्त के विरूद्ध साक्ष्य को प्रतिपरीक्षण के द्वारा परखने की आवश्यकता नहीं है।

(ii) अतिरिक्त अभियुक्त को आहूत करना – जब न्यायालय, परिवादी द्वारा दायर विरोध याचिका के आधार पर ऐसे व्यक्ति को, जिसका नाम प्रथम सूचना प्रतिवेदन में दर्ज किया गया था अभियोजित नहीं करती, तब भी न्यायालय संहिता की धारा 319 में प्रदत्त शक्ति के आधार पर उसे अभियोजित कर सकता है।

Rajesh and others v. State of Haryana

Judgment dated 01.05.2019 passed by the Supreme Court in Criminal Appeal No. 813 of 2019, reported in 2019 (2) Crimes 199 (SC)

Relevant extracts from the judgment:

Considering the law laid down by this Court in the case of ***Hardeep Singh v. State of Punjab, (2014) 3 SCC 92,*** and the observations and findings referred to and reproduced herein above, it emerges that (i) the Court can exercise the

power under Section 319 of the CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 of the CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

In the case of ***S. Mohammed Ispahani v. Yogendra Chandak, (2017) 16 SCC 226*** in para 35, this Court has observed and held as under:

> "35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this Section gets triggered when during the trial some evidence surfaces against the proposed accused."

Thus, even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial Court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 of the CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

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287. CRIMINAL PROCEDURE CODE, 1973 – Section 437

Whether release of accused on bail under Section 437(6) of the Code after expiration of statutory period of sixty days is mandatory? Held, No – Passing of an order under the provision is mandatory, but not grant of bail – Magistrate has discretion to refuse bail.

[Adverse findings given in the cases of *Ram Kumar @ Raj Kumar Rathore v. State of M.P., 2000(2) MPLJ 43; Rajendra son of Rajaram Pal v. State of M.P., 2002(5) MPLJ 301* and *Damodar Singh Chouhan v. State of M.P., 2005*

(II) MPWN 138 **(all single benches) held not to be a good law and the law laid down in the cases of** *Asit @ Nakta v. State of M.P., M.Cr.C. No. 7059 of 2015, decided on 30.9.2015* **and** *Manoj Agrawal v. State of M.P., 2001 (1) MPHT 70* **approved.]**

दण्ड प्रक्रिया संहिता, 1973 - धारा 437

क्या संहिता की धारा 437 (6) के अधीन 60 दिवस की सांविधिक अवधि की समाप्ति उपरांत अभियुक्त को जमानत पर छोड़ा जाना आबद्धकर है? अभिनिर्धारित, नहीं - इस प्रावधान के अधीन आदेश पारित किया जाना आबद्धकर है न कि जमानत दिया जाना। मजिस्टे[q]ट को जमानत अस्वीकार करने का विवेकाधिकार है। [***राम कुमार उर्फ राज कुमार राठौर वि. मध्यप्रदेश राज्य, 2000 (2) एमपीएलजे 43, राजेन्द्र पिता राजाराम पाल वि. मध्यप्रदेश राज्य, 2002 (5) एमपीएलजे 301*** एवं ***दामोदर सिंह चौहान वि. मध्यप्रदेश राज्य, 2005 (2) एमपीडब्ल्यू एन 138*** (सभी एकलपीठ) के मामलों में दिए गए प्रतिकूल निष्कर्ष अच्छी विधि नहीं होना अवधारित किया गया तथा ***आसित उर्फ नक्ता वि. मध्यप्रदेश राज्य, एमसीआरसी क्र. 7059, 2015 निर्णित दिनांक 30.09.2015*** एवं ***मनोज अग्रवाल वि. मध्यप्रदेश राज्य, 2001 (1) एमपीएचटी 70*** के मामलों में प्रतिपादित विधि अनुमोदित की गई।]

Devraj Maratha Dillu v. the State of Madhya Pradesh

Order dated 16.03.2018 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 2668 of 2018, reported in 2019 (2) ANJ (MP) 41 (DB)

Relevant extracts from the order:

Upon a bare perusal of the provision and a close scrutiny thereof, it is noted that sub-section (6) of Section 437 of the Code is in two parts. First- if, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate. Thus, in the first part if in any case triable by a Magistrate, the alleged offence is non-bailable and the trial is not concluded within a period of sixty days from the first date fixed for taking evidence, in case, such person shall be released on bail to the satisfaction of the Magistrate. Still the discretion has been conferred to the Magistrate to record his satisfaction and after recording reasons in writing, the Magistrate can refuse the bail. The issue cropped up for consideration is that whether the aforesaid provision is mandatory to release the accused on bail after expiration of statutory period and the Magistrate has no discretion to refuse bail.

Before adverting to the provision of Section 437(6) of the Code, it is condign to consider the provisions of Section 167(2) of the Code and its interpretation by the Courts. In the case of ***Union of India through Central Bureau of Investigation***

v. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav, (2014) 9 SCC 457 while considering the proviso of Section 167(2) of the Code where the accused was released on bail solely on the ground that he was entitled to the benefit under the proviso of Section 167(2) of the Code, it has been held that the Magistrate under the provisions of sub-section (2) of Section 167 of the Code, may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days. Where the investigation relates to an offence punishable for both – imprisonment for life or imprisonment for a term not less than 10 years and 60 days where the investigation relates to any other offence. On expiry of aforesaid period of 90 days or 60 days, as the case may be, indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completion of the investigation within the prescribed period and the accused is entitled to be released on bail. In that case, there is no discretion left with the Court not to release the accused on bail.

The language employed in sub-section (6) of Section 437 of the Code is different from sub-section (2) of Section 167 of the Code that on expiry of the period of 60 or 90 days, as case may be, the accused person shall be released on bail, unless for reasons to be recorded in writing by the Magistrate. In the case of ***Ram Kumar @ Raj Kumar Rathore v. State of M.P., 2000 (2) MPLJ 43*** the Single Bench held that the provision of Section 437(6) of the Code is mandatory, unless bail is rejected for the reasons to be recorded. In the case of ***Rajendra son of Rajaram Pal v. State of M.P., 2002 (5) MPLJ 301*** another Single Bench of this Court held that the provision of Section 437(6) of the Code is mandatory and if the Court is of the opinion, that the accused is not entitled for bail, then it is obligatory on the part of the Court to assign reason for refusing bail. In case of ***Damodar Singh Chouhan v. State of M.P., 2005 (II) MPWN 138*** the Single Bench held that the provision of Section 437 (6) is mandatory. In the case of ***Asit @ Nakta v. State of M.P., M.Cr.C. No. 7059 of 2015, decided on 30.9.2015*** the Single Bench of this Court held that the provision of Section 437(6) of the Code is not mandatory but directory. The Magistrate has full power to refuse or grant of bail for the reasons to be recorded in writing. The learned Single Judge disagreed from the view expressed in the cases of ***Ram Kumar @ Raj Kumar Rathore*** *(supra)* ***and Rajendra son of Rajaram Pal*** *(supra)*.

Learned counsel appearing for the applicant submitted that in sub-section (6) of Section 437 of the Code the word 'shall' has been used and, therefore, the provision has to be construed as mandatory. In case of non-conclusion of the trial within a period of 60 days from the first date for taking evidence in the case, it is mandatory for the Magistrate to release the accused on bail.

The use of word "may" or "shall" is not conclusive. Whether the provision is merely directory or mandatory, was examined by Hon'ble the Supreme Court in a judgment reported as ***Dhampur Sugar Mills Ltd. v. State of U.P., (2007) 8 SCC 338*** wherein it has been held that whether the provision is directory or mandatory

is required to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the the provision is clothed. The Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue.

In another judgment reported as ***Bachahan Devi v. Nagar Nigam, Gorakhpur, (2008) 12 SCC 372*** the Court held that the use of the words "may" and "shall" may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect.

On a plain reading of the provision of Section 437(6) of the Code it is graphically clear that it is mandatory in the sense that a person should not be kept in jail ordinarily if a trial for non-bailable offence which is triable by the Magistrate, is not concluded within a period of sixty days from the date fixed for evidence. Provided, it is proved that the concerned person was in jail for a period of sixty or ninety days, as the case may be. However, passing of an order under Section 437(6) of the Code appears to be mandatory, but not grant of bail. Sub-section (6) of Section 437 of the Code per se show that if there be any reason for refusing the bail, the Magistrate has to record reasons in writing. Thus, recording of reasons in writing is also mandatory and the reasons would be justiciable in an appropriate criminal or extraordinary jurisdiction under Section 482 of the Code. No fetters have been put on the Magistrate to exercise jurisdiction under Section 437(6) of the Code and bail can be refused for the reasons to be recorded in writing. Magistrate has full power to take into consideration -

(i) the nature of allegations;

(ii) whether the delay is attributable to the accused or to the criminal prosecution; and

(iii) criminal antecedents of the accused or any other justiciable reason.

In view of delineation of facts and law elaborated in a greater detail herein-above, we hold that the law laid down in the cases of ***Ram Kumar @ Raj Kumar Rathore v. State of M.P., 2000 (2) MPLJ 43; Rajendra son of Rajaram Pal v. State of M.P., 2002 (5) MPLJ 301;*** and ***Damodar Singh Chouhan v. State of M.P., 2005 (II) MPWN 138*** wherein it has been held that the provisions of Section 437(6) of the Code are mandatory in nature and the accused is entitled for bail, if the trial is not concluded by the Magistrate within the statutory period and the Magistrate will not have any discretion to refuse bail is not a good law and the law laid down in the case of ***Asit @ Nakta v. State of M.P., M. Cr. C. No. 7059 of 2015, decided on 30.9.2015*** and ***Manoj Agrawal v. State of M.P., 2001 (1) MPHT 70*** is approved.

In view of preceding analysis and enunciation of law governing the field, the reference is answered as under:

(a) Provision envisaged in sub-section (6) of Section 437 of the Code is mandatory in the sense that the Magistrate is required to exercise his

power of granting bail after the statutory period, if the trial is not concluded within that, however, passing of an order under Section 437(6) of the Code is mandatory, but not grant of bail.

(b) The Magistrate is vested with full power to take into consideration-

(i) the nature of allegations;

(ii) whether the delay is attributable to the accused or to the prosecution; and

(iii) criminal antecedents of the accused or any other justiciable reason, while refusing to grant bail.

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288. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 397

Whether an order passed under Section 437(6) of Code of Criminal Procedure is revisable? Held, Yes – The order affects or adjudicates the rights of the accused – It cannot be said to be interlocutory order and so can be revised.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 437 एवं 397

क्या दण्ड प्रक्रिया संहिता की धारा 437 (6) के अधीन पारित आदेश पुनरीक्षण योग्य है? अभिनिर्धारित, हाँ – ऐसा आदेश अभियुक्त के अधिकारों को प्रभावित अथवा अवधारित करता है – इसे अंतवर्ती नहीं कहा जा सकता है और इसलिये पुनरीक्षित किया जा सकता है।

Monu @ Lakhan v. The State of Madhya Pradesh

Order dated 06.02.2019 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 3386 of 2019 (Unreported)

Relevant extracts from the order:

This Court has gone through the record and arguments put forth by the learned counsel for both the parties. It appears from the record that learned Sessions Judge rejected the applicant's revision without going into the merits of the case observing that the order was an interim order against which revision was not maintainable.

Whether the order passed by the learned Magistrate under Section 437 (6) of CrPC is revisable or not, this court in the case of ***Jitendra Jaiswal v. State of M.P. in M.Cr.C. No. 502621, 2018 vide order dated 28.01.2019*** observed as under:-

> "the parameters relevant for the purpose of considering the bail application under Section 437(6) of Cr.P.C. is different from the parameters relevant for considering the bail application under section 437(1) and 439 (1) of Cr.P.C. The Section 437 (6) of Cr.P.C. provides a right in favour of the accused to secure bail where the trial could not be concluded within a period of 60 days, from the first date

fixed for taking evidence with some restrictions. The order passed by the magistrate under section 437(6) of Cr.P.C. affects or adjudicate the rights of the accused. So it cannot be said to be an interlocutory."

The Apex Court in the case of ***Amar Nath v. State of Haryana, (1977) 4 SCC 137*** interpreting the provisions of section 397(2) of Cr.P.C. held as under:-

> "It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."

Which shows that any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory.

Sub section 6 of Section 437 of CrPC mandates that in case of nonbailable offence, which is being tried by a Magistrate and where the trial has not concluded within a period of sixty days from the first date fixed for taking evidence in the case and the accused has remained in custody during whole of the said period, he becomes entitled to be released on bail. Though, the Magistrate can decline the benefit of aforesaid provisions by recording reasons in writing. That section on one side provides an absolute right in favour of the applicant to secure bail under Section 437(6), but, at the same time, puts a check on the said right by conferring jurisdiction upon the Magistrate to reject the applications for the reasons to be recorded in writing.

The stage contemplated under Section 437(6), is accrued after filing of charge-sheet and framing of charge when trial commences and the accused prefers an application after lapse of 60 days from first date fixed for taking

evidence. Reasons for rejection of application under sub-section (6) of the said Section have to be different and little more serious than the reasons that may be relevant for rejection for bail at the initial stage.

A coordinate bench of this Court in ***M.Cr.C. No.12453/2016 - Bhagwan and others v. State of M.P,*** observed:

> "It is obvious that there needs to be something more for denying bail under sub-section (6) than mere grounds on which the bail may be refused under sub-section (1), for the simple reason that the accused would be in jail after 2 months from the first date of evidence only where the grounds for refusing bail under section 437(1) are in existence. If same reasons are cited again for denying bail under sub-section 437(6), it would render the provision under sub-section (6) of section 437 otiose".

A coordinate Bench of this Court in the case of ***M.Cr.C No. 13444/2018 Pramod Kumar Vishwakarma v. State of Madhya Pradesh, Order dated 19.04.2018*** also observed that:

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

The Division Bench of this Court in the case of ***Devraj Maratha @ Dillu v. State of Madhya Pradesh, 2018 (2) MPLJ (Cri) 386*** while answering the reference of a Single bench after considering earlier judgments of this Court held as under:-

> "On a plain reading of the provision of Section 437(6) of the Code it is graphically clear that it is mandatory in the sense that a person should not be kept in jail ordinarily if a trial for non-bailable offence which is triable by the Magistrate, is not concluded within a period of sixty days from the date fixed for evidence."
>
> Which shows that the parameters relevant for the purpose of considering the bail application under Section 437(6) of

Cr.P.C. is different from the parameters relevant for considering the bail application under section 437(1) and 439(1) of Cr.P.C. The Section 437(6) of Cr.P.C. provides a right in favour of the accused to secure bail where the trial could not be concluded within a period of 60 days, from the first date fixed for taking evidence with some restrictions. The order passed by the magistrate under section 437(6) of Cr.P.C. affects or adjudicate the rights of the accused. So it cannot be said to be an interlocutory."

So, in the considered opinion of this Court, learned Sessions Judge committed mistake in rejecting the applicant's revision without going in to the merits of the case with the observation that the impugned order was an interim order and hence revision was not maintainable against it. So, the petition is allowed and the order dated 14.01.2019 passed by learned Sessions Judge, Khandwa in Criminal Revision No.107/2018 is hereby set-aside and the case is remanded back to the learned Sessions Judge with the direction to pass a reasoned order after hearing both the parties.

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***289. CRIMINAL PROCEDURE CODE, 1973 – Section 439**

INDIAN PENAL CODE, 1860 – Section 376

BAIL :

Granting of bail in cases of rape on pretext of marriage – Held, allegation of rape on the pretext of marriage can only be decided after the evidence is led by the parties – Accused persons entitled to be released on bail. [*Deepak Gulati v. State of Haryana, (2013) 7 SCC 675,* relied on]

दण्ड प्रक्रिया संहिता, 1973 – धारा 439

भारतीय दण्ड संहिता, 1860 – धारा 376

जमानतः

विवाह के आश्वासन में बलात्संग के मामलों में जमानत प्रदान किया जाना – अभिनिर्धारित, विवाह के आश्वासन पर बलात्संग के अभियोग का विनिश्चय केवल पक्षकारों द्वारा प्रस्तुत साक्ष्य के पश्चात् ही किया जा सकता है – अभियुक्तगण, जमानत पर छोड़े जाने के हकदार है। [***दीपक गुलाटी वि. हरियाणा राज्य,*** *(2013) 7* ***एससीसी*** *675,* ***अवलंबित***]

Lalji Chaudhary v. State of M.P.

Order dated 21.06.2018 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 18356 of 2018, reported in ILR (2018) MP 1830

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290. EVIDENCE ACT, 1872 – Sections 3 and 118

APPRECIATION OF EVIDENCE:

(i) Eye witnesses – Omission of name of one of the accused in the statement of one eye-witness – Effect of? Held, mere fact that one eye-witness did not mention name of the accused cannot lead to the inference that accused was not involved in the incident – There may be several reasons due to which, he could not have seen accused.

(ii) Contradiction between inquest report and post-mortem report; effect of – Held, inquest report is merely opinion of officer recording it by seeing the injury from bare eyes – This opinion does not belies the prosecution case otherwise proved by eye-witnesses.

(iii) Appreciation of evidence – False implication; defence of – Prompt investigation negates the chances of false implication – Incident took place at 09:00 a.m., *fardbeyan (Dehati Nalishi)* was recorded on the spot at 09:30 a.m. followed by inquest report and seizure memo, post-mortem was conducted at 12:10 p.m., FIR was sent to court on the next day – Held, there was no opportunity for the informant to implicate others leaving the real culprits.

साक्ष्य अधिनियम, 1872 – धाराएं 3 एवं 118

साक्ष्य का मूल्यांकनः

(i) चक्षुदर्शी साक्षी – किसी एक चक्षुदर्शी साक्षी के कथनों में एक अभियुक्त के नाम के लोप का – प्रभाव – अभिनिर्धारित, मात्र इस तथ्य से कि एक चक्षुदर्शी साक्षी ने अभियुक्त के नाम का उल्लेख नहीं किया, यह निष्कर्ष नहीं निकाला जा सकता है कि अभियुक्त घटना में संलिप्त नहीं था – ऐसे अनेक कारक हो सकते हैं जिनके कारण वह अभियुक्त को न देख सका हो।

(ii) मृत्यु समीक्षा रिपोर्ट एवं शव परीक्षण रिपोर्ट में विरोधाभास का प्रभाव – अभिनिर्धारित, मुत्यु समीक्षा रिपोर्ट नग्न आंखों से क्षतियों को देखकर उसे अभिलिखित करने वाले अधिकारी का अभिमत मात्र है – ऐसा अभिमत चक्षुदर्शी साक्षियों द्वारा अन्यथा साबित अभियोजन के मामले को मिथ्या सिद्ध नहीं कर सकता है।

(iii) साक्ष्य का मूल्यांकन – मिथ्या संलिप्त किये जाने का बचाव – त्वरित अन्वेषण मिथ्या संलिप्त किए जाने की संभावना को नकारता है – घटना प्रातः 09:00 बजे घटी, फर्दबयान (देहाती नालिशी) घटनास्थल पर प्रातः 09:30 बजे ही अभिलिखित किए गए जिसके तत्काल पश्चात मृत्यु समीक्षा रिपोर्ट एवं जप्ती पंचनामा तैयार किया गया, शव परीक्षण दोपहर 12:10 बजे किया गया, प्रथम सूचना रिपोर्ट न्यायालय को अगले दिन ही भेज दी गई – अभिनिर्धारित, मुख्य दोषी को बचाकर किसी अन्य को संलिप्त करने का सूचनाकर्ता के पास कोई अवसर नहीं था।

Shio Shankar Dubey and ors. v. State of Bihar

Judgment dated 09.05.2019 passed by the Supreme Court in Criminal Appeal No. 1617 of 2014, reported in AIR 2019 SC 2275

Relevant extracts from the judgment:

The submission of the learned counsel for the appellant that PW5, who is held to be an eye witness has in his statement only taken names of the four accused, who, according to him, were seen running away from the spot. It is submitted that PW5 did not take the name of Ram Pravesh Dubey, the appellant No.2. The statement of PW5 has been brought on the record. PW5 in his statement stated that at 9 O'clock in the morning, he had gone to Sasaram and when he went about fifty steps south to Rouza Road from G.T. Road, he saw the accused persons namely Ram Nandan Dusadh, Dudnath Dusadh, Jamadar Dusadh and Shankar Dubey fleeing on Rouza Road going from the west to the east. It is true that in his statement, he mentioned names of only four persons, who were seen fleeing on Rouza Road. The mere fact that he did not mention name of Ram Pravesh Dubey cannot lead to the inference that Ram Pravesh Dubey was not involved in the incident. There may be several reasons due to which, he could not see Ram Pravesh Dubey. When PW11 and PW13, whose evidence has been relied by the trial court as well as High Court, have categorically proved the presence of Ram Pravesh Dubey and his participation in the occurrence. The mere fact that PW5 did not see Ram Pravesh Dubey fleeing is not conclusive nor on that basis, we can come to any inference that Ram Pravesh Dubey was not involved in the occurrence.

Now, we come to the another submission of the appellants that in the inquest report, it was mentioned that pellet from back in the head has come out of the mouth, but there was no bullet injury found in the post mortem report.

A perusal of the injuries, which have been noticed in the post mortem report indicates that there was fracture of occipital bone in two multiple pieces at back of the head. Some fragments of bone had pierced into brain covering. Multiple fracture of right mallar bone, nosal bone and right maxilla has also been noticed. The nature of the injuries, which were found in the post mortem report indicates that on seeing the injuries, the officers recording the inquest report thought that since occipital bone in two multiple pieces at back of head have been fractured and some fragments of bone had pierced into brain covering, the bullet entered from the back side of the head and came out of the mouth, which is noticed in the inquest report and the officer writing the inquest report made his opinion by seeing the injury by bare eyes. The nature of injuries especially injury in the back of head led him to believe that bullet entered from back of the head and came out of the mouth. The above impression recorded in the inquest report was only opinion of person preparing inquest report and due to the above impression recorded in the inquest report and no bullet having been found in the post mortem report, it cannot be concluded that incident did not happen in a

manner as claimed by the prosecution. The mention of bullet injury was only an opinion of the officer writing the inquest report and in no manner belies the prosecution case as proved by eyewitnesses PW11 and PW13.

There is one more fact, which needs to be noted in the present case. The occurrence is of 9.00 a.m. on 16.05.1980 and within half an hour of the occurrence, police officials from Police Station, Sasaram arrived on the spot, a *fardbeyan* of the informant, PW11 was recorded on the spot itself by the police officials. At 9.30 a.m., the *fardbeyan* has been proved. The inquest report and the seizure report were provided at 10.00 a.m. and 10.15 a.m. respectively on the spot. FIR was sent to the court on 17.05.1980. Trial court has noticed the entire sequence of the events and has rightly come to the conclusion that there was no opportunity for the informant to implicate other leaving the real culprits.

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291. EXCISE ACT, 1915 (M.P.) – Section 47-D

CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457

(i) Whether Magistrate is justified to grant opportunity of hearing to prosecution, where application is filed to release the seized vehicle under the Act of 1915? Held, Yes – Any order passed without giving notice to another party is against the principles of natural justice and is *void ab initio*.

(ii) Relevant date for consideration of bar created under Section 47-D of the 1915 Act for release of seized vehicle – Held, relevant date for exercising jurisdiction u/s 451 and 457 of the Code to release the seized vehicle under the 1915 Act is the date of hearing of application or passing the order and not the date of filing of the application.

आबकारी अधिनियम, 1915 (म.प्र.) – धारा 47-घ

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 451 एवं 457

(i) क्या वाहन को निर्मुक्त किये जाने हेतु संस्थित आवेदन पर मजिस्ट्रेट द्वारा अभियोजन को सुनवाई का अवसर प्रदान किया जाना न्यायोचित है? अभिनिर्धारित, हाँ – दूसरे पक्षकार को सूचना दिये बिना पारित कोई भी आदेश नैसर्गिक न्याय के सिद्धातों के विरूद्ध है तथा आरंभतः शून्य है।

(ii) अभिगृहीत वाहन की निर्मुक्ति हेतु 1915 के अधिनियम की धारा 47-घ के अधीन अधिरोपित वर्जना के विचार हेतु सुसंगत तिथि – अभिनिर्धारित, 1915 के अधिनियम के अधीन अभिगृहीत वाहन की निर्मुक्ति हेतु संहिता की धाराओं 451 तथा 457 के अंतर्गत क्षेत्राधिकार का प्रयोग करने की सुसंगत तिथि आवेदन की सुनवाई की तिथि या आदेश पारित होने की तिथि है न कि आवेदन संस्थित किये जाने की तिथि।

Anil Dhakad v. State of M.P.

Order dated 05.07.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in M.Cr.C. No. 6500 of 2018, reported in ILR (2018) MP 1835

Relevant extracts from the order:

A plain reading of Section 47-D of the Act, 1915 shows that the Section mandates that the court having jurisdiction to try offences covered by the Clause-(a) or (b) of Sub- Section 1 of Section 34 of the Act, 1915 shall not make any order about the disposal, custody etc. of the vehicle after it has received intimation of initiation of confiscation proceedings from the Collector. It transpires from unambiguous provision of the Act that if at the time of hearing on the application or at the time of passing of the order, the concerned Magistrate has information before him regarding initiation of confiscation proceeding then this provision takes away his jurisdiction and he cannot exercise powers under Section 451 & 457 of Cr.P.C. because the provisions of Section 47-D of the Act, 1915 has overriding effect over the general provisions of Section 451 and 457 of Cr.P.C., thus, there is no doubt that relevant date of exercising jurisdiction under Sections 451 & 457 of Cr.P.C. with regard to the disposal of property seized under the provisions of Clause (a) or (b) of Sub Section (1) of Section 34 of the Act, 1915 is the date of hearing of the application or passing the order on the same and not the date of filing of the application.

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292. FAMILY COURTS ACT, 1984 – Section 19

HINDU MARRIAGE ACT, 1955 – Section 24

(i) Appeal; maintainability of – Whether an order of maintenance *pendente lite* under Section 24 of HMA is appealable? Held, Yes. [*Smt. Kiran Bala Shrivastava v. Jai Prakash Shrivastava, 2005 (23) LCD 1 (All HC)* relied upon]

(ii) Maintenance *pendente lite* – Quantum of – ₹ 4,000/- per month for a woman and her infant child held to be deficient looking to the standard of living and rising price index – Notification issued under the Minimum Wages Act, 1948 for an unskilled labour took as guidance for ascertaining the minimum needs of a person to live a life of dignity.

कुटुम्ब न्यायालय अधिनियम, 1984 – धारा 19

हिन्दू विवाह अधिनियम, 1955 – धारा 24

(i) अपील की पोषणीयता – क्या हिन्दू विवाह अधिनियम की धारा 24 के अधीन पारित वादकालीन भरण-पोषण आदेश अपील योग्य है ? – अभिनिर्धारित, हां। [***श्रीमती किरण बाला श्रीवास्तव वि. जय प्रकाश श्रीवास्तव, 2005 (23) एलसीडी 1*** (इला. उच्च न्यायालय) अनुसरित]

(ii) वादकालीन भरण-पोषण की दर-रहन-सहन के स्तर एवं बढ़ते मूल्य सूचकांक के आलोक में एक महिला और उसके शिशु के लिए मात्र ₹ 4,000/- प्रति माह का भरण-पोषण अपर्याप्त पाया गया। एक अकुशल श्रमिक के सम्बन्ध में न्यूनतम वेतन अधिनियम, 1948 के अधीन जारी अधिसूचना को एक व्यक्ति के गरिमापूर्ण जीवन जीने के लिए न्यूनतम जरूरतों का पता लगाने के लिए मार्गदर्शन के रूप में लिया गया।

Reeta Bais (Smt.) v. Vishwapratap Singh Bais

Judgment dated 30.08.2017 passed by the High Court of Madhya Pradesh (Bench Gwalior) in First Appeal No. 196 of 2017, reported in ILR (2017) MP 2441 (DB)

Relevant extracts from the judgment:

Learned counsel for the appellant relying upon a decision of the Full Bench of Allahabad High Court in the case of ***Smt. Kiran Bala Shrivastava v. Jai Prakash Shrivastava, 2005 (23) LCD 1*** submits that the nature, character and colour of an order under Section 24 of the Hindu Marriage Act is of a final order as it decides the rights and liabilities of the wife in a substantial manner and, therefore, can very well be treated akin to "judgment". By relying the Full Bench decision, it is submitted that the instant appeal under Section 19 of the Family Courts Act is maintainable.

This Court is of the considered view that from the current standard of living and rising price index the amount of compensation of ₹ 4000/- per month is deficient to sustain a woman as well as her infant child.

To *prima facie* ascertain the minimum essentials required to allow an individual to survive and live a life of dignity, this court deems it appropriate to seek guidance from the Notification No. S.O. 2413(E) dated 28th July, 2017 of the Ministry of Labour and Employment issued under the Minimum Wages Act, 1948 prescribing minimum rates of wages for unskilled labourer as ₹ 350/- per day.

This Court is of the considered view that taking a modest figure of ₹ 200/- per day for the appellant-wife and ₹ 100/- per day for her infant child would suffice to enable them to sustain a life of dignity allowing them to meet the requirement of necessity and a little bit of comfort.

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***293. FOREST LAWS:**

Release of seized vehicle in forest offences – Held, in forest offences, generally seized forest produce and vehicle should not be released – But, if Court is inclined to release the seized vehicle, it must specify the reasons and must insist upon furnishing of bank guarantee as minimum condition – Release of such vehicle should not be dealt with liberal approach. [*State of Karnataka v. K. Krishnan, (2000)7 SCC 80,* relied on]

वन विधिः

वन अपराधों में अभिगृहीत वाहन की निर्मुक्ति – अभिनिर्धारित, सामान्यतया वन अपराधों में अभिगृहीत वाहन तथा वनोपज को निर्मुक्त नहीं किया जाना चाहिए – परन्तु, यदि न्यायालय अभिगृहीत वाहन को निर्मुक्त करने की ओर अग्रसर होता है तो उसे कारण दर्शाने चाहिए तथा न्यूनतम शर्तों पर बैंक गारंटी देने को कहना चाहिए – उदार दृष्टिकोण अपनाते हुए ऐसे वाहन को निर्मुक्त नहीं करना चाहिए। [***कर्नाटक राज्य वि. के. कृष्णन,*** *(2000) 7* ***एससीसी*** *80,* अवलंबित]

Surendra Kumar Tiwari v. State of M.P.

Order dated 19.06.2018 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 16455 of 2018, reported in ILR (2018) MP 1826

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294. HINDU LAW:

TRANSFER OF PROPERTY ACT, 1882 – Sections 8 and 54

LIMITATION ACT, 1963 – Section 27, Articles 64 and 65

(i) Hindu widow – Property rights – Nature of rights before Hindu Succession Act, 1956 explained – Under Hindu Law, a widow took a limited estate – Alienation of limited estate by widow, when permissible? Held, only for necessity or benefit of estate – Any alienation except for necessity or benefit is a nullity.

(ii) Hindu Law – Right of reversioners – Reversioners have no vested interest in widow's estate – They have mere chance of succession – They are entitled to get the property left behind on the date of death of widow.

(iii) Limitation – Reversioner's suit for possession – Reversioner may sue for possession even without setting aside alienation – Period of limitation is 12 years from the death of widow as per Article 141 of the Limitation Act, 1908 (now Article 65 of the 1963 Act) – Instantly, propositus 'R' died in 1907 leaving behind predeceased wife's daughter 'V' and second wife 'S' – 'S' sold the property in 1913 to her brother 'SR' – 'SR' sold that property in 1954 to defendants – 'S' died in 1938 – 'V's' daughter 'J' sold the same property to plaintiffs in 1955 – Held, 'V' being reversioner, could have ignored sale of 1913 as not binding upon him – But period of limitation for suit of possession started in 1938 upon death of 'S' – 12 years expired in 1950 and thus, suit by plaintiffs is barred by limitation.

(iv) Adverse possession – Effect of – Once an owner has lost his property by operation of adverse possession, any transfer thereafter, would not convey any right – ***Nemo dat quod non habet***

– In present case, transfer by 'J' in 1955 would not convey any right to plaintiffs.

हिन्दू विधि:

संपत्ति अंतरण अधिनियम, 1882 - धाराएं 8 एवं 54

परिसीमा अधिनियम, 1963 - धारा 27 एवं अनुच्छेद 64 व 65

(i) हिन्दू विधवा - संपत्ति में अधिकार - हिन्दू उत्तराधिकार अधिनियम, 1956 के पूर्व अधिकार की प्रकृति की व्याख्या की गई - हिन्दू विधि के अंतर्गत विधवा एक सीमित संपदा प्राप्त करती थी - विधवा द्वारा सीमित संपदा का हस्तांतरण; कब अनुज्ञेय है? अभिनिर्धारित, मात्र आवश्यकता अथवा संपदा के लाभ हेतु ही - आवश्यकता अथवा लाभ के सिवाय अन्य हस्तांतरण शून्य है।

(ii) हिन्दू विधि - उत्तरभोगी का अधिकार - उत्तरभोगी का विधवा की संपदा में कोई सांपत्तिक हित नहीं होता है - उन्हें मात्र संभाव्य उत्तराधिकार प्राप्त है - वे विधवा की मृत्यु दिनांक को उसके द्वारा छोड़ी गई संपत्ति प्राप्त करने के अधिकारी होते हैं।

(iii) परिसीमा - आधिपत्य हेतु उत्तरभोगी का वाद - उत्तरभोगी हस्तांतरण को अपास्त कराए बिना भी आधिपत्य हेतु वाद ला सकता है – परिसीमा अवधि, परिसीमा अधिनियम, 1908 के अनुच्छेद 141 (अब 1963 के अधिनियम का अनुच्छेद 65) के अनुसार, विधवा की मृत्यु दिनांक से 12 वर्ष है - हस्तगत मामले में, प्रस्तावक 'R' की मृत्यु 1907 में उसकी पूर्व पत्नी की पुत्री 'V' तथा द्वितीय पत्नी 'S' के जीवन काल में हो गई - 'S' ने 1913 में संपत्ति अपने भाई 'SR' को विक्रय कर दी - 'SR' ने वह संपत्ति 1955 में प्रतिवादीगण को विक्रय कर दी - 'S' की मृत्यु 1938 में हुई - 'V' की पुत्री 'J' ने वही सम्पत्ति वादीगण को 1955 में विक्रय कर दी - अभिनिर्धारित, 'V' उत्तरभोगी होने के नाते 1913 में हुये विक्रय को स्वयं पर बंधनकारी न होने के कारण नजरअंदाज़ कर सकती थी - किन्तु आधिपत्य हेतु वाद के लिये परिसीमा काल 1938 में 'S' की मृत्यु पर प्रारंभ हुआ - 12 वर्ष का अवसान 1950 में ही हो गया - अतः वादीगण द्वारा संस्थित वाद परिसीमा द्वारा वर्जित है।

(iv) विरोधी आधिपत्य - प्रभाव - जब कोई स्वामी अपनी संपत्ति विरोधी आधिपत्य के कार्यान्वयन से खो देता है तो उसके पश्चात् किया गया कोई भी अंतरण किसी अधिकार का हस्तांतरण नहीं करेगा - कोई व्यक्ति अपने से बेहतर हक अंतरित नहीं कर सकता - वर्तमान मामले में 'J' द्वारा 1955 में किया गया अंतरण वादीगण को कोई अधिकार हस्तांतरित नहीं करता।

Gopalakrishna (Dead) by LRs. and others v. Narayanagowda (Dead) by LRs. and others

Judgment dated 03.04.2019 passed by the Supreme Court in Civil Appeal No. 1332 of 2008, reported in (2019) 4 SCC 592

Relevant extracts from the judgment:

There is no dispute that the parties are governed by the Madras School of Hindu Law. Thereunder, every female who succeeded as an heir whether to a male or a female, took a limited estate in the property inherited by her. As regards widow's estate, this statement is found in Mulla Hindu Law, 23rd Edn.:

> **"176. Widow's estate.**— A widow or other limited heirs is not a tenant for life, but is owner of the property inherited by her, subject to certain restrictions on alienation and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her, and she represents it completely. As stated in a Privy Council case, her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however limited; but so long as she is alive no one has any vested interest in the succession."

In ***Jaisri Sahu v. Rajdewan Dubey, AIR 1962 SC 83,*** this Court proceeded to hold that it could not be an inflexible proposition of law that whenever there is a usufructuary mortgage, the widow could not sell the property on the ground that it would deprive the reversioners of the right to redeem it. This is what the Court held:

> "… Such a proposition could be supported only if the widow is in the position of a trustee, holding the estate for the benefit of the reversioners, with a duty cast on her to preserve the properties and pass them on intact to them. That, however, is not the law. When a widow succeeds as heir to her husband, the ownership in the properties both legal and beneficial, vests in her. She fully represents the estate, the interest of the reversioners therein being only *spes successionis*. The widow is entitled to the full beneficial enjoyment of the estate and is not accountable to anyone. It is true that she cannot alienate the properties unless it be for necessity or for benefit to the estate, but this restriction on her powers is not one imposed for the benefit of reversioners but is an incident of the estate as known to Hindu law. It is for this reason that it has been held that when the Crown takes the property by escheat it takes it free from any alienation made by the widow of the last male holder which is not valid under the Hindu law, vide : ***Collector of Masulipatam v. Cavaly Vencata Narrainapah, (1859-61) 8 Moo IA 529***. Where, however, there is necessity for a transfer, the restriction imposed by Hindu law on her power to alienate ceases to operate, and the widow as owner has got the

fullest discretion to decide what form the alienation should assume. Her powers in this regard are, as held in a series of decisions beginning with ***Hunooman Persaud Panday v. Babooee Munraj Koonweree, (1854-57) 6 Moo IA 393*** those of the manager of an infant's estate or the manager of a joint Hindu family."

In ***Gogula Gurumurthy v. Kurimeti Ayyappa, (1975) 4 SCC 458,*** this Court reiterated the position of a Hindu widow and of greater relevance to us held no one has any vested interest in succession as long as the widow is alive:

> "… A Hindu widow is entitled to the full beneficial enjoyment of the estate. So long as she is not guilty of *willful* waste, she is answerable to no one. Her estate is not a life-estate, because in certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for reversioners. Within the limits imposed upon her, the female holder has the most absolute power of enjoyment and is accountable to no one. She fully represents the estate, and, so long as she is alive, no one has any vested interests in the succession. … It cannot be predicted who would be the nearest reversioner at the time of her death. It is, therefore, impossible for a reversioner to contend that for any loss which the estate might have sustained due to the negligence on the part of the widow he should be compensated from out of the widow's separate properties. He is entitled to get only the property left on the date of the death of the widow. The widow could have, during her lifetime, for necessity, including her maintenance alienated the whole estate."

The next thing which we must ascertain is who are the reversioners. The reversioners are the heirs of the last full owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited heir, if they be then living (as per para 175 of Mulla on Hindu Law). The nature of the interest of reversioners is also discussed under the same para, which is as follows:

> **175. (2) Interest of reversioners.**— The interest of a reversioner is an interest expectant on the death of a limited heir and is not a vested interest. It is a *spes successionis* or a mere chance of succession within the meaning of Section 6, Transfer of Property Act, 1882. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. A transfer of a *spes successionis* is a nullity, and it has no effect in law.

Under the Hindu law, a widow took a limited estate. She was not a trustee for the reversioners. She was owner of the properties. But she could alienate the property only for necessity or benefit of the estate.

Taking up the second question, we notice the following commentary of Mulla on Hindu Law:

> **"207. Reversioner's suit for possession and limitation.** — A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of immovable property from an alienee from her must be brought within 12 years from her death (the Indian Limitation Act, 1908, Schedule I, Article 141), and of movable property, within six years from that date.
>
> [Now see Articles 65, 109 and 113 of the new Limitation Act, 1963.]
>
> The reversioner may sue for possession without suing to have alienation set aside. The reason is that he is entitled to treat the unauthorised alienation as a nullity without the intervention of any court."

The learned counsel for the respondents has placed considerable reliance on the judgment of this Court in ***Kalipada Chakraborti v. Palani Bala Devi, AIR 1953 SC 125.*** Therein, this Court dealt with transfer of Shebeiti right by Hindu widow and the suit by reversioners challenging the same. This Court held as follows:

> "14. … But all doubts on this point were set at rest by the decision of the Privy Council itself in ***Jaggo Bai v. Utsava Lal, (1928-29) 56 IA 267*** and the law can now be taken to be perfectly well settled that except where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. This principle, which has been recognised in the Law of Limitation in this country ever since 1871, seems to us to be quite in accordance with the acknowledged principles of Hindu law. The right of reversionary heirs is in the nature of *spes successionis*, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be

destroyed by the adverse possession of a stranger. The contention raised by Mr Ghose as regards the general principle to be applied in such cases cannot, therefore, be regarded as sound.

15. … Ordinarily there are two limitations upon a widow's estate. In the first place, her rights of alienation are restricted and in the second place, after her death the property goes not to her heirs but to the heirs of the last male owner."

This view has been followed in the judgment in ***Ram Kristo Mandal v. Dhankisto Mandal, AIR 1969 SC 204.*** The law of limitation relevant at that point of It is this statutory framework which formed the basis of the law laid down by this Court which we have noticed.

Description of Suit	**Period of Limitation**	**Time from which period begins to run**
140. By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immovable property.	Twelve years.	When his estate falls into possession.
141. Like suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female.	Twelve years.	When the female dies.

It is this statutory framework which formed the basis of the law laid down by this Court which we have noticed.

It is next relevant to notice Section 28 of the Limitation Act:

"28. Extinguishment of right to property.— At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

In other words, while it was open to the reversioners to ignore an alienation made by a Hindu widow and the period of limitation would not start to run upon a transfer effected by the Hindu widow, undoubtedly, the period of limitation for filing a suit for recovery of possession would commence upon the death of the widow.

The property was alienated by Seethamma, the widow of Ramanna in favour of her brother Shrinivas Rao in the year 1913. Undoubtedly, it was open to the reversioner to proceed on the basis that such alienation does not bind her.

Thereafter, in 1938, Seethamma passed away. Even proceeding on the basis that Jankamma, the granddaughter of Ramanna was a reversioner, her estate in expectancy became vested in her, upon the death of Ramanna's widow, Seethamma in 1938. While it is true that it was open to the reversioner to ignore the sale deed executed by the widow, as not binding on her, as far as suit for recovery of possession, the law clearly provided for a period of 12 years and the period of limitation started with the death of the limited owner, namely, the widow in 1938. The time started ticking with the passing away of the widow in 1938. The period of limitation being 12 years, it ran out in 1950. With the running out of the period of limitation prescribed under the Limitation Act, 1908 (by Articles 140 and 141), the very right of the alleged reversioner Jankamma also came to an end. Thus, when she executed the sale in the year 1955 in favour of the appellants, she could not have conveyed any right. That apart, even for a moment, proceeding on the basis that period of limitation would start from 12 years from 1955 when the sale deed was executed in favour of the appellants by Jankamma even that period ran out in 1967.

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295. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 6

(i) Custody of minor child – Welfare of child is the supreme consideration while adjudicating custodial disputes – Court is not bound by mere legal right of parents or guardians.

(ii) Custody of minor child of 1½ years – Preferential right of father and relatives of deceased mother – Father being natural guardian, highly educated, having stable economic condition, have recovered from illness and is healthy and have support of his mother – Held, welfare of child will be best served by handing over the custody of child to father.

हिन्दू अप्राप्तवयता और संरक्षकता अधिनियम, 1956 – धारा 6

(i) अप्राप्तवय बालक की अभिरक्षा – अभिरक्षा संबंधी विवादों का निर्णयन करते समय बालक का कल्याण सर्वोत्तम आधार है – न्यायालय मात्र माता-पिता अथवा संरक्षक के विधिक अधिकार से बाध्य नहीं हैं।

(ii) 1½ वर्षीय अप्राप्तवय बालक की अभिरक्षा – पिता तथा मृत माता के नातेदारों के अधिमानी अधिकार – पिता नैसर्गिक संरक्षक है, उच्च शिक्षित, स्थिर आर्थिक दशा में, बीमारी से ठीक होकर स्वस्थ है एवं उसे अपनी मां का साथ भी उपलब्ध है – अभिनिर्धारित, बालक की अभिरक्षा उसके पिता को दिया जाना ही बालक के लिए कल्याणकारी होगा।

Tejaswini Gaud and ors. v. Shekhar Jagdish Prasad Tewari and ors.
Judgment dated 06.05.2019 passed by the Supreme Court in Criminal Appeal No. 838 of 2019, reported in AIR 2019 SC 2318

Relevant extracts from the judgment:

Welfare of the minor child is the paramount consideration. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in ***Nil Ratan Kundu v. Abhijit Kundu, AIR 2009 SC (Supp) 732,*** it was held as under:

> "In ***Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148*** the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.

The appellants submit that handing over of the child to the first respondent would adversely affect her and that the custody can be handed over after a few years. The child is only 1½ years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1½ years, her choice cannot be ascertained at this stage. With the passage of time, she

might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection. Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, we find that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

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296. HINDU SUCCESSION ACT, 1956 – Section 14

Property in possession of Hindu women at the commencement of the Act of 1956 – When becomes her absolute property? Held, Hindu woman must have acquired some kind of title over such property – She will not become full owner of the property when she was only a trespasser without any right to property – Mere possession without right would not confer full ownership after the commencement of Act of 1956.

हिन्दू उत्तराधिकार अधिनियम, 1956 – धारा 14

1956 के अधिनियम के लागू होने के समय हिन्दू महिला के आधिपत्य की संपत्ति – कब उसके पूर्ण स्वामित्व की हो जाती है? अभिनिर्धारित, हिन्दू महिला का ऐसी संपत्ति पर किसी न किसी प्रकार का स्वत्व होना चाहिए – संपत्ति में बिना किसी अधिकार के मात्र अतिचारी होने पर वह संपत्ति की पूर्ण स्वामी नहीं होगी – बिना अधिकार के मात्र आधिपत्य 1956 के अधिनियम के लागू होने के पश्चात् पूर्ण स्वामित्व प्रदत्त नहीं करेगा।

Ajit Kaur alias Surjit Kaur v. Darshan Singh (Dead) Through LRs. and ors.

Judgment dated 04.04.2019 passed by the Supreme Court in Civil Appeal No. 226 of 2010, reported in AIR 2019 SC 2122

Relevant extracts from the judgment:

The submission of learned counsel for the appellant that the appellant being in possession of the subject property in question at the time when Act, 1956 came into force and by virtue of Section 14 (1) of the Act became an absolute owner of the subject property and the decree being a nullity is inexecutable and it is a jurisdictional error against the policy of legislature, is without substance for the reason that Section 14 (1) of the Act, 1956 clearly envisage that the possession of the widow, however, must be under some vestige of a claim, right or title or under any of the devise which has been purported under the law. Indisputedly, in the instant case, the appellant was not holding any valid possession over the subject property and as already observed, opening of fiscal proceedings would not confer a right of acquisition by either of the devise which has been referred to under the explanation to Section 14 (1) of the Act, 1956.

The effect of Section 14, after the Act, 1956 came to be examined by a three Judge Bench of this Court in ***Eramma v. Veerupana and others, AIR 1966 SC 1879*** as under:

> "It was next contended by the appellant that she was admittedly in possession of half the properties of her husband Eran Gowda after he died in 1341-F and by virtue of Section 14 of the Hindu Succession Act she became the full owner of the properties and Respondents 1 and 2 cannot, therefore, proceed with the execution case. We are unable to accept this argument as correct. At the time of Eran Gowda's death the Hindu Women's Right to Property Act, 1937 (Act 18 of 1937) had not come into force. It is admitted by Mr. Sinha that the Act was extended to Hyderabad State with effect from February 7, 1953. It is manifest that at the time of promulgation of Hindu Succession Act, 1956 the appellant had no manner of title to properties of Eran Gowda.
>
> …….
>
> It is true that the appellant was in possession of Eran Gowda's properties but that fact alone is not sufficient to attract the operation of Section 14. The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the Explanation to Section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner" as given in the last portion of subsection (1) of Section 14 clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, Section 14 (1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called limited estate or "widow's estate" in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of

the last male holder. The Explanation to subsection (1) of Section 14 defines the word "property" as including "both movable and immovable property acquired by a female Hindu by inheritance or devise ...". Subsection (2) of Section 14 also refers to acquisition of property. It is true that the Explanation has not given any exhaustive connotation of the word "property" but the word "acquired" used in the Explanation and also in subsection (2) of Section 14 clearly indicates that the object of the section is to make a Hindu female a full owner of the property which she has already acquired or which she acquires after the enforcement of the Act. It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. It follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of female Hindu and it does not confer any title on a mere trespasser. In other words, the provision of Section 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property."

In the instant case, the appellant although was holding possession but not under any of the devise referred to under explanation to Section 14 (1) of the Act, 1956 and mere possession would not confer preexisting right of possession over the subject property to claim full ownership rights after the Act, 1956 came into force by operation of law and this what was considered and negated by the High Court in the impugned judgment.

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297. INDIAN PENAL CODE, 1860 – Section 149

Constructive liability; determination of – Held, to determine whether an accused, being a member of an unlawful assembly, is liable for a given offence, it needs to be seen whether such act was committed in prosecution of the common object of the assembly – And alternatively whether the members of the assembly knew that the offence was likely to be committed in prosecution of such common object – This has to be determined from the facts and circumstances of each case.

भारतीय दण्ड संहिता, 1860 – धारा 149

आन्वयिक दायित्व का निर्धारण – अभिनिर्धारित, यह निर्धारित करने के लिये कि विधिविरूद्ध जमाव का सदस्य होने के कारण क्या अभियुक्त किसी अपराध के लिये दायी है, यह देखा जाना आवश्यक है कि क्या वह कृत्य जमाव के सामान्य उद्देश्य के

अग्रसरण में कारित किया गया था – तथा विकल्पतः क्या जमाव के सदस्यगण जानते थे कि ऐसे सामान्य उद्देश्य के अग्रसरण में अपराध कारित किया जाना संभाव्य था – इसे प्रत्येक प्रकरण के तथ्यों और परिस्थितियों के आधार पर निर्धारित किया जाना चाहिए।

Bal Mukund Sharma alias Balmukund Chaudhry and others v. State of Bihar

Judgment dated 16.04.2019 passed by the Supreme Court in Criminal Appeal No. 1382 of 2014, reported in (2019) 5 SCC 469 (3 Judge Bench)

Relevant extracts from the judgment:

We may now address the aspect of the constructive liability of the accused Kapildeo Chaudhry, Mahendra Rai, Babulal Chaudhry, Bhavesh Chaudhry and Anil Chaudhry for the murder of the deceased. It is well settled that to determine whether an accused, being a member of an unlawful assembly, is liable for a given offence, it needs to be seen whether such act was committed in prosecution of the common object of the assembly, and alternatively whether the members of the assembly knew that the offence was likely to be committed in prosecution of such common object. This, in turn, has to be determined from the facts and circumstances of each case. [See ***Dharam Pal v. State of Uttar Pradesh, (1975) 2 SCC 596; Roy Fernandes v. State of Goa, (2012) 2 SCC (Cri) 111***]

In the instant case, it is evident that the six accused initially accosted the informant, chased him to his house, and on failing to get a hold on him, set fire to a portion of his house and caught hold of his nephew, the deceased, who was done to death by the accused Brahamdeo. It is thus evident that the murder of the deceased was itself not the common object of the unlawful assembly. Moreover, we find that the act of the accused Brahamdeo of shooting the deceased was sudden, and knowledge of the likelihood of the same could not be attributed to the rest of the accused. Though the other accused had followed the accused Brahamdeo, in our considered opinion, the evidence on record and circumstances of this case could not, conclusively and beyond reasonable doubt, show common object being shared by the other accused, in the commission of the offence of murder by the accused Brahamdeo.

It is no doubt true that the evidence on record may create grave suspicion in the mind of the Court about the complicity of the other accused also, with the help of Section 149, IPC, however, such grave suspicion cannot take the place of proof. It is for the prosecution to prove its case beyond reasonable doubt. Even if the evidence on record creates suspicion in the mind of the Court, though grave, the same would not be sufficient to conclude that the other accused are liable to be convicted for the offence under Section 302 along with the accused Brahamdeo, with the help of Section 149, IPC.

In such circumstances, we are of the opinion that the accused Kapildeo Chaudhry, Mahendra Rai, Babulal Chaudhry, Bhavesh Chaudhry and Anil

Chaudhry cannot be said to have shared any common object for the murder of the deceased, and cannot be made liable for the same. Notably, the Courts have rightly held only the accused Brahamdeo and Kapildeo liable for the attempt to murder the injured eye-witnesses by firing upon them. However, for the afore-stated reasons, only the accused Brahamdeo can be held liable for the murder of the deceased. At the most, it can be said that the role of the accused Mahendra Rai, Babulal Chaudhry, Bhavesh Chaudhry and Anil Chaudhry has been proved only in so far as the assault on PW4 is concerned, through cogent and reliable evidence attributing specific and overt acts to them.

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298. INDIAN PENAL CODE, 1860 – Section 300, Exception 4 and Section 304, Part II

Exception 4 to Section 300; conditions to bring the case within – Enumerated – Held, to bring the case within Exception 4 to Section 300 IPC, following conditions must be satisfied (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offender having taken undue advantage; and (iv) the accused has not acted in a cruel or unusual manner – Further held, even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken undue advantage of the deceased, accused cannot be protected under Exception 4 to Section 300 IPC.

भारतीय दण्ड संहिता, 1860 – धारा 300, अपवाद 4 और धारा 304, भाग दो

धारा 300 के अपवाद 4 के तहत प्रकरण लाने हेतु शर्तें – प्रगणित – अभिनिर्धारित, धारा 300 भा.दं.सं. के अपवाद 4 के तहत प्रकरण लाने हेतु निम्न शर्तों का संतुष्ट किया जाना आवश्यक है (i) कृत्य आवेश की तीव्रता में हुई अचानक लड़ाई में पूर्व चिंतन के बिना कारित किया जाना चाहिए; (ii) अचानक हुए झगड़े में; (iii) अभियुक्त द्वारा अनुचित लाभ उठाये बिना; तथा (iv) अभियुक्त ने क्रूरतापूर्ण या अप्रायिक रीति से कार्य न किया हो – आगे यह भी अभिनिर्धारित कि, चाहे लड़ाई पूर्व चिंतन के बिना या अचानक हुई हो, यदि हथियार या प्रतिकार की रीति अपराध के अनुपातहीन है तथा यदि अभियुक्त ने मृतक का अनुचित लाभ उठाया है, तब अभियुक्त को धारा 300 भा.दं.सं. के अपवाद 4 के तहत संरक्षण नहीं दिया जा सकता।

Nandlal v. State of Maharashtra

Judgment dated 15.03.2019 passed by the Supreme Court in Criminal Appeal No. 510 of 2019, reported in (2019) 5 SCC 224

Relevant extracts from the judgment:

The only point falling for consideration is whether the appellant-accused has made out a case for modification of his conviction under Section 304 Part II IPC instead of Section 302 IPC?

In order to bring the case within Exception 4 to Section 300 IPC, the following conditions enumerated therein must be satisfied:- (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offender's having taken undue advantage; and (iv) the accused had not acted in a cruel or unusual manner.

Even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken the undue advantage of the deceased, the accused cannot be protected under Exception 4 to Section 300 IPC. Considering the scope of Exception 4 to Section 300 IPC, in ***Sridhar Bhuyan v. State of Orissa, (2004) 11 SCC 395,*** this Court held as under:-

> "For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.
>
> The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate..... There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether

a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."

The same principle was reiterated in ***Pappu v. State of M.P., (2006) 7 SCC 391*** and ***Surain Singh v. State of Punjab, (2017) 5 SCC 796,*** where the conviction under Section 302 IPC was modified under Section 304 Part II IPC.

In the light of the above principles, we have to consider whether facts of the present case fall under Exception 4 to Section 300 IPC or not? Gopichand-PW-1/complainant is the real brother of deceased Lakhichand and Dilip and the appellant is the cousin brother of their father. The house of the appellant and the house of Dilip are adjacent to each other and Dilip constructed a common wall between his premises and the house of the appellant and there was a dispute between them in sharing the expenses of the construction of wall and this became the reason for frequent quarrels between the parties. On the date of occurrence i.e. on 16.05.2006 at around 04:00 PM, there was an exchange of abuse between Dilip, his wife Sakhubai-PW-4 and the appellant. Ganesh-PW-5, son of Dilip called Gopichand-PW-1. Accordingly, PW-1 and his brother Lakhichand (deceased) went to the house of Dilip and tried to pacify the situation which could not be controlled. In that process, deceased abused the appellant who got annoyed and assaulted Lakhichand with stick on his back. On seeing this, Gopichand-PW-1 gave a stick blow on the head of the appellant. It was thereafter, the appellant went to his house and returned back armed with gupti and other accused and inflicted injury with gupti on the left armpit of Lakhichand. The above incident happened only after the exchange of abuse and the stick blow given by Gopichand on the head of the appellant. As noted above, the dispute between the appellant and Dilip was due to construction of a common wall and non-sharing of expenses. The house of the appellant, being the next house of Dilip, there was no time gap between the first incident and the incident that followed, in which the appellant inflicted gupti injury on the left armpit of the deceased. Both the incidents cannot be said to be two different parts but are integral part of the same incident.

In the judgment cited by learned counsel appearing for the respondent-State in ***Criminal Appeal Nos. 286-288 of 2019, Asif Khan v. State of Maharashtra and another dated 05.03.2019,*** the accused thereon went away from the scene of occurrence on the motorcycle and he came back after ten to fifteen minutes and then attacked the deceased and in such facts and circumstances, it was held that both are two different incidents. The facts of the case in hand stand on a different footing. The deceased abused the appellant who got annoyed and

first attacked Lakhichand and on seeing this, Gopichand gave a stick blow on the head of the appellant and thereafter, the appellant went to his house situated next door and came back with a gupti. Inflicting injury on the deceased is part of the same incident and cannot be said to be a different part to hold that the act was premeditated and intentional. As rightly contended by learned counsel for the appellant, the incident was in a sudden quarrel and there was no premeditation. One of the conditions of Exception is that the offender ought not to have taken the "undue advantage" or acted in a cruel or unusual manner. The appellant inflicted a single blow injury with gupti on the left armpit which pierced through the upper end of the left arm and then entered the chest causing fracture of fourth rib and reached till the lung causing rupture of left lung vasculature. Though, the gupti was a dangerous weapon, the appellant-accused caused a single injury which pierced into the lung. Having sustained a stick blow from Gopichand-PW-1, in the sudden quarrel and in the heat of passion, the appellant inflicted the injury on deceased Lakhichand. Considering the facts and circumstances of the case, in our view, the case falls within Exception 4 to Section 300 IPC. The conviction of the appellant-accused under Section 302 IPC is liable to be modified as Section 304 Part II IPC.

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299. INDIAN PENAL CODE, 1860 – Section 302

EVIDENCE ACT, 1872 – Section 32

APPRECIATION OF EVIDENCE:

(i) Dying declaration – Evidentiary value of – Deceased was alive for nearly 18 hours after incident – Naib Tehsildar who recorded dying declaration proved that deceased was conscious and capable of making statement – His mental fitness was also certified and proved by treating doctor – Dying declaration was corroborated by testimony of eye-witnesses also – Held, dying declaration can be fully relied upon.

(ii) Related witnesses – Reliability of – Merely because an eye-witness is closely related to deceased, his testimony cannot be doubted – A witness normally would not leave the real culprits and rope in innocent persons.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धारा 32

साक्ष्य का मूल्यांकनः

(i) मृत्युकालीन कथन – साक्ष्यिक मूल्य – मृतक घटना के पश्चात् लगभग 18 घण्टे तक जीवित रहा – जिस नायब तहसीलदार ने मृत्युकालीन कथन अभिलिखित किए थे, ने यह प्रमाणित किया कि मृतक चेतन अवस्था में था तथा कथन देने में समर्थ था – उसकी मानसिक सक्षमता को इलाज करने वाले डॉक्टर ने भी प्रमाणित तथा साबित किया - मृत्युकालीन कथन की संपुष्टि चक्षुदर्शी साक्षियों

द्वारा भी की गई – अभिनिर्धारित, मृत्युकालीन कथन का पूर्णतः अवलंब लिया जा सकता है।

(ii) संबंधी साक्षी – विश्वसनीयता – चक्षुदर्शी साक्षी का मृतक का निकट संबंधी होना मात्र उसकी साक्ष्य पर संदेह का आधार नहीं है – सामान्यतः कोई भी साक्षी किसी मुख्य अपराधी को बचाकर किसी निर्दोष को नहीं फँसायेगा।

Ramanda @ Yashvant Gond v. State of M.P.

Judgment dated 05.09.2017 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 2173 of 2006, reported in ILR (2017) MP 2489 (DB)

Relevant extracts from the judgment:

Naib Tahsildar Sudheer Kumar Jain (PW-11) deposed that on 08.05.2005 at about 1:55 a.m., he had reached to CHC Bankhedi and recorded the dying declaration Ex.P-8 of Prahlad. As the hands of Prahlad were burnt therefore, he had obtained the thump impression of him in the dying declaration. In cross examination, PW-11 further deposed that the deceased was fully conscious and capable of making statement. His mental and physical condition and fitness was certified by the doctor also. This fact is corroborated by Dr. S.K. Chandaiya (PW-12) who deposed that he had examined the deceased at the time of recorded of dying declaration and found him fit to give statement. He had certified this fact on the dying declaration Ex.P-8 at C to C and D to D. Since deceased was alive for about 18 hours after recording of dying declaration, he was conscious during his admission in medical college hospital Jabalpur, therefore it can be believed that at the time of recording of dying declaration he was fully conscious and the dying declaration made by him is reliable.

In his dying declaration the deceased has clearly stated that the appellant had set him ablaze. This dying declaration is fully corroborated by statements of eye witnesses Pramod (PW-1), Lata Bai (PW-2) and Munna (PW-4). Although they are close relatives of deceased but merely on this ground there testimonies can not be doubted. The incident occurred in the court yard of the house of deceased during summer season. It is quite natural that in the late hours of night the deceased and other members of family were sleeping in the courtyard. The presence of these witnesses in the house is natural and believable. In the late hours of night we can not expect the presence of any independent witness on the spot.

It is settled law that merely because witnesses are closely associated with or interested in the deceased, their evidence does not necessarily require corroboration before acting upon. Evidence of interested witness is to be considered with care and caution. Evidence of a witness cannot be discarded merely on the ground of his being an interested witness as a witness normally would not leave the real culprits and rope in innocent persons.

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300. INDIAN PENAL CODE, 1860 – Section 302

EVIDENCE ACT, 1872 – Section 106

APPRECIATION OF EVIDENCE:

(i) Plea of *alibi*; proof of – Accused charged for murder of his wife – Their son stated that accused was present in their home on the fateful night – This statement was not challenged in cross-examination – Admittedly, accused was not present in house when dead body was found – Accused took plea of *alibi* in his examination under Section 313 Cr.P.C. – Suggestion of *alibi* was not given to any of the prosecution witnesses – No evidence given by accused as to *alibi* – Held, plea of *alibi* not proved.

(ii) Burden of proof – Circumstantial evidence – Offences committed in secrecy inside a house – Burden on prosecution would be of comparatively lighter character – There is a corresponding burden on the inmates of house to explain the circumstances in which crime was committed in view of Section 106 of the Evidence Act.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धारा 106

साक्ष्य का मूल्यांकन

(i) अन्यत्रता का बचाव; साबित किया जाना – अभियुक्त पर अपनी पत्नी की हत्या का आरोप था – उनके पुत्र ने बताया कि अभियुक्त रात में घर पर ही था – इस कथन को प्रतिपरीक्षण में चुनौती नहीं दी गई – स्वीकृत रूप से शव मिलने के समय घर में उपलब्ध नहीं था – अभियुक्त ने द.प्र.सं. की धारा 313 के अधीन अपने परीक्षण में अन्यत्रता का बचाव लिया – अभियोजन साक्षियों में से किसी को भी अन्यत्रता का सुझाव नहीं दिया गया था – अभियुक्त द्वारा अन्यत्रता संबंधी कोई साक्ष्य भी प्रस्तुत नहीं की गई – अभिनिर्धारित, अन्यत्रता का बचाव सिद्ध नहीं हुआ।

(ii) सबूत का भार – परिस्थितिजन्य साक्ष्य – घर के भीतर गोपनीयता में किए गए अपराध – अभियोजन का भार तुलनात्मक रूप से हल्का होगा – साक्ष्य अधिनियम की धारा 106 के अनुसार घर के निवासियों पर उन परिस्थितियों को स्पष्ट करने का तुलनात्मक भार होगा जिनमें अपराध घटित हुआ है।

Mahesh Soni v. State of M.P.

Judgment dated 13.07.2017 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 1085 of 2004, reported in ILR (2017) MP 2463 (DB)

Relevant extracts from the judgment:

Only two witnesses namely Manoj (PW-3) and Roshni (PW-1) have partly supported the prosecution case. It may be noted here that Manoj was 13 years

old son and Roshni was 11 years old daughter of the ill fated couple; therefore, their presence on the spot was most natural. Their presence was also not challenged at any stage by the appellant. For obvious reasons, they were not inclined to support the prosecution; yet, the prosecution was able to coax certain information from them. Manoj (PW-3) has stated that at the night of the incident, his mother and sisters were sleeping at one place. He was sleeping at a different place and his father was also sleeping. Thus, Manoj has clearly stated that his father was also sleeping in the house along with himself, his mother and sisters that night. Likewise, Roshni has at first denied that his father was not at home on the date on which her mother had died but in the same sentence, she has stated that his father was at home. Suresh (PW-7), brother of the appellant has turned hostile and has given no indication as to whether or not the appellant was at his home on the date of the incident.

Even if we ignore the statement of Roshni (PW-1) because she blows hot and cold in the same breath, it is clear that Manoj has unequivocally stated that his father was at home. This part of his statement has not been challenged in cross-examination at all. The defence of the appellant has been that he had gone to attend Kirtan at the night of the incident and returned only the next evening; however, no such suggestion has been given in the cross-examination to any of the prosecution witnesses. The appellant has also not adduced any evidence in defence to establish the plea of alibi taken by him in his examination under Section 313 of the Cr.P.C. In these circumstances, it stands proved that the appellant was present at home at the night of the incident along with his wife deceased Kanchan, three daughters and a son. He was found missing in the morning. In these circumstances, where the crime was committed within the four corners of the house, the burden shifts upon the appellant to explain the circumstances in which his wife was throttled to death; however, the appellant has adduced no evidence to explain these circumstances.

On the basis of the statement of the appellant's son Manoj, it is proved beyond reasonable doubt that on the night of the incident, the appellant had slept in his house with his wife deceased Kanchan, three daughters and a son and he was found missing the next morning. The dead body of his wife Kanchan, who had been throttled to death was found in his house along with his children. No attempt was made to break open the house and no article was found to be missing. The deceased was a housewife with four children. The eldest of them being 13 years old. It is inconceivable that she would have any enmity with someone outside the house. In these circumstances, heavy burden of explaining the circumstances wherein his wife had died had shifted upon the appellant but he utterly failed to discharge the same; therefore, the seeming absence of any motive or absence of evidence regarding blood in finger nails of the appellant would not derail the prosecution case.

In the case of ***Trimukh Maruti Kirak v. State of Maharashtra, (2006) 10 SCC 681*** the Supreme Court in respect an offence committed within four wall of the home has held that:

> "15. Where an offence like murder is committed in secrecy inside a house the initial burden to establish the case would undoubtedly be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

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301. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 118
APPRECIATION OF EVIDENCE:

(i) Related witness versus Interested witness – Related witness is not always an interested witness – A witness may be called "interested" only when he or she derives some benefit from the result of litigation – There must be some direct or indirect interest of witnesses to get the accused punished to call them as "interested" witnesses.

(ii) Extra judicial confession – Non-examination of Village Administrative Officer who recorded extra-judicial confession which resulted in recovery of gun used in crime; effect of – Held, non-examination of person who recorded extra-judicial confession is not always fatal – Strong circumstantial evidence available on record – Last seen evidence was cogent, there was prompt fling of FIR, forensic evidence proved the use of recovered gun to cause physical injuries on deceased, accused not disputed ownership of recovered gun – Under such circumstances, conviction, held proper.

भारतीय दण्ड संहिता, 1860 – धारा 302

साक्ष्य अधिनियम, 1872 – धारा 118

साक्ष्य का मूल्यांकनः

(i) संबंधी साक्षी विरूद्ध हितबद्ध साक्षी – संबंधी साक्षी सदैव हितबद्ध नहीं होता है – किसी साक्षी को ''हितबद्ध'' मात्र तभी कहा जा सकता है जब वह मुकदमे के

परिणाम से कोई लाभ प्राप्त करता हो – साक्षियों को "हितबद्ध" साक्षी कहलाने के लिए उनका अभियुक्त को दण्डित कराने में प्रत्यक्ष या परोक्ष हित अवश्य होना चाहिए।

(ii) न्यायिकेत्तर संस्वीकृति – ग्राम के प्रशासनिक अधिकारी, जिसने न्यायिकेत्तर संस्वीकृति को अभिलिखित किया था और जिसके परिणामस्वरूप अपराध में प्रयुक्त बंदूक बरामद हुई, परीक्षित नहीं कराया गया; प्रभाव – अभिनिर्धारित, न्यायिकेत्तर संस्वीकृति अभिलिखित करने वाले व्यक्ति का परीक्षित न कराया जाना सदैव घातक नहीं होगा – अभिलेख पर प्रबल परिस्थितिजन्य साक्ष्य उपलब्ध थी – अंतिम बार देखे जाने की विश्वसनीय साक्ष्य, तात्कालिक प्रथम सूचना रिपोर्ट, अभियुक्त से बरामद हुई बंदूक से मृतक को शारीरिक क्षति कारित करना फॉरेन्सिक साक्ष्य से प्रमाणित, अभियुक्त ने बंदूक के स्वामित्व को विवादित नहीं किया – उपरोक्त परिस्थितियों में दोषसिद्धि उचित ठहराई गई।

Sadayappan alias Ganesan v. State, represented by Inspector of Police

Judgment dated 26.04.2019 passed by the Supreme Court in Criminal Appeal No. 1990 of 2012, reported in AIR 2019 SC 2191

Relevant extracts from the judgment:

Criminal law jurisprudence makes a clear distinction between a related and interested witness. A witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. [See: ***Sudhakar v. State, AIR 2018 SC 1372***]

Going by the corroborative statements of these witnesses, it is discernible that though they are related to each other and to the deceased as well, their evidence cannot be discarded by simply labelling them as "interested" witnesses. After thoroughly scrutinizing their evidence, we do not find any direct or indirect interest of these witnesses to get the accused punished by falsely implicating him so as to meet out any vested interest. We are, therefore, of the considered view that the evidences of PWs 1, 2, 3, 4 and 6 are quite reliable and we see no reason to disbelieve them.

With respect to forensic evidence, Dr. T. Jeya Singh (PW12), who conducted post mortem on the body of the deceased, found prominent injures on the body of the deceased and opined that the deceased died due to shock and haemorrhage from multiple injuries (perforating and penetrating) which were possible due to piercing of pellets. The post mortem report and chemical analysis report confirms the gun shot and proves that the gun powder discovered on the body and clothes of the deceased was the residue of the gun (MO1). The

ownership of this gun (MO1), which was discovered on the basis of his extra-judicial confession, has not been disputed by the appellant in his Section 313 Cr.P.C. statement.

The counsel appearing on behalf of the appellant agitated the genuineness and admissibility of the extra-judicial confession of the accused on the basis of which recovery of gun (MO1) was made. He questioned the same on the basis of absence of the examination of the VAO who allegedly recorded the same. It is to be noted that the record indicates that the VAO could not be examined due to his death before the commencement of the trial. However, it is clear that the said confessional statement, was sent by the VAO to the Inspector of Police along with a covering letter (Ext. P14). Moreover, the Village Assistant-PW11, even though turned hostile, had specifically deposed that the said extra judicial confession was recorded by the VAO.

Though the prosecution case is premised on circumstantial evidence in the absence of any eyewitness, the depositions of prosecution witnesses which have stood the rigour of cross-examination clearly support the prosecution version and establishes enmity between the accused and the deceased. This fact supported by PW1's last seen evidence, her prompt complaint to the police and the forensic evidence which correlates the recovered weapon to the physical injuries on the body of the deceased proves the prosecution case beyond any reasonable doubt independent of the extra-judicial confession.

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302. INDIAN PENAL CODE, 1860 – Sections 302 and 498-A

DOWRY PROHIBITION ACT, 1961 – Section 4

EVIDENCE ACT, 1872 – Section 32

Dowry death – Dying declaration; reliability of – Prosecution examined the Doctor and Metropolitan Magistrate, who recorded the dying declaration – Held, dying declaration is established and proved by prosecution and cannot be discarded on some minor contradictions/omissions – Also, accused/husband was last seen in the house and immediately after occurrence, ran away – Further, conviction u/s 302 and 498A IPC and Section 4 of the Dowry Prohibition Act held to be proper.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 498क

दहेज प्रतिषेध अधिनियम, 1961 – धारा 4

साक्ष्य अधिनियम, 1872 – धारा 32

दहेज मृत्यु – मृत्युकालिक कथन की विश्वसनीयता – अभियोजन द्वारा चिकित्सक तथा मृत्युकालिक कथन लेखबद्ध करने वाले मेट्रोपोलिटन मजिस्ट्रेट का परीक्षण कराया गया – अभिनिर्धारित, अभियोजन द्वारा मृत्युकालिक कथन को स्थापित व प्रमाणित किया गया है और कुछ मामूली विरोधाभासों/लोपों के आधार पर नामंजूर नहीं किया

जा सकता – यह भी कि, अभियुक्त/पति अंतिम बार घर में देखा गया था और घटना के तुरंत बाद भाग गया था – आगे यह भी कि, धारा 302 तथा 498क भा.दं.सं. एवं धारा 4 दहेज प्रतिषेध अधिनियम के तहत दोषसिद्ध उचित ठहरायी गई।

Vijay Mohan Singh v. State of Karnataka

Judgment dated 10.04.2019 passed by the Supreme Court in Criminal Appeal No. 1656 of 2013, reported in (2019) 5 SCC 436

Relevant extracts from the judgment:

Having considered the entire evidence on record afresh and on re-appreciation of the entire evidence on record, we are of the firm opinion that the High Court has not committed any error in holding the appellant – original accused no.1 guilty for the offence punishable under Section 302 of the IPC. In the present case, there is a dying declaration given by the deceased which has been proved and supported by the independent witnesses, metropolitan magistrate (PW28), it has been established and proved by examining the medical officer and even the medical officer certified that the patient was conscious and coherent and fit state of mind to give the statement. The metropolitan magistrate who recorded the dying declaration and who was examined by the prosecution as PW28 deposed as under:

> "that he was working as Principal Junior Civil Judge, Bhongir; during the relevant period, he was working as XI Metropolitan Magistrate, Secunderabad. He has further deposed that in pursuance of the requisition received from the I.O., P.S. Afzal Gunj, he proceeded to Osmania General Hospital on 14.2.2005 and reached the said place around 6:25 a.m.; with the assistance of the police and duty doctor, he went to Acute Burns Ward and contacted the victim by name Abhilash Kaur, wife of Vijay Mohan Singh; one Dr. Rajesh was the duty doctor; he interacted with the said doctor and satisfied himself as to the mental fitness of the victim to Abilash Kaur the statement before him and also obtained an endorsement in that regard on the relevant document Ext. P-2 which is already marked. Further he has deposed that he asked preliminary questions to the victim and thereafter having been satisfied as to the nature of her statement being voluntary and not being under coercion or any kind of duress, he recorded her statement in his own handwriting in Ext. P-2 and Ext. P-2(d) is his signature; the handwriting portion in Ext. P-2 is in his handwriting and they are true and correct; they are in question and answer form. Further, he has deposed that he read over the contents therein to the victim Abhilash Kaur in Hindi language which was known to her and to him also; having

admitted to the correctness of that document, victim signed in his presence as per Ext. P-2(a); that he obtained the signature of the duty doctor as per Ext. P-2(c). Further he has deposed that as a matter of abundant caution, he obtained the R.T.I. of the victim Abhilash Kaur below Ext. P-2(a); that victim Abhilash Kaur made statement against her husband with regard to assault and also acting under the influence of his mother and sister that he demanded money; she complained against the accused as being responsible for the death of his first wife also on account being burnt by him. He has further deposed that at the time of recording Ext. P-2, other than himself, the doctor and the victim, none else were present nearby; the victim was there in the general ward; having so recorded such statement of the victim as per Ext. P-2, he returned to his place of work along with the document and along with covering letter, he sent Ext. P-2 to IV Metropolitan Magistrate, Hyderabad, within whose jurisdiction that Osmania Hospital and Afzal Gunj police station are situated; and that the covering letter is marked as Ext.P-2(e) and Ext.P-2(f) is his signature. Further he has deposed that he was duty bound to record such statements in all the hospitals of Hyderabad for 15 days and for the next 15 days, some other Magistrate will be there; likewise the duty keeps changing every 15 days and since the date pertaining to the recording of this statement fell during his duty days he recorded the same."

On Ext. P-2, the medical officer had certified that at the relevant time the patient was conscious and coherent and fit state of mind to give the statement. In the dying declaration, the deceased specifically stated before the Magistrate while answering question nos. 7 & 8, as under:

"Q.No.7 What happened to you and how the same happened?

A. Yesterday at 5:00 p.m. in my house near the Gurudwara my husband Vijaya Mohan Singh took kerosene from the kerosene batti stove and put it on my body. I was wearing green color shirt and shalwar and he lit a match stick and put the burning match stick on my body and locked the door of the room and went away as such I was burnt on my face, hands and other parts of body.

Q No.8 Is there any foul Act/Omission of anyone or do you blame anyone for this to you?

A. My husband did this to me. He beats me and acts under the influence of his mother and sisters. He demanded money from me and would torture to me. His first wife was also burnt by him."

While answering question nos. 10, 11 & 12, the victim stated as under:

Q.No.10 What was the behaviour of your husband Vijay Mohan Singh?

A. My husband would say that I am mad and frequently ask money. He had earlier wife by name Kamaljeet Kaur. She too was burnt by my husband and she died. My husband managed the case and came out. (Patient is in pain). He would ask me to get money from my parents.

Q.No.11 How you come out of the room and where was your daughter?

A. I opened the door and came out and my daughter was in other room and then I fell lot of pain and burning.

Q.No.12 What more do you want to say?

A. In Bidar to the Police I did not say the above as my husband and my brother in law Madan Mohan Singh threatened me and asked me not to tell the truth and hence I gave a wrong statement. Now I am telling the truth. Sir please help me and save me. My child be taken care of."

Thus, the dying declaration involving the appellant came to be established and proved by the prosecution, by examining the doctor as well as the metropolitan magistrate who record the dying declaration. Despite the above overwhelming evidence in the form of medical evidence as well as the dying declaration and the deposition of the metropolitan magistrate, the learned trial Court discarded the same on some minor contradictions/omissions. It also appears from the judgment and order passed by the learned trial Court that the learned trial Court gave undue importance to the initial statement of the victim while giving the history to the doctor when she was admitted and when she gave the history of accidental burns while cooking in kitchen. However, the trial Court did not consider her explanation on the above gave in the dying declaration. Even considering the surrounding circumstances and the medical evidence and the other evidence, the defence has miserably failed and proved that it was an accidental burns/death. The appellant – original accused no.1 was last seen in the house and immediately on the occurrence of the incident he ran away. Thus, we are of the opinion that the approach of the trial Court was patently erroneous and the conclusions arrived at by it were wholly untenable.

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303. INDIAN PENAL CODE, 1860 – Sections 320 and 326

(i) Whether acid is a corrosive substance for the purpose of Section 326 IPC ? Held, Yes.

(ii) Grievous hurt – Hurt caused by pouring acid on the body of victim, when becomes grievous? Victim suffered acid burns on forehead, scalp, neck, back, left buttock and front of left thigh – He was hospitalised for 50 days – Held, it would be wholly unrelialistic to postulate that in such circumstances victim would not have been in severe bodily pain for more than 20 days – Further held, medical opinion suggests that in case of acid burns, scars would develop only later – Case clearly covered under clauses "Sixthly" and "Eighthly" of Section 320.

भारतीय दण्ड संहिता, 1860 – धाराएं 320 एवं 326

(i) क्या धारा 326 भा.द.सं. के प्रयोजन के लिये अम्ल एक संक्षारक पदार्थ है? अभिनिर्धारित, हां।

(ii) घोर उपहति – पीड़ित के शरीर पर अम्ल फेंककर कारित उपहति कब घोर उपहति होती है? पीड़ित को चेहरे, सिर, गर्दन, पीठ, बाएं नितम्ब तथा बाईं जंघा पर अम्ल दाह कारित हुआ – वह अस्पताल में 50 दिनों तक भर्ती रहा – अभिनिर्धारित, यह प्रख्यापित करना पूर्णतः अवास्तविक होगा कि ऐसी परिस्थितियों में पीड़ित को 20 दिवस से अधिक की तीव्र शारीरिक पीड़ा नहीं हुई होगी – आगे अभिनिर्धारित, चिकित्सीय अभिमत यह सुझाता है कि अम्ल दाह की दशा में घाव के निशान बाद में ही प्रकट होंगे – मामला स्पष्टतः धारा 320 के खण्ड ''छठवां'' एवं ''आठवां'' में आता है।

Omanakuttan v. State of Kerala

Judgment dated 09.05.2019 passed by the Supreme Court in Criminal Appeal No. 873 of 2019, reported in AIR 2019 SC 2314

Relevant extracts from the judgment:

In the present case, the extensive injuries suffered by the victim, being of acid burns involving forehead, scalp, neck, back of chest, left buttock and front of left thigh are distinctly stated in the wound certificate Ex. P/5.

The victim sustained the aforesaid injuries due to the effect of the acid poured upon him by the appellant. The acid is undoubtedly a corrosive substance within the meaning of Section 326 IPC. The victim remained hospitalised for more than 50 days. It would be wholly unrealistic to postulate that even with such extensive acid burn injuries from head to thigh on the left portion of his body and long-drawn hospitalisation, the victim may not have been in severe bodily pain for a period of more than 20 days. The victim also stated in his examination-in-chief that he was unable to carry out his daily routines by himself during hospitalisation; and there had not been any suggestion in the cross-examination to challenge such an assertion of the victim. Above all, the Trial

Court specifically noticed the fact that the victim had suffered permanent disfigurement on the head, when he was examined in the Court. In the given set of circumstances and the facts available on record, the statement of the doctor PW-8 to the effect that the patient could carry on his daily affairs without any aid while being treated in the hospital, does not take away the substance of the matter that the case was clearly covered under clauses 'Sixthly' and 'Eighthly' of Section 320 IPC. In fact, even the doctor PW-8 stated that there was no immediate disfigurement during the time the skin was healing; and that the scars would develop only later.

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***304. INDIAN PENAL CODE, 1860 – Section 324**

APPRECIATION OF EVIDENCE:

Motive; absence of – Effect – Held, in cases based on direct evidence, absence of motive is of no significance – Only for absence of motive, direct evidence cannot be ignored.

Hkkjrh; n.M lafgrk] 1860 & /kkjk 324

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grqd dk vHkko & çHkko & vfHkfu/kkfjr] çR;{k lk{; ij vk/kkfjr ekeyksa esa grqd dk vHkko] dkbZ egRo ugha j[krk gS & ek= grqd dh vHkko esa çR;{k lk{; dk utjvankt ugha fd;k tk ldrk gSA

भारतीय दण्ड संहिता, 1860 – धारा 324

साक्ष्य का मूल्यांकनः

हेतुक का अभाव – प्रभाव – अभिनिर्धारित, प्रत्यक्ष साक्ष्य पर आधारित मामलों में हेतुक का अभाव, कोई महत्व नहीं रखता है – मात्र हेतुक के अभाव में प्रत्यक्ष साक्ष्य को नजरअंदाज नहीं किया जा सकता है।

State of M.P. v. Keshovrao

Judgment dated 31.08.2017 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 803 of 1994, reported in ILR (2017) MP 2480 (DB)

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305. INDIAN PENAL CODE, 1860 – Section 376

APPRECIATION OF EVIDENCE:

CRIMINAL TRIAL:

(i) Appreciation of evidence – Sole testimony of prosecutrix – Conviction can be sustained on sole testimony of prosecutrix if inspiring confidence – Corroboration of testimony of prosecutrix is not a requirement of law, but a guidance of prudence – Evidence of prosecutrix cannot be thrown out on account of minor contractions or small discrepancies. [*State of Punjab v. Gurmit Singh, (1996) 2 SCC 384* relied on]

(ii) Appreciation of evidence – Absence of injury or non-rupture of hymen – In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix – In case of rape, it is not necessary

that external injury is to be found on the body of the prosecutrix.

(iii) Approach of Courts as to offences against women – The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with the charges of sexual assault on woman.

भारतीय दण्ड संहिता, 1860 – धारा 376

साक्ष्य का मूल्यांकनः

आपराधिक विचारणः

(i) साक्ष्य का मूल्यांकन – अभियोक्त्री की एकल साक्ष्य – अभियोक्त्री की एकल साक्ष्य पर दोषसिद्धि आधारित हो सकती है यदि वह विश्वास जागृत करती हो – अभियोक्त्री की अभिसाक्ष्य की सम्पुष्टि – विधि की अपेक्षा नहीं है वरन् प्रज्ञा का मार्गदर्शन है – अभियोक्त्री की साक्ष्य सूक्ष्म विरोधाभास या अल्प विसंगतियों के कारण अस्वीकार नहीं की जा सकती है।

(ii) साक्ष्य का मूल्यांकन – चोट की अनुपस्थिति अथवा योनिच्छद का विदीर्ण न होना – अभियोक्त्री के अंतः अंगों पर चोट की अनुपस्थिति से यह निष्कर्ष नहीं निकाला जा सकता है कि घटना घटित नहीं हुई है या लैंगिक संभोग अभियोक्त्री की सहमति से हुआ है – बलात्संग के मामलों में यह आवश्यक नहीं है कि अभियोक्त्री के शरीर के भागों पर बाह्य चोट पायी जाए।

(iii) महिलाओं के विरूद्ध अपराधों के संबंध में न्यायालयों का दृष्टिकोण – न्यायालयों को महिलाओं पर यौन हमले के आरोपों पर विचार करते समय अधिक संवेदनशील होना चाहिए और अधिक उत्तरदायित्व बोध प्रदर्शित करना चाहिए।

State of Himachal Pradesh v. Manga Singh

Judgment dated 28.11.2018 passed by the Supreme Court of India in Criminal Appeal No. 1481 of 2018, reported in 2019 (1) ANJ 333

Relevant extracts from the judgment:

The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

It is well settled by a catena of decisions of the Supreme Court that corroboration is not a *sine qua non* for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason

to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.

In ***State of Punjab v. Gurmit Singh and others, (1996) 2 SCC 384,*** it was held as under:-

> "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?…"

In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix. The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse. The absence of injuries on the private part of the prosecutrix can be of no consequence in the facts and circumstances of the present case.

As rightly stated by Dr. Neerja Gupta (PW-6) that merely because there was no rupture of hymen it cannot be said that there was penetration. It cannot be the reason to disbelieve the testimony of the prosecutrix (PW-4). It is fairly a well-settled principle that in case of rape it is not necessary that external injury is to be found on the body of the prosecutrix.

Observing that there are number of unmerited acquittals in rape cases and that the courts have to display a greater sense of responsibility and to be more sensitive while dealing with the charges of sexual assault on woman, in ***State of Rajasthan v. N.K. The Accused, (2000) 5 SCC 30,*** this Court has held as under:

> ".... A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217*** this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this Court has said through one of us (Dr A.S. Anand, 1. as his Lordship then was) in ***State of Punjab v. Gurmeet Singh, (1996) 2 SCC 384***:
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> > "[A] rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very should of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. The must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."
>
> The questions arising for consideration before us are: whether the prosecution story, as alleged, inspires

confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been in victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the FIR?"

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

CRIMINAL PROCEDURE CODE, 1973 – Sections 177 and 179

(i) Jurisdiction – Matrimonial offences such as cruelty – Whether a woman forced to leave her matrimonial home on account of acts and conduct that constitute cruelty can institute proceedings within the jurisdiction of the Court where she is forced to take shelter? Held, Yes – The consequences of the cruelty committed at matrimonial home results in repeated offences of cruelty at parental home – Such offences are continuing in nature – Section 179 CrPC squarely applies to such cases.

(ii) Jurisdiction – Matrimonial offences – Whether or not any part of cruelty is committed at place where woman has taken shelter – Courts situated at such place also have jurisdiction to entertain complaints under Section 498A IPC.

[*Y. Abraham Ajith and others v. Inspector of Police, Chennai and another, (2004) 8 SCC 100, Ramesh and others v. State of Tamil Nadu, (2005) 3 SCC 507, Manish Ratan and others v. State of Madhya Pradesh and another, (2007) 1 SCC 262* and *Amarendu Jyoti and others v. State of Chhattisgarh and others, (2014) 12 SCC 362,* no longer good law]

भारतीय दण्ड संहिता, 1860 – धारा 498-क

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 177 एवं 179

(i) क्षेत्राधिकार – क्रूरता जैसे वैवाहिक अपराध – क्या कोई महिला जो क्रूरता का गठन करने वाले कृत्यों एवं आचरण के आधार पर अपने वैवाहिक घर को छोड़ने के लिए मजबूर होती है, उस न्यायालय के अधिकार क्षेत्र में कार्यवाही कर सकती है, जहां वह आश्रय लेने के लिए मजबूर है? अभिनिर्धारित, हाँ – वैवाहिक घर में की गई क्रूरता के परिणाम पैतृक घर पर क्रूरता के बार-बार होने वाले अपराधों के परिणाम हैं – ऐसे अपराध सतत प्रकृति के अपराध हैं – धारा 179 दं.प्र.सं. ऐसे मामलों पर लागू होती है।

(ii) क्षेत्राधिकार – वैवाहिक अपराध – क्रूरता का कोई भी भाग उस स्थान पर जहां महिला ने आश्रय लिया है, घटित हुआ हो अथवा नहीं – ऐसे स्थान पर स्थित

न्यायालयों को भी धारा 498ए भा.द.सं. के मामलों की सुनवाई की क्षेत्रीय अधिकारिता है। [***वाय. अब्राहिम अजीथ तथा अन्य विरूद्ध इन्सपेक्टर ऑफ पुलिस, चेन्नई तथा अन्य, (2004) 8 एससीसी 100, रमेश तथा अन्य विरूद्ध तमिलनाडू राज्य, (2005) 3 एससीसी 507, मनीष रतन तथा अन्य विरूद्ध म.प्र. राज्य तथा अन्य, (2007) 1 एससीसी 262*** एवं ***अमरेन्दु ज्योती तथा अन्य विरूद्ध छत्तीसगढ़ राज्य तथा अन्य, (2014) 12 एससीसी 362,*** अच्छी विधि नहीं है]

Rupali Devi v. State of Uttar Pradesh and others

Judgment dated 09.04.2019 passed by the Supreme Court in Criminal Appeal No. 71 of 2012, reported in 2019 (2) Crimes 139 (SC) (3 Judge Bench)

Relevant extracts from the judgment:

"Whether a woman forced to leave her matrimonial home on account of acts and conduct that constitute cruelty can initiate and access the legal process within the jurisdiction of the Courts where she is forced to take shelter with the parents or other family members?". This is the precise question that arises for determination in this group of appeals.

The opinions of this Court on the aforesaid question being sharply divided, the present reference to a larger Bench has been made for consideration of the question indicated hereinabove.

In ***Y. Abraham Ajith and others v. Inspector of Police, Chennai and another, (2004) 8 SCC 100, Ramesh and others v. State of Tamil Nadu, (2005) 3 SCC 507, Amarendu Jyoti and others v. State of Chhattisgarh and others, (2014) 12 SCC 362,*** a view has been taken that if on account of cruelty committed to a wife in a matrimonial home she takes shelter in the parental home and if no specific act of commission of cruelty in the parental home can be attributed to the husband or his relatives, the initiation of proceedings under Section 498A in the Courts having jurisdiction in the area where the parental home is situated will not be permissible. The core fact that would be required to be noted in the above cases is that there were no allegations made on behalf of the aggrieved wife that any overt act of cruelty or harassment had been caused to her at the parental home after she had left the matrimonial home. It is in these circumstances that the view had been expressed in the above cases that the offence of cruelty having been committed in the matrimonial home the same does not amount to a continuing offence committed in the parental home to which place the aggrieved wife may have later shifted.

Section 178 creates an exception to the "ordinary rule" engrafted in Section 177 by permitting the Courts in another local area where the offence is partly committed to take cognizance. Also if the offence committed in one local area continues in another local area, the Courts in the latter place would be competent to take cognizance of the matter. Under Section 179, if by reason of the

consequences emanating from a criminal act an offence is occasioned in another jurisdiction, the Court in that jurisdiction would also be competent to take cognizance. Thus, if an offence is committed partly in one place and partly in another; or if the offence is a continuing offence or where the consequences of a criminal act result in an offence being committed at another place, the exception to the "ordinary rule" would be attracted and the Courts within whose jurisdiction the criminal act is committed will cease to have exclusive jurisdiction to try the offence.

The object behind the aforesaid amendment, undoubtedly, was to combat the increasing cases of cruelty by the husband and the relatives of the husband on the wife which leads to commission of suicides or grave injury to the wife besides seeking to deal with harassment of the wife so as to coerce her or any person related to her to meet any unlawful demand for any property, etc. The above stated object of the amendment cannot be overlooked while answering the question arising in the present case. The judicial endeavour must, therefore, always be to make the provision of the laws introduced and inserted by the Criminal Laws (second amendment) Act, 1983 more efficacious and effective in view of the clear purpose behind the introduction of the provisions in question, as already noticed.

The provisions contained in Section 498A of the Indian Penal Code, undoubtedly, encompasses both mental as well as the physical well-being of the wife. Even the silence of the wife may have an underlying element of an emotional distress and mental agony. Her sufferings at the parental home though may be directly attributable to commission of acts of cruelty by the husband at the matrimonial home, would, undoubtedly, be the consequences of the acts committed at the matrimonial home. Such consequences, by itself, would amount to distinct offences committed at the parental home where she has taken shelter. The adverse effects on the mental health in the parental home though on account of the acts committed in the matrimonial home would, in our considered view, amount to commission of cruelty within the meaning of Section 498A at the parental home. The consequences of the cruelty committed at the matrimonial home results in repeated offences being committed at the parental home. This is the kind of offences contemplated under Section 179 Cr.P.C which would squarely be applicable to the present case as an answer to the question raised.

We, therefore, hold that the Courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code.

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

(i) Whether decree of divorce between parties, wipe out any criminal offence committed under IPC and Protection of Women from Domestic Violence Act? Held, No.

(ii) Whether complaint u/s 498-A can be filed only by woman who is subjected to cruelty? Held, No – Complaint of cruelty u/s 498-A IPC can also be filed by relatives of woman who is subjected to cruelty.

भारतीय दण्ड संहिता, 1860 – धारा 498-क

(i) क्या पक्षकारों के मध्य विवाह विच्छेद की आज्ञप्ति भारतीय दण्ड संहिता तथा घरेलू हिंसा अधिनियम के अंतर्गत कारित किसी दाण्डिक अपराध को समाप्त कर देती है? अभिनिर्धारित, नहीं।

(ii) क्या धारा 498-क के अंतर्गत परिवाद मात्र क्रूरता के अधीन महिला द्वारा ही संस्थित किया जाना चाहिए? अभिनिर्धारित, नहीं – भारतीय दण्ड संहिता की धारा 498-क के अंतर्गत परिवाद क्रूरता के अधीन महिला के नातेदार द्वारा भी संस्थित किया जा सकता है।

Rashmi Chopra and others v. The State of Uttar Pradesh and another

Judgment dated 30.04.2019 passed by the Supreme Court in Criminal Appeal No. 594 of 2019, reported in 2019 (2) Crimes 301(SC)

Relevant extracts from the judgment:

There is nothing on the record to indicate that order of divorce between the parties was brought into the notice of the Magistrate when he issued process against the appellants. We, however, are in agreement with the submission of Shri Santosh Krishan that decree of divorce between Nayan Chopra and Vanshika shall not wipe out any criminal offence, which has been committed within the meaning of I.P.C. or Domestic Violence Act, 2005 and the criminal offence committed in jurisdictional Court has to be examined despite the divorce decree having been granted.

Section 498A provides for an offence when husband or the relative of the husband, subject her to cruelty. There is nothing in Section 498A, which may indicate that when a woman is subjected to cruelty, a complaint has to be filed necessarily by the women so subjected. A perusal of Section 498A, as extracted above, indicates that the provision does not contemplate that complaint for offence under Section 498A should be filed only by woman, who is subjected to cruelty by husband or his relative. We, thus, are of the view that complaint filed by respondent No.2, the father of Vanshika cannot be said to be not maintainable on this ground.

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308. INDIAN PENAL CODE, 1860 – Section 499

Defamation – Cognizance by Magistrate of complaint filed by an Advocate against Executive Engineer posted in Electricity Department – Brother of complainant also facing criminal prosecution for theft of electricity – Held, witness has not stated that after hearing the alleged words uttered by accused, reputation of the Advocate was harmed – Forcing officials to face criminal prosecution to deter them from discharging their official duties would demoralise them – Complaint u/s 499 of the Code against Executive Engineer quashed.

भारतीय दण्ड संहिता, 1860 – धारा 499

मानहानि – अधिवक्ता की ओर से बिजली विभाग में पदस्थ कार्यवाहक अभियंता के विरूद्ध संस्थित परिवाद पर मजिस्टे्ट द्वारा संज्ञान लिया जाना – परिवादी का भाई भी विद्युत की चोरी के लिये दाण्डिक विचारण का सामना कर रहा है - अभिनिर्धारित, साक्षी द्वारा यह कथन नहीं किया गया कि अभियुक्त द्वारा उच्चारित अभिकथित शब्दों को सुनने के पश्चात् अधिवक्ता की ख्याति की अपहानि कारित हुई – अधिकारियों को उनके पदीय कृत्यों के निर्वहन से निवारित करते हुए दाण्डिक विचारण का सामना करने के लिए दबाव बनाना, उन्हें हतोत्साहित करेगा – कार्यवाहक अभियंता के विरूद्ध धारा 499 के अंतर्गत संस्थित परिवाद अभिखण्डित किया गया।

A.K. Hade v. Shailendra Singh Yadav & anr.

Order dated 07.05.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 2629 of 2012, reported in ILR (2018) MP 1807

Relevant extracts from the order:

From the plain reading of Section 499 of I.P.C., it is clear that no imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. In the present case, the complainant has examined only one witness in his support. Shri Girish Kumar has not stated that after hearing the words allegedly uttered by the applicant, the reputation of the respondent no.1 was harmed in his estimation. On the contrary, Girish Kumar has stated that after considering the conduct of the applicant, he too returned back without making his application. Thus, the statement of Girish Kumar, does not prima facie fulfill the requirement of Explanation 4 of Section 499.

Thus, it is held, that the complaint by the respondent no.1, has been filed maliciously instituted with an ulterior motive for wreaking vengeance on the applicant and with a view to deter him from discharging his official duties as

provided under the Electricity Act. It is the duty of the Electricity Department to check the theft of electricity and to act in accordance with the provisions of Electricity Act. There is nothing on record to suggest that any action of the Electricity Department was dehors the provisions of Electricity Act. If an official is forced to face criminal prosecution for having performed his duties, then certainly, it would demoralize the officers, and they would start hesitating in discharging their duties and such an attitude on the part of the officers would be against the society at large and would not be in the interest of justice. Furthermore, the complaint filed by the respondent no.1, does not full fill the requirement of Explanation 4 of Section 499 of I.P.C.

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309. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 2, 3 and 4

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 2, 4 and 7

(i) Whether Principal Magistrate, while sitting alone, can finally decide a case pending before Juvenile Justice Board? Held, No – The case can finally be decided by at least two members including the Principal Magistrate – No individual member including the Principal Magistrate and no two members excluding the Principal Magistrate can finally dispose of the case.

(ii) Disposal of case in contravention of the provisions of the Act, effect of – If Principal Magistrate finally disposes of a case in contravention of the provisions of the Act, the order passed by it is *coram non judis* and being nullity is *void ab initio*.

(iii) Decision by a Court having no jurisdiction – The decision or order will be *non est* or nullity.

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2000 – धाराएं 2, 3 एवं 4

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 – धाराएं 2, 4 एवं 7

(i) क्या किशोर न्याय बोर्ड के समक्ष लंबित मामले को, प्रधान मजिस्ट्रेट, जब वह अकेले बैठा है, अंतिम रूप से निराकृत कर सकता है? अभिनिर्धारित, नहीं – ऐसा प्रकरण प्रधान मजिस्ट्रेट सहित न्यूनतम दो सदस्यों द्वारा ही अंतिम रूप में निराकृत किया जा सकता है – प्रधान मजिस्ट्रेट या कोई भी सदस्य अकेले और प्रधान मजिस्ट्रेट के बिना कोई भी दो सदस्य ऐसे मामले को अंतिम रूप से निराकृत नहीं कर सकते हैं।

(ii) अधिनियम के प्रावधानों के उल्लंघन में मामले के निराकरण का प्रभाव – यदि प्रधान मजिस्ट्रेट इस अधिनियम के प्रावधानों के उल्लंघन में अंतिम रूप में किसी प्रकरण को निराकृत करता है, तो ऐसा पारित आदेश अधिकारिता विहीन है और अस्तित्वहीन होने से प्रारंभतः शून्य है।

(iii) अधिकारिता न रखने वाले न्यायालय द्वारा विनिश्चय – ऐसा विनिश्चय या आदेश नास्ति अथवा अस्तित्वहीन होगा ।

State of Himachal Pradesh v. Happy

Order dated 28.05.2019 passed by the High Court of Himachal Pradesh in Criminal Revision No. 407 of 2018, reported in 2019 LawSuit (HP) 393

Relevant extracts from the order:

The case was instituted on 28.09.2010 when the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'Act of 2000') was in operation.

Section 2 (c) defines Board in the following terms:

> "(c) **"Board"** means a Juvenile Justice Board constituted under Section 4."

Section 2(l) of the Act of 2000 reads thus:

> **"juvenile in conflict with law"** means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence."

Only sub-Section (2) of Section 4 is relevant for the determination of the instant *lis* and reads thus:

> "(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the Principal Magistrate."

Thus, it is clear that a Juvenile Justice Board is to be three member Board consisting of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench has been vested with the powers conferred by the Code of Criminal Procedure, on a Metropolitan Magistrate or, as the case may be, on a Judicial Magistrate of the first class and the Magistrate on the Board is to be designated as the Principal Magistrate.

As regards the procedure etc. to be followed by the Board, the same is provided in Section 5 and sub section (3) thereof reads as under:

> "3. A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings:
>
> Provided that there shall be at least two members including the principal Magistrate present at the time of final disposal of the case."

It is not in dispute that the case was decided at the time when the Act of 2000 was repealed and the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'Act of 2015') had come into force.

It would be noticed that even under this Act, the Board has been defined in Section 2 (10) in the following terms:

> "(10). **"Board"** means a Juvenile Justice Board constituted under Section 4."

Section 2 (13) of the Act of 2015, reads thus:

> **"child in conflict with law"** means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence."

It would further be noticed that even though there are some changes in the qualifications of the members of the Board, however, the composition remains the same and such Board is to comprise of three members as provided in sub-Section (2) of Section 4, which reads thus:

> "(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class."

Likewise, the procedure in relation to the Board has been provided under Section 7 of the Act of 2015 and sub-Section (3) whereof is *pari-materia* with sub-Section (3) of Section 5 of the Act of 2000 and reads thus:

> "(3). A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board

shall be invalid by the reason only of the absence of any member during any stage of proceedings:

Provided that there shall be at least two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under subsection (3) of Section 18."

At this stage, the Court is not going into the thicket of the controversy as to which of the Acts would govern the proceedings. However, in view of the legal provisions extracted above, it is abundantly clear that under both the Acts, the cases of "juvenile in conflict with law" and "child in conflict with law", as the case may be, can be disposed of finally only by at least two members including the Principal Magistrate present at the time of disposal of such case. No individual Member including the Principal Magistrate and no two Members excluding the Principal Magistrate can finally dispose of the case.

The Principal Magistrate could not have finally disposed of the case in contravention of the provisions of the Act(s) *supra* and, therefore, the order passed by it is ***coram non judis*** and being nullity is ***void ab initio***.

It is well settled and needs no authority that "where a Court takes upon itself to exercise a jurisdiction it has not possessed, its decision amounts to nothing". Consequently, any order passed by the Court having no jurisdiction is ***non est*** and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is ***coram non judis***.

This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Hasham Abbas Sayyad v. Usman Abbas Sayyad and others, AIR 2007 SC 1077,*** wherein it was held as under:

"The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be ***coram non judis*** being a nullity, the same ordinarily should not be given effect to.

This aspect of the matter has recently been considered by this Court in ***Harshad Chiman Lal Modi v. DLF Universal Ltd. and another, (2005) 7 SCC 791,*** in the following terms :

"We are unable to uphold the contention. The jurisdiction of a Court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction;

(ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is nullity." [See also ***Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum and others, 2006 (9) SCALE 675*** and ***Shahbad Coop. Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana and others, 2006 (11) SCALE 674 para 29***]

We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Sec. 21 of the Code of Civil Procedure; and a decree passed by a Court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

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310. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 2, 15, 19, 49 and 107

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2016 – Rules 10A and 86

CONSTITUTION OF INDIA – Article 21

(i) Preliminary assessment of heinous offences by Board – Following precautions are required to be followed:

(a) Experience of psychologists or psycho-social workers or other experts whose assistance may be taken by Board – They should have mandatory experience of working with children living in difficult circumstances.

(b) The child alleged to be in conflict with law cannot be kept confined in the psychiatry ward of a Hospital for the purpose of preliminary assessment – Non-compliance of the same, vitiates the order.

(c) Legal assistance/effective opportunity of hearing – Legal assistance/ effective opportunity of hearing should be provided to the child in conflict with law during the preliminary assessment made by the Juvenile Justice Board – If it is not provided, the proceeding shall be vitiated.

(d) If Board decides that there is a need for trial of the child as an adult, it should assign reasons for the same and the copy of the order shall be provided to the child forthwith.

(e) While undertaking preliminary assessment, Principal Magistrate is required to mention in the order, the circumstances in which the offence took place – Also, required to adhere to the presumption of innocence in favour of the child in conflict with law.

(f) While directing the trial of the child as an adult, the Board must remain alive to the situation that the offence had been committed by the child in such a manner which gives rise to an inference that the act was done in a cold blooded or calculated manner which does not co-relate to the child like behaviour of the offender.

(g) The order must refer to the circumstances which led to the commission of offence – There must be an active consideration of the fact whether the child was driven to commit the offence because of the conduct of the victim.

(h) Juvenile Justice Board should ensure that the child alleged to be in conflict with law shall not be placed in a police lock-up or lodged in a jail.

(ii) Criminal investigation as to child alleged to be in conflict with law – The investigation has to be done by Special Juvenile Police Unit headed by a police officer not below the rank of a Deputy S.P., with two social workers, of whom one shall be a woman – It is a mandate of law that for dealing with the girl child, woman police personnel shall be engaged – Non-compliance of the same, vitiates the entire investigation.

(iii) Sending a juvenile to prison, effect of – It amounts to deprivation of personal liberty on multiple aspects and breach of fundamental rights guaranteed under Article 21 of the Constitution of India.

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2015 – धाराएं 2, 15, 19, 49 एवं 107

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2016 – नियम 10क एवं 86

भारत का संविधान – अनुच्छेद 21

(i) बोर्ड द्वारा जघन्य अपराधों में प्रारंभिक निर्धारण – निम्नलिखित पूर्वावधानियां अनुसरित की जाना आवश्यक हैं –

(a) मनोचिकित्सकों या मनोसामाजिक कार्यकर्ताओं या अन्य विशेषज्ञों, जिनका सहयोग बोर्ड द्वारा लिया जा सकता है, का अनुभव – उन्हें अनिवार्य रूप से कठिन परिस्थितियों में रहने वाले बच्चों के साथ कार्य करने का अनुभव होना चाहिए।

(b) विधि का उल्लंघन करने के लिए अभिकथित बालक को प्रारंभिक निर्धारण के प्रयोजन से किसी चिकित्सालय के मनोचिकित्सा वार्ड में नहीं रखा जा सकता है – इसका अपालन, आदेश को दूषित करता है।

(c) विधिक सहायता/सुनवाई का प्रभावी अवसर – किशोर न्याय बोर्ड द्वारा किए जा रहे प्रारंभिक निर्धारण के अनुक्रम में विधिक सहायता/सुनवाई का प्रभावी अवसर विधि का उल्लंघन करने वाले किशोर को प्रदान कराया जाना चाहिए – यदि इसे प्रदान नहीं किया जाता है तो कार्यवाही दूषित होगी।

(d) यदि बोर्ड विनिश्चित करता है कि बालक के वयस्क की भांति विचारण की आवश्यकता है तो उसे इसके कारण देने चाहिए तथा ऐसे आदेश की प्रति तुरंत बालक को उपलब्ध करायी जानी चाहिए।

(e) प्रारंभिक निर्धारण संपादित करते समय प्रधान मजिस्ट्रेट को आदेश में वह परिस्थितियां जिनमें अपराध घटित हुआ है, उल्लिखित करना अनिवार्य है – साथ ही, विधि का उल्लंघन करने वाले बालक के पक्ष में निर्दोषिता की उपधारणा का पालन करना आवश्यक है।

(f) बालक के वयस्क की भांति विचारण का निर्देश देते समय बोर्ड को सदैव इस परिस्थिति के बारे में सचेत रहना चाहिए कि बालक द्वारा अपराध ऐसी रीति से किया गया है जिसमें यह अनुमान प्राप्त होता है कि ऐसा कार्य ऐसी निर्दयी अथवा सुनियोजित रीति से किया गया था जो कि अपराधकर्ता के बाल सुलभ व्यवहार से सहसंबद्ध नहीं है।

(g) ऐसे आदेश में उन परिस्थितियों का उल्लेख होना चाहिए जो ऐसे आदेश में अपराध कारित करने का कारण बनी हैं – इस संबंध में क्रियाशील विमर्श होना चाहिए कि क्या बालक व्यथित (पीड़ित व्यक्ति) के आचरण के कारण अपराध कारित करने मजबूर हुआ।

(h) किशोर न्याय बोर्ड को यह सुनिश्चित करना चाहिए कि विधि का उल्लंघन करने के लिए अभिकथित बालक पुलिस लॉकअप या जेल में न रखा जाए।

(ii) विधि का उल्लंघन करने के लिए अभिकथित बालक के संबंध में आपराधिक अन्वेषण – ऐसा अन्वेषण ऐसी विशेष किशोर पुलिस इकाई द्वारा किया जाना

चाहिए जिसका नेतृत्व दो सामाजिक सदस्य जिनमें से एक महिला होगी, सहित पुलिस उप अधीक्षक से अनिम्न श्रेणी के पुलिस अधिकारी द्वारा किया जाएगा – विधि का यह समादेश है कि स्त्री/बालिका से संव्यवहार हेतु स्त्री पुलिस अधिकारी को नियुक्त किया जाएगा – इसका अपालन सम्पूर्ण अन्वेषण दूषित करता है।

(iii) किशोर को कारागार प्रेषित करने का प्रभाव – यह विविध पहलुओं पर वैयक्तिक स्वतंत्रता से वंचित करना है और संविधान के अनुच्छेद 21 के अधीन प्रत्याभूत मूलभूत अधिकार का भंग है।

Smt. Durga w/o Shri Bherulal Meena v. State of Rajasthan

Judgment dated 15.04.2019 passed by the Rajasthan High Court in Criminal Appeal No. 27 of 2019, reported in 2019 LawSuit (RAJ) 180 (DB)

Relevant extracts from the judgment:

Having appreciated the proceedings of inquiry conducted by the Juvenile Justice Board and the Medical Report, we are of the firm opinion that the same do not stand to scrutiny on the anvil of the mandatory requirements of the Juvenile Justice Act and Rule 10A of The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (hereinafter referred to as 'the Model Rules, 2016').

As per the material available on record, the appellant, who was married (at the tender age of about 14 years) to the deceased for the last three years, was admittedly facing marital strife on a continued basis and thus, unquestionably, she was a child in difficult circumstances.

As is apparent from sub-Rule 2 of Rule 10A of the Model Rules, 2016, the assistance of the psychologists or psycho-social workers or other experts, which the Board requires for carrying out the preliminary assessment, should have experience of working with children in difficult circumstances. However, neither the assistance of any such psychologist was sought for nor any such psychologist or child psychologist having special experience of working with children in difficult circumstances was associated in the proceedings. Furthermore, we do not approve of the procedure adopted by the Juvenile Justice Board while making the preliminary assessment in as much as, the principles of natural justice were not adhered to and without any justification and without providing legal assistance, the child was sent and admitted in the psychiatry department of the MBH Hospital, Udaipur on the basis of some random secret report (copy whereof was not provided to her). Be that as it may. Rule 10A(4) provides that where the Board, after preliminary assessment under Section 15 of the Act, passes an order that there is a need for trial of the child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith. However, a plain reading of the order dated 05.09.2016 indicates that the Board did not provide a copy thereof to the child.

On going through the above order, it is crystal clear that the reasons assigned by the Board in the order dated 05.09.2016 for treating the child delinquent to be fit to be tried as an adult under Section 15 of the Juvenile Justice Act are not cogent, germane and compliant with the requirements of law.

Considered in light of 'Section 15 of the Act and Rule 10A of the Model Rules', we are of the firm opinion that the order dated 05.09.2016 does not stand to scrutiny on the anvil of these mandatory statutory provisions. While undertaking this exercise, the Principal Magistrate failed to advert to the circumstances in which, the offence took place and did not adhere to the presumption of innocence in favour of the child in conflict with law and passed the order dated 05.09.2016 in an absolutely mechanical and laconic manner. In our understanding while invoking Section 15 of the Act and directing the trial of the child as an adult, the Board must remain alive to the situation that the offence had been committed by the child in such a manner which gives rise to an inference that the act was done in a cold blooded or calculated manner which does not co-relate to the child like behaviour of the offender. No such reflection is visible in the order dated 05.09.2016. The order must refer to the circumstances which led to the commission of offence and there must be an active consideration of the fact whether, the child was driven to commit the offence because of the conduct of the victim. The Medical Board's report dated 30.08.2016 is referred to in an absolutely casual manner in the order. It is relevant to mention here that when the child was subjected to interrogation during the course of investigation, she categorically mentioned that she had contracted a love marriage with her husband Shri Bherulal the deceased. After some time, Bherulal started bearing a suspicion in his mind that illicit relations had developed between Durga and his father Unkar. He used to beat her and also treated her like an animal every other day after consuming liquor. In the night of 14.06.2016, Bherural consumed liquor and assaulted her badly. Thereafter, he poured kerosene on her body, on which, she ran away and slept in the bada. On the fateful night i.e. 15.05.2015, she was again badly thrashed and thus she became infuriated. In these difficult circumstances and finding Bherulal to be in an inebriated condition, she gave him a single blow with an axe which proved fatal. Manifestly, the tenor of this statement coupled with the allegations levelled in the FIR indicate that the husband and wife were not keeping on good terms and used to fight with each other on trivial issues. The appellant had been married to the deceased at a very tender age and thus, without any doubt, she cannot be attributed with the mental ability or maturity to understand and weigh the implications of the act which she committed on the spur of the moment after being traumatized by the cruel behaviour of her spouse. The anger of a young girl who is harassed, humiliated and treated cruelly in her matrimonial home and that too by the man with whom, she contracted a love marriage, can very well be understood because the doors of her maternal home are closed for her.

In this background, we are of the firm opinion that the admitted circumstances as reflected from record did not warrant that the appellant's case should have been sent to the Sessions Judge, Pratapgarh for trial as an adult under Section 15 of the Juvenile Justice Act. Be that as it may. Since the appellant was not provided the copy of the order dated 05.09.2016, manifestly, she was deprived of the opportunity to assail the same in appeal. The Sessions Judge Pratapgarh, framed charge against the appellant for the offence under Section 302 IPC vide order dated 09.02.2017. She pleaded not guilty. The prosecution examined as many as 12 witnesses in support of its case. The appellant, upon being questioned and confronted with the prosecution allegations in her statement under Section 313 Cr.P.C., denied the same and claimed to have been falsely implicated. However, no evidence was led in defence. Upon conclusion of the trial, the learned Sessions Judge, proceeded to convict and sentence the appellant as above by judgment dated 12.12.2018 immediately whereafter, the appellant was sent to the Central Jail Udaipur to suffer the sentence.

It is noteworthy that during the course of the trial and no sooner, the appellant crossed the threshold of 18 years, the learned Sessions Judge, Pratapgarh passed an order dated 19.08.2017 directing that she be sent to the District Jail, Pratapgarh. ***Ex-facie,*** the said order is also grossly illegal and contrary to the mandate of Section 10 of the Juvenile Justice Act which prohibits that no child alleged to be in conflict with law shall be placed in a police lock-up or lodged in a jail. After crossing the threshold of 18 years, the child accused had to be sent to the place of safety as per Section 19(3) read with Section 49 of the Juvenile Justice Act and could not have been transferred to the District Jail. We hold that on account of the child being sent to the District Jail, Pratapgarh contrary to the statutory prohibition, all further proceedings of the trial are vitiated.

Constitution of a Special Juvenile Police Unit in each district headed by a police officer not below the rank of a Dy. S.P. with two social workers having experience of working in the field of child welfare of whom one shall be a woman, is a mandate of law.

As per Rule 86(5) of the Model Rules, it is a mandate of law that for dealing with the girl child, woman police personnel shall be engaged. However, on a perusal of the entire record, it is clear that neither was the case handled by the Special Juvenile Police Units nor any woman police personnel was ever associated for dealing with the case of the child appellant. In this background, the entire procedure adopted by the investigating officer while investigating the case against the appellant suffers from an irregularity falling short of gross illegality. We are of the firm view that a prejudice caused to the child offender owing to non association of a female police officer in the procedure of investigation goes to the root of the matter.

In view of the above discussion made herein above, we conclude as below:

(i) that the entire investigation is vitiated for the reason that no female police officer was associated in the investigation against female child offender. Furthermore, the investigation was not conducted by the Special Juvenile Police Unit as warranted by Section 107(2) of the Juvenile Justice Act;

(ii) that the appellant did not murder her husband in furtherance of any pre-conceived design or in a cold calculated manner, and thus there was no justification for her trial as an adult by a Sessions Court by virtue of Section 15 of the Juvenile Justice Act;

(iii) that the Principal Magistrate failed to adhere to the mandatory requirements of Section 15 of the Act while holding the enquiry and making the assessment;

(iv) that no legal assistance/effective opportunity of hearing was provided to the appellant child during the preliminary assessment made by the Juvenile Justice Board under Section 15 of the Act and thus also, these proceedings are vitiated;

(v) that the preliminary assessment order is also vitiated for the reason that the appellant was unjustly kept confined in the psychiatry ward of the Hospital and because no psychologist or psycho-social worker having experience of working with children in difficult circumstances (as mandated by Section 15(3) of the Juvenile Justice Act), was associated during the enquiry conducted under Section 15 of the Juvenile Justice Act;

(vi) While holding the inquiry, the Juvenile Justice Board, failed to adhere to the principle that the child shall be presumed to be innocent unless proved otherwise as mandated by Section 3 of the Juvenile Justice Act read with Rule 10A(3) of the Model Rules, 2016. No consideration of this principle is reflected in the order and thus, the illegality is incurable and goes to the root of the matter;

(vii) copy of the order passed under Section 15 of the Act was not provided to the juvenile, thus breaching the mandate of Rule 10A of the Model Rules of 2016;

(viii) that the under-trial child was sent to the District Jail, Pratapgarh vide order dated 19.08.2017 and thus, was treated in gross contravention of the mandate of Section

19(3) read with Section 46 of the Act of 2015 thereby vitiating the entire proceedings before the Sessions Court.

(ix) The child suffered incarceration from 16.05.2016 to 11.02.2019 on which date this Court suspended the sentences awarded to her and thus, she has undergone a custodial period of nearly two years and seven months in a prison which course of action is totally prohibited by law.

Henceforth, the above observations shall be considered to be guidelines in considering cases of juveniles and shall be followed in the letter and spirit.

Hon'ble the Delhi High Court in case of ***Court On Its Own Motion v. Dept. of Women and Child Development and others, 2013 (3) RCR (Criminal) 382,*** considered the impact of sending a juvenile to prison and held that such a course of action amounts to deprivation of personal liberty on multiple aspects and is in breach of fundamental rights guaranteed under Article 21 of the Constitution of India. The Hon'ble Court observed as below:

"Today, the concept of personal liberty has received a far more expansive interpretation. The notion that is accepted today is that liberty encompasses these rights and privileges which have long been recognized as being essential to the orderly pursuit of happiness by a free man and not merely freedom from bodily restraint. There can be no cavil in saying that lodging juveniles in adult prisons amounts to deprivation of their personal liberty on multiple aspects.

In this backdrop, lodging of juveniles in the prison clearly amounts to violation of their fundamental rights guaranteed under Article 21 of the Constitution of India; contrary to the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000 apart from adverse psychological impact on these children..."

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311. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 2(33) and 15

INDIAN PENAL CODE, 1860 – Section 304

(i) Jurisdiction of Children's Court – The offences, which do not carry minimum punishment of seven years, do not come within the ambit of heinous offences – The offences are not to be tried by the Children Court and have to be tried by Juvenile Justice Board.

(ii) Whether offence punishable under Section 304 IPC comes within the ambit of heinous offence as defined in Section 2(33) of Juvenile Justice Act? Held, No.

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 – धाराएं 2 (33) एवं 15

भारतीय दण्ड संहिता, 1860 - धारा 304

(i) बालक न्यायालय की अधिकारिता – ऐसे अपराध जिनके लिए सात वर्ष का न्यूनतम दण्ड विहित नहीं है, जघन्य अपराध की परिधि में नहीं आते हैं – ऐसे अपराध बालक न्यायालय द्वारा विचारित नहीं किए जाने है और किशोर न्याय बोर्ड द्वारा विचारित किए जाने चाहिए।

(ii) क्या धारा 304 भा.दं.सं. के अधीन दण्डनीय अपराध किशोर न्याय अधिनियम की धारा 2(33) में यथा परिभाषित घोर अपराध की परिधि में आता है? अभिनिर्धारित, नहीं।

X Minor Through His Mother v. State of NCT of Delhi

Order dated 01.05.2019 passed by the High Court of Delhi in Cri.M.A. 6252 of 2019, reported in 2019 LawSuit (Del) 1862

Relevant extracts from the order:

Offence under Section 304 of IPC, consists two parts. Section 304 (Part-I) is punishable with imprisonment for life or imprisonment which may extend up to 10 years with fine, if it is found that accused had intended to cause death. So far as Section 304 (Part-II) of IPC is concerned, it carries punishment up to 10 years or fine or both, if the act is done with knowledge that it is likely to cause death but without any intention to cause death. A bare reading of Section 304 of IPC makes it clear that it does not carry any minimum punishment. Section 2(33) of Juvenile Justice Act clearly provides that heinous offence would be the one for which the minimum punishment of seven years is provided.

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312. LIMITATION ACT, 1963 – Articles 58 and 65

CIVIL PROCEDURE CODE, 1908 – Section 9, Order 7 Rule 7 and Order 22 Rules 3, 4 and 11

(i) Impleadment of legal representatives – If original plaintiffs sued as *Mutawalis* of suit properties which is in the nature of a managerial post, an appeal may not be abated on the ground that some of them have died and their legal representatives were not brought on record.

(ii) Grant of relief – Civil Court is empowered to mould or grant the lesser relief or smaller version of the relief claimed or prayed for.

(iii) Suit for possession based on title; limitation for – Limitation for filing suit for possession on basis of title is 12 years – Merely because one of the reliefs sought is of declaration, it will not mean that outer limitation of 12 years is lost.

(iv) Jurisdiction of Civil Court – Dispute as to whether the suit properties belong to *Dargah* or not and whether the properties are wakf properties or not – As the plaintiffs were not claiming any personal right in suit land but only claiming rights of management over the property, civil court had the jurisdiction to decide the suit.

परिसीमा अधिनियम, 1963 – अनुच्छेद 58 एवं 65

सिविल प्रक्रिया संहिता, 1908 – धारा 9, आदेश 7 नियम 7 एवं आदेश 22 नियम 3, 4 एवं 11

(i) विधिक प्रतिनिधि को पक्षकार बनाना – यदि मूल वादीगण ने वादग्रस्त सम्पत्तियों के प्रबंधकीय प्रकृति के पद मुतवल्ली, के रूप में वाद प्रस्तुत किया है तो उनमें से कुछ की मृत्यु हो जाने तथा उनके विधिक प्रतिनिधियों के अभिलेख पर नहीं लाए जाने के आधार पर अपील उपशमित नहीं हो सकती।

(ii) अनुतोष प्रदत्त करना – सिविल न्यायालय प्रार्थित या दावाकृत अनुतोष को परिवर्तित कर सकता है अथवा उसका छोटा या अल्प भाग प्रदान कर सकता है।

(iii) स्वत्व पर आधारित आधिपत्य हेतु वाद के लिए परिसीमा – स्वत्व के आधार पर आधिपत्य के लिऐ वाद प्रस्तुत करने की परिसीमा 12 वर्ष है – मात्र इस कारण कि अनुतोषों में से एक घोषणा है, 12 वर्ष की अधिकतम परिसीमा समाप्त नहीं होगी।

(iv) सिविल न्यायालय की अधिकारिता – इस संबंध में विवाद कि वादग्रस्त सम्पत्ति दरगाह से संबंधित है अथवा नहीं और वक्फ सम्पत्ति है अथवा नहीं – चूंकि वादीगण वादग्रस्त भूमि में किसी व्यक्तिगत अधिकार का दावा नहीं कर रहे थे वरन् उस सम्पत्ति पर प्रबंध के अधिकार मात्र का दावा कर रहे थे – सिविल न्यायालय को वाद को निराकृत करने की अधिकारिता है।

Sopanrao and anr. v. Syed Mehmood and anr.

Judgment dated 03.07.2019 passed by the Supreme Court of India in Civil Appeal No. 4478 of 2007, reported in (2019) 7 SCC 76 (3 Judge Bench)

Relevant extracts from the judgment:

During the pendency of this appeal, some of the plaintiffs have died and their legal representatives were not brought on record. Though a preliminary objection was raised that the appeal abates as a whole, we find no merit in this preliminary objection. The plaintiffs have been held to be descendents of *Mutawalis* of the properties which is in the nature of a managerial post. As such the appeal does not abate.

It was also urged that the plaintiffs had prayed that they were *Inamdars* and that the High Court had created a new case for the plaintiffs by declaring them to be

Mutawalis. It was argued that since plaintiffs had not claimed the relief that they were *Mutawalis*, the High Court could not have granted this relief. Reliance has been placed on a judgment of this Court in the case of ***Bachhaj Nahar v. Nilima Mandal, (2008) 17 SCC 491.*** Para 22 of the said judgment reads as follows:

> "22. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer."

In our view, the aforesaid judgment does not help the appellants and, in fact, helps the respondents. The judgment clearly lays down that the lesser relief or smaller version of the relief claimed or prayed for can be granted. The plaintiffs claimed the status of *Inamdars* which is a higher position than that of *Mutawalis*. The High Court has granted a lesser or lower relief and not a higher relief or totally new relief and, therefore, we reject this contention also.

It was next contended by the learned counsel that the suit was not filed within limitation. This objection is totally untenable. Admittedly, the possession of the land was handed over to the Trust only in the year 1978. The suit was filed in the year 1987. The appellants contend that the limitation for the suit is three years as the suit is one for declaration. We are of the view that this contention has to be rejected. We have culled out the main prayers made in the suit hereinabove which clearly indicate that it is a suit not only for declaration but the plaintiffs also prayed for possession of the suit land. The limitation for filing a suit for possession on the basis of title is 12 years and, therefore, the suit is within limitation. Merely because one of the reliefs sought is of declaration that will not mean that the outer limitation of 12 years is lost. Reliance placed by the learned counsel for the appellants on the judgment of this Court in ***L.C. Hanumanthappa v. H.B. Shivakumar, (2016) 1 SCC 332*** is wholly misplaced. That judgment has no applicability since that case was admittedly only a suit for declaration and not a suit for both declaration and possession. In a suit filed for possession based on title the plaintiff is bound to prove his title and pray for a declaration that he is the owner of the suit land because his suit on the basis of title cannot succeed unless he is held to have some title over the land. However, the main relief is of possession and, therefore, the suit will be governed by Article 65 of the Limitation Act, 1963. This Article deals with a suit for possession of immovable property or any interest therein based on title and the limitation is 12 years from the date when possession of the land becomes adverse to the

plaintiff. In the instant case, even if the case of the defendants is taken at the highest, the possession of the defendants became adverse to the plaintiffs only on 19.08.1978 when possession was handed over to the defendants. Therefore, there is no merit in this contention of the appellants.

It was also urged that the civil court had no jurisdiction to decide the suit. No such objection was raised before the trial court. This objection was raised before the High Court but has been rightly rejected. The issue in this case was whether the properties were properties of the *Dargah* or not and the issue was not whether the properties are wakf properties or not. The High Court rightly held that the plaintiffs were not claiming any personal right in the land but only claiming rights of management over the property of the *Dargah*. We agree with the finding of the High Court that the civil court had the jurisdiction to decide the suit.

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***313. MENTAL HEALTH ACT, 1987 – Sections 50, 51, 52, 53 and 54**

(i) Mentally ill person – Inquisition by Court – Whether separate applications are required for declaration of a person to be mentally ill and for appointment of guardian or manager for him? Held, No – Only one application is required to be made under Section 50 of the Act – Entire inquiry can be made on one application only.

(ii) Whether an application under Section 50 of the Mental Health Act can be rejected on the ground that details of property have not been disclosed? Held, No – Court should direct to give a declaration about details of properties of such person.

मानसिक स्वास्थ्य अधिनियम, 1987 – धाराएं 50, 51, 52, 53 एवं 54

(i) मानसिक रूप से अस्वस्थ व्यक्ति – न्यायालय द्वारा जांच - क्या किसी व्यक्ति को मानसिक रूप से अस्वस्थ घोषित करने एवं उसके लिए अभिभावक या प्रबंधक की नियुक्ति के लिए पृथक-पृथक आवेदन आवश्यक हैं? अभिनिर्धारित, नहीं – अधिनियम की धारा 50 के अधीन मात्र एक आवेदन ही आवश्यक है – पूरी जांच मात्र एक आवेदन पर की जा सकती है।

(ii) क्या मानसिक स्वास्थ्य अधिनियम की धारा 50 के अधीन प्रस्तुत आवेदन इस आधार पर खारिज किया जा सकता है कि संपत्ति का विवरण नहीं दिया गया है? अभिनिर्धारित, नहीं – न्यायालय को ऐसे व्यक्ति की संपत्ति के विवरण की घोषणा करने का निर्देश देना चाहिए।

Mohd. Yunus Munshi v. Public in General

Order dated 18.08.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Misc. Appeal No. 2295 of 2014, reported in ILR (2017) MP 2434

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

Assessment of compensation – Future prospects, addition of – Process of assessment of compensation must be certain and not vague – Where deceased was self-employed and was 23 years of age (below 40 years of age), addition of 40% of established income is required to be added towards future prospects.

[*Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130.* **and** *National Insurance Company Limited v. Pranay Sethi and ors., AIR 2017 SC 5157* **relied on]**

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर का निर्धारण – भविष्य की संभावनाओं का जोड़ा जाना – प्रतिकर निर्धारण की प्रक्रिया निश्चित होनी चाहिए न कि अस्पष्ट - जहाँ मृतक स्वनियोजित था और 23 वर्ष की आयु का (40 वर्ष से नीचे की आयु) था, सुस्थापित आय का 40 प्रतिशत भविष्य की संभावनाओं के संबंध में जोड़ा जाना आवश्यक है।

[***मैग्मा जनरल इंश्योरेंस कं. लिमिटेड वि. नानू राम, (2018) 18 एससीसी 130*** एवं ***नेशनल इंश्योरेंस कम्पनी लिमिटेड वि. प्रणय सेठी एवं अन्य, एआईआर 2017 एससी 5157 अवलंबित***]

Shantaben and ors. v. National Power Transport and anr.

Judgment dated 06.03.2019 passed by the Supreme Court in Civil Appeal No. 2523 of 2019, reported in 2019 ACJ 1784

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315. MOTOR VEHICLES ACT, 1988 – Section 166

(i) Compensation; assessment of – Death cases – Principles and factors – Summed up. (*Pranay Sethi, AIR 2017 SC 5157* **and** *Sarla Verma, AIR 2009 SC 3104* **followed).**

(ii) Whether *ex-gratia* **payment received by the claimants from the employer of the deceased is to be deducted while assessing pecuniary loss? Held, pecuniary advantage from whatever source must correlate with the injury or death resulting from motor accident – *Ex-gratia* amount need not be deducted. (*Sebastiani Lakra v. National Insurance Co. Ltd., AIR 2018 SC 5034* followed).**

मोटरयान अधिनियम, 1988 – धारा 166

(i) प्रतिकर का निर्धारण – मृत्यु के मामले – सिद्धांत एवं कारक – समेकित किए गए। (***प्रणय सेठी, एआईआर 2017 एससी 5157*** तथा ***सरला वर्मा, एआईआर 2009 एससी 3104*** अनुसरित।

(ii) क्या आर्थिक नुकसानी के निर्धारण में दावाकर्ता द्वारा मृतक के नियोक्ता से अनुग्रहपूर्वक प्राप्त भुगतान की कटौती की जानी चाहिए? अभिनिर्धारित, किसी भी स्रोत से प्राप्त आर्थिक लाभ का मोटर दुर्घटना के परिणामस्वरूप हुई क्षति या

मृत्यु से संबंधित होना चाहिए – अनुग्रहपूर्वक भुगतान की कटौती किया जाना आवश्यक नहीं है। (***सेबस्तियानी लाकरा वि. नेशनल इंश्योरेंस कं. लि., एआईआर 2018 एससी 5034*** अनुसरित)

National Insurance Company Ltd. v. Mannat Johal and ors. Etc.

Judgment dated 23.04.2019 passed by the Supreme Court in Civil Appeal No. 4079 of 2019, reported in AIR 2019 SC 2079

Relevant extracts from the judgment:

In a case like the present one, relating to the death of the vehicular accident victim, any process of awarding "just" compensation involves assessment of such amount of pecuniary loss which could be reasonably taken as the loss of dependency suffered by the claimants due to the demise of the victim. In other words, such a process, by its very nature, involves the assessment of monetary contribution that the claimants were likely to receive from the deceased had he not met with the untimely end due to the accident. For the purpose of such an assessment, while some of the basic facts, like the age, job and income of the deceased and the number of dependents with extent of their dependency, could be reasonably ascertained from the evidence on record, yet, several uncertain factors also, per force, come into play, like the future prospects of the deceased coupled with various imponderables related with a human life. As the process, by its very nature, involves a substantial deal of guess-work, this Court, over the years, has evolved and applied several principles so as to ensure that as far as possible, the methods for assessment remain uniform, curbing against disparity in the amount of compensation to be awarded in similarly circumstanced cases. It is not necessary for the present purpose to traverse through the large number of past decisions, particularly for the reason that the basic parameters stand explained and standardised with the larger Bench decision in ***National Insurance Co. Ltd. v. Pranay Sethi, AIR 2017 SC 5157,*** Para 61, wherein this Court has partly modulated the parameters enunciated in the two-Judge Bench decision in ***Sarla Verma and ors. v. Delhi Transport Corporation and anr., AIR 2009 SC 3104,*** and has laid down the principles as follows:

> "While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of

40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

The selection of multiplier shall be as indicated in the Table in Sarla Verma read with para 42 of that judgment.

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

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

For completion of the principles above-quoted, appropriate would it to be to take note of paragraphs 30 to 32 as also paragraph 42 in ***Sarla Verma*** (supra) which read as under:-

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in ***U.P. State Road Transport Corporation and other v. Trilok Chandra, (1996) 4 SCC 362,*** the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the

parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

... 42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the Table, which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

The aforesaid decision in ***Reliance General Insurance Company Ltd. v. Shashi Sharma & ors., 2016 ACJ 2723 (SC) = AIR 2016 SC 4465*** has been explained and distinguished by another three-Judge Bench of this Court in ***Sebastiani Lakra & ors. v. National Insurance Company Ltd. & ors., 2019 ACJ 34 (SC) = AIR 2018 SC 5034*** in the following:

"10. In ***Shashi Sharma's case, 2016 ACJ 2723 (SC) : (AIR 2016 SC 4465),*** this court was dealing with the payments made to the legal heirs of the deceased in terms of Rule 5(1) of the Haryana Compassionate Assistance to the Dependants of Deceased Government Employees Rules, 2006 (for short 'the said Rules'). Under Rule 5 of the said Rules on the death of a Government employee, the family would continue to receive as financial assistance a sum equal to the pay and other allowances that was last drawn by the deceased employee for periods set out in the Rules and after the said period the family was entitled to receive family pension.

The family was also entitled to retain the Government accommodation for a period of one year in addition to payment of ₹ 25,000 as *ex gratia*. In this case, the three-Judge Bench adverted to the principles laid down in ***Helen C. Rebello's and others v. Maharashtra State Road Transport Corporation and another, 1999 ACJ 10 (SC) : (AIR 1998 SC 3191),*** followed in ***Union India Insurance Co. Ltd. and others v. Patricia Jean Mahajan and others, 2002 ACJ 1441 (SC) : (AIR 2002 SC 2607),*** and came to the conclusion that the decision in ***Vimal Kanwar and others v. Kishore Dan and others, 2013 ACJ 1441 (SC) : (AIR 2013 SC 3830),*** did not take a view contrary to ***Helen C. Rebello or Patricia Jean Mahajan cases*** *(supra)*. The following observations are relevant: "(12) The principle expounded in this decision in ***Helen C. Rebello's case*** that the application of general principles under the common law to estimate damages cannot be invoked for computing compensation under the Motor Vehicles Act. Further, the 'pecuniary advantage' from whatever source must correlate to the injury or death caused on account of motor accident. The view so taken is the correct analysis and interpretation of the relevant provisions of the Motor Vehicles Act of 1939, and must apply *proprio vigore* to the corresponding provisions of the Motor Vehicles Act, 1988. This principle has been restated in the subsequent decision of the two-Judge Bench in ***Patricia Jean Mahajan's case,*** *(supra)*, to reject the argument of the insurance company to deduct the amount receivable by the dependants of the deceased by way of 'social security compensation' and 'life insurance policy'." However, while dealing with the scheme the court held that applying a harmonious approach and to determine a just compensation payable under the Motor Vehicles Act it would be appropriate to exclude the amount received under the said Rules under the head of 'pay and other allowances' last drawn by the employee. We may note that on principle this court has not disagreed with the proposition laid down in ***Helen C. Rebello or in Patricia Jean Mahajan*** *(supra)*, but while arriving at a just compensation, it had ordered the deduction of the salary received under the statutory Rules."

In the present case too, it has not been shown if the *ex gratia* amount received by the claimants had been under any Rules of service and would be of continuous assistance, as had been the case in ***Shashi Sharma*** *(supra)* as per the Rules of 2006 considered therein. In an overall analysis and with reference

to the decision in ***Sebastiani Lakra*** *(supra)*, we are clearly of the view that the decision in Shashi Sharma would not apply to the facts of the present case and no deduction in the amount awarded by the High Court appears necessary.

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

Compensation, determination of – Multiplier – Appropriate multiplier in case of deceased bachelor – Multiplier should be applied according to the age of the deceased and not according to the age of the dependents. [*Sube Singh and another v. Shayam Singh (Dead) and others, (2018) 3 SCC 18,* relied on]

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर का निर्धारण – गुणांक – अविवाहित मृतक के मामले में उपयुक्त गुणांक – गुणांक मृतक की आयु के अनुसार लागू किया जाना चाहिए न कि उसके आश्रितों की आयु के अनुसार। *[* ***सूबे सिंह एवं अन्य विरूद्ध श्याम सिंह (मृत) एवं अन्य,*** *(2018) 3* ***एसीसी*** *18,* अवलंबित]

M/s Royal Sundaram Alliance Insurance Company Ltd. v. Mandala Yadagari Goud and others

Judgment dated 09.04.2019 passed by the Supreme Court in Civil Appeal No. 6600 of 2015, reported in AIR 2019 SC 1825 (3 Judge Bench)

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317. MOTOR VEHICLES ACT, 1988 – Sections 166, 168 and 173

Actionable negligence in motor accident claim cases – Concept of negligence as applicable to the cases of motor accidents has three components i.e. duty to take care, breach of such duty and consequential injury/ damage – A claim petition cannot be dismissed without considering the three elements.

मोटर यान अधिनियम, 1988 – धाराएं 166, 168 एवं 173

मोटर यान दावों में अनुयोज्य असावधानी – मोटर दुर्घटनाओं के मामलों में प्रयोज्य असावधानी की अवधारणा के तीन घटक हैं यथा सावधानी बरतने का कर्त्तव्य, ऐसे कर्त्तव्य का उल्लंघन और परिणामी क्षति/हानि – इन तीन घटकों पर विचार किए बिना दावा याचिका खारिज नहीं की जा सकती है।

Virendra Singh Rana v. Pratap Singh and ors.

Judgment dated 1l.05.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Misc. Appeal No. 257 of 2004, reported in 2019 ACJ 1499

Relevant extracts from the judgment:

Learned Claims Tribunal has recorded a finding that as far as plea of driver not having a valid driving licence is concerned, that was not correct inasmuch

as Insurance Company had failed to discharge this burden that driver was not having valid driving licence, but it also recorded a finding that there is contradiction in *Dehati Nalishi* which was recorded by claimant himself inasmuch as Ex. P/24 is the copy of *Rojnamacha* and claimant had given intimation at police Station, Barohi, that he was travelling in car No. MP 07 W 1784 and that car was driven by Pratap Jatav. Because it was raining and weather was not conducive, car had slipped from the road and collided with a tree, as a result of which they sustained injuries. There is no mention of car being driven at a very high speed and negligently, whereas the story which was developed by respondent/driver in regard to car meeting with an accident is because of a blue-bull came on the road, accident had occurred. Thus, holding that unless and until negligence of driver is proved, the Insurance Company is not liable to pay any compensation, claim petition has been dismissed.

In the Law of Torts by Ratanlal and Dhirajlal updated 26th Edition by Justice G.P. Singh, Former Chief Justice of Madhya Pradesh High Court, it has been mentioned that there are three constituents of negligence; (i) duty to take care (ii) breach of duty and (iii) consequential damage. It is mentioned that actionable negligence constitutes in the negligence of use of ordinary care or skill towards a person to whom defendant owes the duty of observing ordinary care and skill, by which negligence the plaintiff has suffered injury to his person or property. According to Winfield "negligence as a tort is the breach of legal duty to take care which results in damage, undesired by the defendant to the plaintiff''. Therefore, in this backdrop the concept of negligence is to be examined and chronology of events leading to the accident is to be appreciated. As per *Rojnamacha* entry, it is mentioned that because of weather and rain car had slipped and collided with a tree on the roadside. Under such facts and circumstances, the duty of the driver was to drive cautiously when the weather is not conducive and when the road conditions are such that it may create slippery conditions on the road for several reasons like mixing of dirt and water making the road slippery or mixing of vehicular emission with water or dirt or both rendering the vehicle slippery and also tyres of vehicle are not having appropriate grip and groove, and these may be the conditions which will determine the speed of driving and skill of driving. It is true that in *Dehati Nalishi* only one facet has been recorded regarding slipping of vehicle due to rain and thunderstorm and its collusion with tree, but at the same time, if the vehicle is being driven in such weather condition, then a duty is cast on the driver either not to drive and wait for rain and thunderstorm to pass or to take all possible precautions so that vehicle may not slip and collide with a tree. This degree of care should have been higher looking to the time of the accident. Collusion with a tree in itself gives a presumption to the facet of negligence inasmuch as under such weather conditions also if vehicle would have been driven with due care and caution, then it would not have slipped and collided with a roadside object. Therefore, in the opinion of this Court, Claims Tribunal has failed to understand and appreciate

the concept of negligence into its three components, namely duty to take care, breach of duty and consequential damage and has wrongly held that there was no negligence on the part of the driver, and therefore, denied compensation. In the opinion of this Court, once vehicle had met with an accident and that accident is not disputed, then in the light of the law laid down by the Supreme Court in the case of ***Kaushnuma Begum v. New India Assurance Co. Ltd., 2001 ACJ 428,*** applying the rule of strict liability propounded in ***Raylands v. Fletcher, 1868 LR 3 HL 330*** compensation is payable. The decision rendered by this Court in the case ***Jitendra Sharma v. Yaduveer Singh, M.A. No. 760 of 2001, decided on 30.08.2016*** cited by learned counsel for the Insurance Company is not applicable in the facts and circumstances of this case.

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318. N.D.P.S. Act, 1985 – Section 32B

Sentence – More than the minimum prescribed – Whether trial court can impose punishment higher than the minimum term of imprisonment prescribed in absence of any of the factors enumerated in clauses (a) to (f) of Section 32? Held, Yes – Court's discretion to consider *"such factors as it may deem fit"* is not taken away – Further held, quantity of substance with which accused is charged with is a relevant factor for imposing higher than the minimum term of punishment.

स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम, 1985 – धारा 32ख

दण्डादेश – न्यूनतम विहित दण्ड से अधिक दिया जाना – क्या विचारण न्यायालय धारा 32 के खण्ड (क) से (च) में प्राविधित किन्हीं बातों के अभाव में न्यूनतम विहित दण्डादेश से अधिक दण्डादेश अधिरोपित कर सकता है? अभिनिर्धारित, हां – न्यायालय का ''ऐसी बातें जिन्हें वह उचित समझे'' पर विचार करने का विवेकाधिकार नहीं छीना जा सकता – आगे अभिनिर्धारित, पदार्थ की मात्रा जिसके लिये अभियुक्त को आरोपित किया गया है, भी न्यूनतम विहित दण्डादेश से अधिक अधिरोपित किए जाने हेतु सुसंगत कारक है।

Rafiq Qureshi v. Narcotics Control Bureau Eastern Zonal Unit

Judgment dated 07.05.2019 passed by the Supreme Court in Criminal Appeal No. 567 of 2019, reported in AIR 2019 SC 2268

Relevant extracts from the judgment:

The main issues which have arisen in the present appeal pertain to interpretation of Section 32B of the Narcotic Drugs and Psychotropic Substances Act, 1985. The issues are as to: -

i) Whether in absence of any of the factors enumerated in Section 32-B from clauses (a) to (f) whether the trial court could have awarded punishment higher than the minimum term of imprisonment?

ii) Whether the trial court could not take any other factor into consideration apart from factors mentioned in clauses (a) to (f) while imposing punishment higher than the minimum term of imprisonment?

We have to first see the actual words used in the statute to find out object and purpose of inserting Section 32B. The Court after conviction of an accused hears the accused and take into consideration different circumstances of the accused and offence for awarding the appropriate sentence. Section 32B uses the phrase ***"the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment".*** The above statutory scheme clearly indicates the following:

(a) the court may where minimum term of punishment is prescribed take into consideration "such factors as it may deem fit" for imposing a punishment higher than the minimum term of imprisonment or fine;

(b) in addition, take into account the factors for imposing a punishment higher than the minimum as enumerated in clause (a) to (f).

The statutory scheme indicates that the decision to impose a punishment higher than the minimum is not confined or limited to the factors enumerated in clauses (a) to (f). The Court's discretion to consider such factors as it may deem fit is not taken away or tinkered. In a case a person is found in possession of a manufactured drug whose quantity is equivalent to commercial quantity, the punishment as per Section 21(c) has to be not less than ten years which may extend to twenty years. But suppose the quantity of manufactured drug is 20 time of the commercial quantity, it may be a relevant factor to impose punishment higher than minimum. Thus, quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment. Clauses (a) to (f) as enumerated in Section 32B do not enumerate any factor regarding quantity of substance as a factor for determining the punishment. In the event the Court takes into consideration the magnitude of quantity with regard to which an accused is convicted the said factor is relevant factor and the Court cannot be said to have committed an error when taking into consideration any such factor, higher than the minimum term of punishment is awarded.

The specific words used in Section 32B that Court may, in addition to such factors as it may deem fit clearly indicates that Court's discretion to take such factor as it may deem fit is not fettered by factors which are enumerated in clauses (a) to (f) of Section 32B.

In view of the foregoing discussion, we are of the view that punishment awarded by the trial court of a sentence higher than the minimum relying on the quantity of substance cannot be faulted even though the Court had not adverted to the factors mentioned in clauses (a) to (b) as enumerated under Section 32B.

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***319. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 139**

(i) Dishonor of cheque – Presumption – Once signature upon cheque is admitted by accused – Presumption shall be raised that cheque was issued in discharge of debt or liability.

(ii) Dishonor of cheque – Presumption – When accused raises a probable defence regarding financial capacity of complainant in his cross-examination – It is incumbent upon complainant to explain his financial capacity – Court cannot insist on a person to lead negative evidence.

परक्राम्य लिखत अधिनियम, 1881 – धाराएं 138 एवं 139

(i) चैक का अनादरण – उपधारणा – एक बार अभियुक्त द्वारा चैक पर हस्ताक्षर स्वीकार कर लिया गया है – तो यह उपधारणा की जायेगी की चैक किसी ऋण अथवा दायित्व के उन्मोचन हेतु जारी किया गया था।

(ii) चैक का अनादरण – उपधारणा – जब अभियुक्त द्वारा परिवादी के प्रतिपरीक्षण के दौरान उसकी आर्थिक सक्षमता को लेकर अधिसंभाव्य बचाव लिया जाता है - तब परिवादी का यह कर्तव्य है कि वह अपनी आर्थिक सक्षमता को स्पष्ट करे – न्यायालय किसी व्यक्ति को नकारात्मक साक्ष्य देने के लिये विवश नहीं कर सकता।

Basalingappa v. Mudibasappa

Judgment dated 09.04.2019 passed by the Supreme Court in Criminal Appeal No. 636 of 2019, reported in AIR 2019 SC 1983

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320. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 142

Dishonour of cheque – Multiple demand notices – Cause of action when arises? Held, there is no bar in issuing multiple notices – But cause of action would arise even after service of the first notice itself.

परक्राम्य लिखत अधिनियम, 1881 – धाराएं 138 एवं 142

चैक का अनादरण – एक से अधिक मांग सूचना पत्र – वाद हेतुक कब उत्पन्न होगा? अभिनिर्धारित, एक से अधिक सूचना पत्र जारी करने पर कोई रोक नहीं है – परन्तु वाद हेतुक प्रथम सूचना पत्र से भी उत्पन्न होगा।

Birendra Prasad Sah v. State of Bihar and anr.

Judgment dated 08.05.2019 passed by the Supreme Court in Criminal Appeal No. 868 of 2019, reported in AIR 2019 SC 2496

Relevant extracts from the judgment:

In the present case, the facts narrated indicate that the appellant issued a legal notice on 31 December 2015. This was within a period of thirty days of the receipt of the memo of dishonour on 4 December 2015. Consequently, the requirement stipulated in proviso (b) to Section 138 was fulfilled. Proviso (c)

spells out a requirement that the drawer of the cheque has failed to make payment to the holder in due course or payee within fifteen days of the receipt of the notice. The second respondent does not as a matter of fact, admit that the legal notice dated 31 December 2015 was served on him. The appellant has in the complaint specifically narrated the circumstance that despite repeated requests to the postal department, no acknowledgment of the notice was furnished. It was in these circumstances that the appellant issued a second notice dated 26 February 2016. Cognizant as we are of the requirement specified in proviso (b) to Section 138, that the notice must be issued within thirty days of the receipt of the memo of dishonour, we have proceeded on the basis that it is the first notice dated 31 December 2015 which constitutes the cause of action for the complaint under Section 138.

Note : कृपया इसके साथ ***MSR Leathers v. Palaniappan and another (2013) 1 SCC 177*** का अवलोकन अवश्य करें।

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321. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 148
CRIMINAL PROCEDURE CODE, 1973 – Sections 389 and 357
INTERPRETATION OF STATUTES:

(i) Whether amendment as to power of Appellate Court to order payment pending appeal against conviction shall be applicable to the proceedings initiated prior to the date of insertion of Section 148 i.e. 01.09.2018? Held, Yes – The amendment does not take away vested substantial right of appeal of the accused and is applicable retrospectively – Fact that the complaint was filed prior to the amendment, has no consequence.

(ii) Whether provision as to direct appellant/accused by Appellate Court to deposit minimum 20% of the fine or compensation awarded by the trial Court under Section 148 is mandatory? Held, Yes – The word 'may' used in section 148, Negotiable Instruments Act, 1881 should be construed as 'shall' – However, in exceptional cases, the Appellate Court is empowered not to direct to deposit the same but special reasons shall be recorded for it.

(iii) Whether Section 357(2) of CrPC is applicable to Section 148 of Negotiable Instruments Act? Held, No – As *non-obstante* clause in Section 148 of Negotiable Instruments Act prohibits application of provisions of the Criminal Procedure Code, the provision of Section 357(2) of the Code has no application to it.

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 138 एवं 148

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 389 एवं 357

संविधियों का निवर्चनः

(i) क्या दोषसिद्धि के विरूद्ध लंबित अपील में भुगतान करने की अपीलीय न्यायालय की शक्ति से संबंधित संशोधन धारा 148 के समाविष्ट किए जाने की तिथि यथा 01.09.2018 के पूर्व प्रारंभ कार्यवाहियों पर लागू होगा? अभिनिर्धारित, हां - यह संशोधन अभियुक्त के अपील के निहित सारवान् अधिकार को नहीं छीनता है और भूतलक्षी रूप से प्रयोज्य है - तथ्य कि परिवाद संशोधन के पूर्व प्रस्तुत की गई थी का कोई प्रभाव नहीं होगा।

(ii) क्या अभियुक्त/अपीलार्थी को अपीलीय न्यायालय द्वारा धारा 148 के अधीन विचारण न्यायालय द्वारा अधिनिर्णीत अर्थदण्ड या प्रतिकर का न्यूनतम 20 प्रतिशत जमा करने का निर्देश देने संबंधी प्रावधान आज्ञापक है? अभिनिर्धारित, हां - परक्राम्य लिखत अधिनियम, 1881 की धारा 148 में प्रयुक्त 'शब्द' may (सकता है)' का अर्थान्वयन 'shall (करेगा)' के रूप में किया जाना चाहिए - हालांकि, आपवादिक मामलों में अपील न्यायालय निक्षेप (जमा) करने का निर्देश न देने के लिए सशक्त है परंतु इसके लिए विशेष कारण अभिलिखित करने होंगे।

(iii) क्या परक्राम्य लिखत अधिनियम की धारा 148 के संबंध में धारा 357(2) दं.प्र.सं. प्रयोज्य है? अभिनिर्धारित, नहीं - चूंकि परक्राम्य लिखत अधिनियम की धारा 148 का 'नॉन आब्स्टेन्ट' खण्ड दण्ड प्रक्रिया संहिता के प्रावधानों की प्रयोज्यता को प्रतिषिद्ध करता है अतएव, संहिता की धारा 357(2) के प्रावधान की इसके संबंध में कोई प्रयोज्यता नहीं है।

Surinder Singh Deswal @ Col. S.S. Deswal v. Virender Gandhi

Judgment dated 29.05.2019 passed by the Supreme Court of India in Criminal Appeal No. 917 of 2019, reported in 2019 LawSuit (SC) 1245

Relevant extracts from the judgment:

While considering the aforesaid issue/question, the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act, as amended by way of Amendment Act No. 20/2018 and Section 148 of the N.I. Act as amended, are required to be referred to and considered, which read as under:

> "The Negotiable Instruments Act, 1881 (the Act) was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The said Act has been amended from time to time so as to provide, *inter alia*, speedy disposal of cases relating to the offence of dishonour of cheques. However, the Central Government has been receiving several representations from the public including trading community relating to pendency of cheque

dishonour cases. This is because of delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in Court proceedings to realize the value of the cheque. Such delays compromise the sanctity of cheque transactions.

2. It is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy.

3. It is, therefore, proposed to introduce the Negotiable Instruments (Amendment) Bill, 2017 to provide, *inter alia*, for the following, namely:-

(i) to insert a new Section 143A in the said Act to provide that the Court trying an offence under Section 138, may order the drawer of the cheque to pay interim compensation to the complainant, in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and in any other case, upon framing of charge. The interim compensation so payable shall be such sum not exceeding twenty per cent of the amount of the cheque; and

(ii) to insert a new Section 148 in the said Act so as to provide that in an appeal by the drawer against conviction under Section 138, the appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court.

4. The Bill seeks to achieve the above objectives."

"148. Power to Appellate Court to order payment pending appeal against conviction...

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court

may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.''

It is the case on behalf of the appellants that as the criminal complaints against the appellants under Section 138 of the N.I. Act were lodged/filed before the amendment Act No. 20/2018 by which Section 148 of the N.I. Act came to be amended and therefore amended Section 148 of the N.I. Act shall not be made applicable. However, it is required to be noted that at the time when the appeals against the conviction of the appellants for the offence under Section 138 of the N.I. Act were preferred, Amendment Act No. 20/2018 amending Section 148 of the N.I. Act came into force w.e.f. 01.09.2018. Even, at the time when the appellants submitted application/s under Section 389 of the Cr.P.C., 1973 to suspend the sentence pending appeals challenging the conviction and sentence, amended Section 148 of the N.I. Act came into force and was brought on statute w.e.f. 01.09.2018. Therefore, considering the object and purpose of amendment in Section 148 of the N.I. Act and while suspending the sentence in exercise of powers under Section 389 of the Cr.P.C., 1973 when the first appellate court directed the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court, the same can be said to be absolutely in consonance with the Statement of Objects and Reasons of amendment in Section 148 of the N.I. Act.

Having observed and found that because of the delay tactics of unscrupulous drawers of dishonored cheques due to easy filing of appeals and

obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the first appellate Court, in an appeal challenging the order of conviction under Section 138 of the N.I. Act, is conferred with the power to direct the convicted accused - appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any vested right of appeal of the accused - appellant has been taken away and/or affected. Therefore, submission on behalf of the appellants that amendment in Section 148 of the N.I. Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 01.09.2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the N.I. Act, no substantive right of appeal has been taken away and/or affected. Therefore the decisions of this Court in the cases of ***Garikapatti Veeraya v. N. Subbiah Choudhury, AIR 1957 SC 540*** and ***Videocon International Limited v. Securities and Exchange Board of India, (2015) 4 SCC 33,*** relied upon by the learned senior counsel appearing on behalf of the appellants shall not be applicable to the facts of the case on hand.

Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the N.I. Act stated hereinabove, on purposive interpretation of Section 148 of the N.I. Act as amended, we are of the opinion that Section 148 of the N.I. Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the N.I. Act, even in a case where the criminal complaints for the offence under Section 138 of the N.I. Act were filed prior to amendment Act No. 20/2018 i.e., prior to 01.09.2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the N.I. Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate Court directing the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial Court considering Section 148 of the N.I. Act, as amended.

Now, so far as the submission on behalf of the appellants that even considering the language used in Section 148 of the N.I. Act as amended, the appellate Court “may” order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word used is not “shall” and therefore the discretion is vested with the first appellate Court to direct the appellant-accused to deposit such sum and the appellate Court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the N.I. Act as amended is concerned, considering the amended Section 148 of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the N.I. Act, though it is true that in amended Section 148 of the N.I. Act, the word used is “may”, it is generally to be

construed as a “rule” or “shall” and not to direct to deposit by the appellate Court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the N.I. Act confers power upon the appellate Court to pass an order pending appeal to direct the appellant-accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the appellant-accused under Section 389 of the Cr.P.C., 1973 to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial Court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate Court for sufficient cause shown by the appellant.

Therefore, if amended Section 148 of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the N.I. Act, but also Section 138 of the N.I. Act. Negotiable Instruments Act has been amended from time to time so as to provide, ***inter alia,*** speedy disposal of cases relating to the offence of the dishonour of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the Court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend section 148 of the N.I. Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the N.I. Act and also Section 138 of the N.I. Act.

Now so far as the submission on behalf of the appellants, relying upon Section 357(2) of the Cr.P.C., 1973 that once the appeal against the order of conviction is preferred, fine is not recoverable pending appeal and therefore such an order of deposit of 25% of the fine ought not to have been passed and in support of the above reliance placed upon the decision of this Court in the case of ***Dilip S. Dhanukar v. Kotak Mahindra Bank, (2007) 6 SCC 528,*** is concerned, the aforesaid has no substance. The opening word of amended Section 148 of the N.I. Act is that “notwithstanding anything contained in the Code of Criminal Procedure...”. Therefore irrespective of the provisions of Section 357(2) of the Cr.P.C., 1973 pending appeal before the first appellate court, challenging the order of conviction and sentence under section 138 of the N.I. Act, the appellate Court is conferred with the power to direct the appellant to deposit such sum pending appeal which shall be a minimum of 20% of the fine or compensation awarded by the trial Court.

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322. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141

(i) Company and partnership firm – There is a distinction between Company and its Directors on one hand and a partnership firm and its partners on the other.

(ii) Dishonour of Cheque – Liability of one of the partners for cheques issued by another – Complaint clearly describes the nature of partnership, the business which was being carried on, the role of each of the partners and role of the partners in transactions with complainant – Accused have always been referred in plural sense – Specific role of each partner elucidated – Held, requirement of Section 141(1) is satisfied – Each partner is responsible for dishonour of cheque.

परक्राम्य लिखत अधिनियम, 1881 – धारा 141

(i) कंपनी और भागीदारी फर्म – एक ओर कंपनी और उसके निदेशकों और दूसरी ओर भागीदारी फर्म और उसके भागीदारों के मध्य अंतर होता है।

(ii) चेक अनादरण – एक भागीदार द्वारा जारी किए गए चेक के लिए दूसरे भागीदार का दायित्व – परिवाद स्पष्ट रूप से भागीदारी की प्रकृति, किए जाने वाले व्यवसाय, प्रत्येक भागीदार की भूमिका और परिवादी के साथ लेनदेन में भागीदारों की भूमिका का वर्णन करती है – अभियुक्त को हमेशा बहुवचन अर्थ में संदर्भित किया गया है – प्रत्येक भागीदार की विशिष्ट भूमिका स्पष्ट की गई – अभिनिर्धारित, धारा 141(1) की आवश्यकताएं पूर्ण होती हैं – प्रत्येक भागीदार चेक अनादरण के लिए उत्तरदायी है।

G. Ramesh v. Kanike Harish Kumar Ujwal and another

Judgment dated 05.04.2019 passed by the Supreme Court in Criminal Appeal No. 603 of 2019, reported in 2019 (2) Crimes 158 (SC)

Relevant extracts from the judgment:

In terms of the explanation to Section 141, the expression "company" has been defined to mean any body corporate and to include a firm or other association of individuals. Sub-Section (1) of Section 141 postulates that where an offence is committed under Section 138 by a company, the company as well as every person who, at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business shall be deemed to be guilty of the offence.

The issue is whether there are sufficient averments in the complaint to meet the requirement of Section 141(1). This is a matter which has to be determined on a holistic reading of the complaint. From the averments in the complaint, the case of the complainant is that the partnership firm of which the first respondent is a partner had obtained contracts for data entry, which were being sub-contracted to the complainant. The accused are alleged to have obtained a caution deposit of ₹ 1,00,000 and to have assigned the job of data

entry to the complainant. After completing the job of data entry, the accused issued two cheques dated 1st November, 2010 and 18th December, 2010 for the amount of ₹ 2,00,000 and ₹ 2,50,000 respectively. On presentation, the cheques were returned due to insufficiency of funds. It was thereafter, that the first respondent is alleged to have transferred an amount of ₹ 1,00,000 from his account on 8th February, 2011 and 10th February, 2011. The complaint contains the statement that the parties are related. Thereafter, two further cheques were issued by the managing partner on 30th May, 2011 and 19th July, 2011 each in the amount of ₹ 2,00,000. After the cheques were returned unpaid due to insufficiency of funds, the complainant is alleged to have informed the accused who are stated to have assured him that both the cheques would be honoured on re-presentation in the month of July 2011.

In the present case, it is evident from the relevant paragraphs of the complaint which have been extracted above that the complaint contains a sufficient description of (i) the nature of the partnership; (ii) the business which was being carried on; (iii) the role of each of the accused in the conduct of the business and, specifically, in relation to the transactions which took place with the complainant. At every place in the averments, the accused have been referred to in the plural sense. Besides this, the specific role of each of them in relation to the transactions arising out of the contract in question, which ultimately led to the dishonour of the cheques, has been elucidated.

The complaint contains a recital of the fact that the first set of cheques were returned for insufficiency of funds. It is alleged that the first respondent transferred an amount of ₹ 1,00,000 on 8th February, 2011 and 10th February, 2011. The complaint also contains an averment that after the second set of cheques were dishonoured, the accused assured the complainant that they will be honoured on re-presentation in the month of July 2011. The averments are sufficient to meet the requirement of Section 141(1).

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***323. PARTNERSHIP ACT, 1932 – Section 69**

CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

Rejection of plaint – Plaint contains an averment that agreement is in nature of partnership deed – Admittedly deed was not registered – Held, suit based on such unregistered partnership deed is not maintainable – Plaint is liable to be rejected.

भागीदारी अधिनियम, 1932 – धारा 69

सिविल प्रक्रिया संहिता, 1908 – आदेश 7 नियम 11

वादपत्र नामंजूर किया जाना – वादपत्र में यह अभिवचन था कि अनुबंध भागीदारी विलेख की प्रकृति का है – स्वीकृत रूप से विलेख पंजीकृत नहीं था – अभिनिर्धारित, इस तरह के अपंजीकृत भागीदारी विलेख के आधार पर संस्थित वाद प्रचलन योग्य नहीं है - वादपत्र नामंजूर किए जाने योग्य है।

Nirmala Devi (Smt.) and ors. v. Smt. Bharti Devi and ors.

Order dated 07.09.2017 passed by the High Court of Madhya Pradesh in Civil Revision No. 439 of 2015, reported in ILR (2017) MP (SN) 129.

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***324. PREVENTION OF CORRUPTION ACT, 1988 – Sections 8 and 12**

Non-public servant – Liability of – After receiving bribe, public servant handed it over to his wife – Wife actually abetted the offence of gratification through her husband; public servant – She cannot be presumed to be a channel between bribe giver and public servant without any gain for herself – Held, she is also liable for trial under Section 8/12 of the PC Act.

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 8 एवं 12

गैर-लोक सेवक – दायित्व – रिश्वत प्राप्त करने के बाद, लोक सेवक ने इसे अपनी पत्नी को सौंप दिया – पत्नी ने वास्तव में अपने पति लोक सेवक के माध्यम से परितोषण के अपराध का दुष्प्रेरण किया – उसके स्वयं के लिए लाभ के बिना, उसे रिश्वत देने वाले तथा लोकसेवक के मध्य कड़ी उपधारित नहीं किया जा सकता है। – अभिनिर्धारित, पत्नी भी भ्रष्टाचार निवारण अधिनियम की धारा 8/12 के अधीन विचारण के लिए उत्तरदायी है।

Shobha Jain (Smt.) v. State of M.P.

Order dated 08.08.2017 passed by the High Court of Madhya Pradesh in Criminal Revision No. 928 of 2017, reported in ILR (2017) MP 2555 (DB)

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325. PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 and 17

CRIMINAL PROCEDURE CODE, 1973 – Sections 173 and 362

CRIMINAL PRACTICE:

(i) Whether authorisation order for investigation not filed along with charge-sheet can subsequently be filed? Held, Yes – Failure to file it along with charge-sheet is mere omission constituting procedural lapse – Further held, rejection of first application, not on merits, has no impediment to bring the same on record subsequently.

(ii) Criminal trial – Investigating officer is required to produce all the relevant documents at the time of submission of charge-sheet but it does not mean that the additional documents cannot be produced subsequently – If he failed to file any document by mistake at previous occasion, he can file the same subsequently with the permission of the court.

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 13 एवं 17

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 173 एवं 362

आपराधिक विचारणः

(i) क्या अभियोग पत्र के साथ अप्रस्तुत अन्वेषण के लिये प्राधिकार आदेश बाद में प्रस्तुत किया जा सकता है? अभिनिर्धारित, हाँ – अभियोग पत्र के साथ प्रस्तुत करने में असफलता मात्र प्रक्रियात्मक चूक गठित करने वाला लोप है – आगे अभिनिर्धारित, गुणदोष पर अस्वीकार न किया गया प्रथम आवेदन तत्पश्चात् इसे अभिलेख पर लिये जाने में कोई बाधा नहीं है।

(ii) आपराधिक विचारण – अन्वेषण अधिकारी से अपेक्षित है कि वह अभियोग पत्र प्रस्तुति के समय सभी सुसंगत प्रलेखों को प्रस्तुत करे परन्तु इसका अर्थ यह नहीं है कि अतिरिक्त प्रलेख तत्पश्चात् प्रस्तुत नहीं किये जा सकते हैं – यदि वह पूर्व अवसर पर भूलवश किसी प्रलेख को प्रस्तुत करने में असफल रहता है तो वह उसे न्यायालय की अनुमति से पश्चातवर्ती प्रक्रम पर न्यायालय के समक्ष प्रस्तुत कर सकता है।

State Represented by Inspector of Police Central Bureau of Investigation v. M. Subrahmanyam

Judgment dated 07.05.2019 passed by the Supreme Court in Criminal Appeal No. 853 of 2019, reported in (2019) 6 SCC 357

Relevant extracts from the judgment:

The failure to bring the authorisation on record was more a matter of procedure, which is but a handmaid of justice. Substantive justice must always prevail over procedural or technical justice. To hold that failure to explain delay in a procedural matter would operate as res judicata will be a travesty of justice considering that the present is a matter relating to corruption in public life by holder of a public post. The rights of an accused are undoubtedly important, but so is the rule of law and societal interest in ensuring that an alleged offender be subjected to the laws of the land in the larger public interest. To put the rights of an accused at a higher pedestal and to make the rule of law and societal interest in prevention of crime, subservient to the same cannot be considered as dispensation of justice. A balance therefore has to be struck. A procedural lapse cannot be placed at par with what is or may be substantive violation of the law.

In ***Sakshi v. Union of India, (2004) 5 SCC 518,*** the Court observed:

> "... There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of

justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties."

The High Court was exercising inherent jurisdiction in the interest of justice and to prevent the abuse of the process of law. In the facts and circumstances of the case, the High Court ought to have exercised its inherent powers to allow the bringing of the authorisation order on record rather than to have adopted a narrow and pedantic approach to its own jurisdiction given the provisions of section 173(2)(5)(a) Cr.P.C., 1973 as observed in ***Bureau of Investigation v. R.S. Pai, (2002) 5 SCC 82:***

"From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in ***Narayan Rao v. State of A.P., AIR 1957 SC 737*** and it was held that the word "shall" occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused. Hence, the

impugned order passed by the Special Court cannot be sustained."

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326. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 2(f) and 12

Live-in relationship – When becomes relationship in the nature of marriage? Explained – Held, long cohabitation of a man and a woman raises a presumption of marriage – But this presumption is rebuttable – 'Exclusivity' and 'monogamous in character' are necessary for a relationship to be in nature of marriage – A concubine cannot maintain relation in the nature of marriage – Applicant entered in live-in relationship with respondent knowing him to be married – Held, this relationship cannot be called a relationship in nature of marriage.

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 – धारा 2(च) एवं 12

लिव-इन संबंध – विवाह की प्रकृति का संबंध कब बनता है? समझाया गया – एक पुरुष एवं एक महिला का लंबी अवधि तक साथ रहना, विवाह की उपधारणा बनाता है – परन्तु यह उपधारणा खण्डनीय है – 'अनन्य' एवं 'एक-विवाह का चरित्र' विवाह की प्रकृति के संबंध के लिए आवश्यक हैं – एक उपस्त्री विवाह की प्रकृति में संबंध नहीं बनाए रख सकती है – आवेदिका ने अनावेदक के विवाहित होने की जानकारी के बावजूद उसके साथ लिव-इन संबंध में प्रवेश किया – अभिनिर्धारित, इस संबंध को विवाह की प्रकृति का संबंध नहीं कहा जा सकता है।

Sooma Devi v. Ramkripal Mishra

Order dated 13.09.2017 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1796 of 2016, reported in ILR (2017) MP 2561

Relevant extracts from the order:

In the case of ***Indra Sarma v. V.K.V. Sarma, reported in (2013) 15 SCC 755*** the Apex Court has given guidelines for testing under what circumstances, a "live in relationship" will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. According to the Supreme Court :-

"**(i) Duration of period of relationship:** Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonalble period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(ii) Share household: The expression has been defined under Seciton 2(s) of the DV Act and hence, need no further elaboration.

(iii) **Pooling of resources and financial arrangements:** Supporting each other, or any one of them, financially, sharing bank account, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long-standing relationship, may be a guiding factor.

(iv) **Domestic arrangements:** Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(v) **Sexual relationship:** Marriage-like relationship refers to sexual relationship not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring, etc.

(vi) **Children:** Having children is a strong indication of a relationship in the nature of marriage. The parties, therefore, intend to have a long-standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(vii) **Socialisation in public:** Holding out to the public and socialising with friends, relations and others, as if they are husband and wife is a strong circumstances to hold the relationship is in the nature of marriage.

(viii) **Intention and conduct of the parties:** Common intention of the parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship. Intention may be expressed or implied and what is relevant is their intention as to matters that are characteristics of a marriage."

Though these parameters are not exhaustive, but will definitely give some insight to such relationship, observed by the Supreme Court. In the present case, the petitioner admittedly entered into "live in relationship" with the respondent but with the knowledge that the respondent is a married man. The generic proposition that where a man and a woman are proved to lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage. Hence, the relation of the petitioner and the respondent was not a relation in the nature of marriage. The status of the petitioner is, therefore, was of a concubine. A "concubine" cannot maintain relations in the nature of marriage. Because, such a relation (sic:relation) will not have exclusivity and will not be monogamous in character. The continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is

a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. In the instant case, there is rebuttal of the presumption.

As the petitioner was aware that the respondent was the married man even before the commencement of their relationship, hence, the status of the petitioner is that of "concubine" or mistress, who entered into relationship not in the nature of marriage. Long standing relations as concubine, though relations is not in the nature of marriage, of course, may at times, deserve protection because that woman might not have financial independence, but the DV Act, 2005 does not take care of such relationship. Hence, the petitioner is not entitled for the relief under the DV Act, 2005. That being so, the petition is dismissed.

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***327. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3(i)(x)**

Offence of atrocity – Complainant in his statement did not mention that expressions used by accused refer to caste or tribe to which he belong – Although other witnesses testify the same, held, there is doubt regarding offence of atrocity – Accused acquitted.

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 – धारा 3 (i) (x)

अत्याचार अपराध – परिवादी ने अपने कथनों में इस बात का उल्लेख नहीं किया कि अभियुक्त ने उसकी जाति या वर्ग सूचक शब्दों का प्रयोग किया था – यद्यपि अन्य साक्षियों ने ऐसे कथन किए थे – अभिनिर्धारित, अत्याचार के अपराध के संबंध में संदेह उत्पन्न होता है – अभियुक्त को दोषमुक्त किया गया।

Narad Patel v. State of Chhattisgarh

Judgment dated 10.05.2019 passed by the Supreme Court in Criminal Appeal No. 883 of 2019, reported in AIR 2019 SC 2288

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***328. SPECIFIC RELIEF ACT, 1963 – Section 38**

Perpetual injunction against co-owner – Disputed property is a part of land owned by several brothers as co-owner – 'X' purchased disputed property from one co-sharer – Suit filed by one co-sharer against 'X' and other brothers for perpetual injunction restraining them from interfering in peaceful possession over suit properties – Held, 'X' being purchaser of disputed property from one co-sharer, stepped into the shoes of co-sharer, hence, he has a right to defend his title and possession against co-sharer – Plaintiff, in absence of proof of exclusive possession of disputed property, cannot be granted injunction against co-owner.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 38

सह-स्वामी के विरूद्ध शाश्वत व्यादेश – विवादित संपत्ति अनेक भाईयों द्वारा सह-स्वामी के रूप में धारित भूमि का भाग है – 'X' ने विवादित संपत्ति एक सह-अंशधारी से क्रय की – एक सह-अंशधारी द्वारा 'X' तथा अन्य भाईयों के विरूद्ध उन्हें विवादित संपत्ति के शांतिपूर्ण आधिपत्य में हस्तक्षेप करने से अवरूद्ध करने के लिये शाश्वत व्यादेश हेतु वाद संस्थित किया गया – अभिनिर्धारित, 'X' ने एक सह-अंशधारी से विवादित संपत्ति के क्रेता के रूप में सह-अंशधारी की हैसियत को प्राप्त किया, अतः उसे सह-अंशधारी के विरूद्ध अपने स्वत्व तथा आधिपत्य की रक्षा का अधिकार है – वादी का विवादित संपत्ति में अन्नय आधिपत्य साबित होने के अभाव में, सह-स्वामी के विरूद्ध व्यादेश अनुदत्त नहीं किया जा सकता।

T. Ramalingeswara Rao (Dead) Thr. LRs. and another v. N. Madhava Rao and others

Judgment dated 05.04.2019 passed by the Supreme Court in Civil Appeal No. 3408 of 2019, reported in AIR 2019 SC 1777

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***329. SUCCESSION ACT, 1925 – Section 383**

Succession certificate; revocation of – Held, succession certificate can be revoked only when the grounds mentioned under sub-sections (a) to (e) of Section 383 are satisfied.

भारतीय उत्तराधिकार अधिनियम, 1925 – धारा 383

उत्तराधिकार प्रमाणपत्र का प्रतिसंहरण – अभिनिर्धारित, उत्तराधिकार प्रमाणपत्र का प्रतिसंहरण केवल तब किया जा सकता है जब धारा 383 की उपधारा (क) से (ड़) के तहत वर्णित आधारों की संतुष्टि होती है।

Joseph Easwaran Wapshare and others v. Shirley Katheleen Wheeler

Judgement dated 26.02.2019 passed by the Supreme Court in Civil Appeal No. 2284 of 2019, reported in (2019) 5 SCC 58

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330. TRANSFER OF PROPERTY ACT, 1882 – Section 58 (c)

(i) "Mortgage by conditional sale" and "Sale with a condition to repurchase" – Distinction and assessment of – Held, if sale and condition to repurchase are embodied in the separate documents, then the transaction cannot be a mortgage – However, converse is not always true – Relationship of debtor and creditor and transfer being a security for debt is the distinguishing factor between the two – Non-mention of mortgage amount and interest in the deed – Absence of any

condition to cultivate and enjoy usufructs as interest on mortgage amount show lack of intention to create mortgage.

(ii) "Mortgage by conditional sale" and "Sale with a condition to repurchase" – Interpretation of – Held, intention of the parties is the determining factor – This intention must be gathered from the document itself – If there is an ambiguity in the document, then Court may look to the surrounding circumstances to determine what was intended.

संपत्ति अंतरण अधिनियम, 1882 - धारा 58 (ग)

(i) ''सशर्त विक्रय द्वारा बंधक'' तथा ''पुनः क्रय की शर्त के साथ विक्रय'' - विभेद एवं निर्धारण - अभिनिर्धारित, यदि विक्रय तथा पुनः क्रय की शर्तें अलग-अलग दस्तावेजों में समाहित हैं, तो संव्यवहार बंधक नहीं हो सकता - ऋणी तथा ऋणदाता का संबंध एवं ऋण की प्रतिभूति के रूप में अंतरण उक्त दोनों के मध्य विभेदकारी तत्व है - विलेख में बंधक राशि तथा ब्याज के उल्लेख का अभाव - खेती करने तथा ऋण के ब्याज स्वरूप भोगाधिकार का उपभोग करने की किसी भी शर्त का अभाव बंधक सृजित करने के आशय का अभाव दर्शाता है।

(ii) ''सशर्त विक्रय द्वारा बंधक'' तथा ''पुनः क्रय की शर्त के साथ विक्रय'' - अर्थान्वयन - अभिनिर्धारित, पक्षकारों का आशय निर्धारक तत्व है - ऐसा आशय दस्तावेज से निकाला जाना चाहिए - यदि दस्तावेज में कोई अस्पष्टता हो, तब न्यायालय जो आशयित था यह निर्धारित करने के लिए परिवृत्त परिस्थितियों को देख सकता है।

Dharmaji Shankar Shinde and ors. v. Rajaram Shripad Joshi Dead through LRs. and ors.

Judgment dated 23.04.2019 passed by the Supreme Court in Civil Appeal No. 7448 of 2008, reported in AIR 2019 SC 2367

Relevant extracts from the judgment:

As per proviso to Section 58(c), if the sale and agreement to repurchase are embodied in the separate documents then the transaction cannot be a "mortgage by conditional sale" irrespective of whether the documents are contemporaneously executed; but the converse does not hold good. Observing that the mere fact that there is only one document, it does not necessarily mean that it must be a mortgage and cannot be a sale, in ***Chunchun Jha v. Ebadat Ali and another, AIR 1954 SC 345,*** it was held as under: "6. The first is that the intention of the parties is the determining factor: see ***Balkishen Das v. Legge 27 IA 58.*** But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not

what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.

The question in each case is the determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances. If the words are plain and unambiguous then in the light of the evidence of the surrounding circumstances, it must be given their true legal effect. If there is any ambiguity in the language employed, the intention is to be ascertained from the contents of the deed and the language of the deed is to be taken into consideration to ascertain the intention of the parties. Evidence of contemporaneous conduct of the parties is to be taken into consideration as the surrounding circumstances.

By perusal of Ex.P-73, it is clear that eight days prior to Ex.P-73, Shripad Joshi has borrowed orally a sum of Rs.700/- for the purpose of marriage of his daughter. At the time of execution of Ex.P-73 (28.07.1967), Shirpad Joshi required more money for the same reason and he executed Ex.P-73-document titled as "mortgage by conditional sale" for a consideration of ₹ 2500/- and on the date of execution of the said document, Shripad Joshi received only a sum of ₹ 1800/-. The earlier borrowed amount of ₹ 700/- was thus adjusted from the sale consideration of ₹ 2500/-. The intention of the parties in putting an end to the debtor-creditor relationship with respect to the sum of ₹ 700/- is clear from the recitals of the document i.e. adjustment of ₹ 700/- from the total consideration of ₹ 2500/- and parties intending to create a relationship of vendor and vendee by transfer of the suit property for a consideration of ₹ 2500/-. Period of five years was fixed in Ex.P-73 within which Shirpad Joshi-father of the respondents-plaintiffs was to repay the said amount. On the date of execution of the document (Ex.P-73), the possession of the property was handed over to the appellants-defendants for cultivation. Further, recitals are to the effect that if the consideration amount is paid within five years, Shripad Joshi-executant will get the mortgage redeemed. In case, the amount is not paid within the stipulated period of five years, the mortgage shall be treated as an absolute sale and thereafter Shankar Shinde to pay the land revenue to the government and all other charges for which executant will have no complaint. The recitals of the document make clear the intention of the parties that if the amount is not repaid within the stipulated period of five years, the transferee will have absolute right and the mortgage will be treated as an absolute sale and the transferee to pay the land revenue and the other charges. These clauses in Ex.P-73, in our view, are consistent with the intention of the parties making the transaction a conditional sale with an option to repurchase.

Mention of "borrowed a sum of ₹ 700/-" in the document is incidental. Mere incorporation of the word "borrowed" and "mortgage by conditional sale" cannot by itself establish that there is a debtor-creditor relationship. In fact, as pointed

out earlier, the recitals of the document make it clear that the parties expressed their intention to put an end to the debtor-creditor relationship with respect to the sum of ₹ 700/- that existed prior to the execution of Ex.P-73 and creating a relationship of vendor and vendee by transfer of the suit property for consideration of ₹ 2500/-. As rightly observed by the trial court, in Ex.P-73, there is no mention of the rate of interest, right of foreclosure that are essential in a deed of mortgage.

As per Section 58(a) of the Transfer of Property Act, the mortgage is the transfer of an interest in specific immovable property as security for the repayment of the debt; but such interest itself is immovable property. In the case in hand, non-mention of the mortgage amount for which the interest in the immovable property was created as security, indicate that the parties have never intended to create a mortgage deed. If really the parties have intended the transaction to be a mortgage, while handing over possession of the property to Shankar Shinde for cultivation, the parties would have stated that the cultivation and enjoyment of usufructs are in lieu of the interest payable by Shripad Joshi on the amount. But that was not to be so. The transfer of possession and right to cultivate the suit land could be conceived as the intention of the executant to transfer the right, title and interest in the property which are essentials in any transaction of a sale.

Moreover, as per the clauses in Ex.P-73 document, the possession of the suit property was also handed over to Shankar Shinde-father of the appellants. Though, it is stated that the transferee-Shankar Shinde was to pay the revenue to the government after five years, according to the appellants, ever since 1967, land revenue was paid by the father of the appellants. In his evidence, PW-1 admitted that revenue cess of the suit property has been paid by Shankar Shinde from 1967 and after his demise, by his legal heirs. Likewise, a mutation was also effected in the name of Shankar Shinde even in the year 1967. During his life time, father of the respondents-Shripad Joshi has not raised any objection to the mutation nor for the payment of the revenue cess by Shankar Shinde. Considering the contemporaneous conduct of the parties, it is clear that Shankar Shinde and thereafter the appellants were dealing with the suit property as if they were the owners of the land. The clause in Ex.P-73 that if the amount is not paid within a period of five years, the transaction will become a permanent sale deed and thereafter, the transferee will have the absolute right over the property are consistent with the express intention of parties making the transaction a conditional sale with option to repurchase.

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PART - III
CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 14.10.2019 OF STATE GOVERNMENT REGARDING DESIGNATION OF SPECIAL COURTS FOR TRIAL OF CASES UNDER MADHYA PRADESH NIKSHEPAKON KE HITON KA SANRAKSHAN ADHINIYAM, 2000

F. No. 1–3-2004-4823-2019-XXI-B(I). – In exercise of the powers conferred by sub-section (1) of Section 7 of the Madhya Pradesh Nikshepakon ke Hiton Ka Sanrakshan Adhiniyam, 2000 (No 16 of 2001), the State Government with the concurrence of the Chief Justice of the High Court of Madhya Pradesh, hereby, designates Courts of Session Judge/Additional Sessions Judge in each Session Division of the State as Special Court for the purpose of disposal of cases under Madhya Pradesh Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam.

This Notification is being issued in supersession of all its earlier Notification(s) issued in this regard.

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NOTIFICATION DATED 16.08.2019 OF MINISTRY OF WOMEN AND CHILD DEVELOPMENT (CW-I SECTION) REGARDING THE DATE OF ENFORCEMENT OF POCSO (AMENDMENT) ACT, 2019

S.O. 2957(E).—In exercise of the Powers conferred by sub-section (2) of section 1 of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (25 of 2019), the Central Government hereby appoints the 16th August, 2019 as the date on which the said Act shall come into force.

[F.No. 30/2/2018-CW-I]
AASTHA SAXENA KHATWANI, Jt. Secy.

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NOTIFICATION DATED 28.08.2019 OF MINISTRY OF ROAD TRANSPORT AND HIGHWAYS REGARDING THE DATE OF ENFORCEMENT OF CERTAIN PROVISIONS OF THE MOTOR VEHICLES (AMENDMENT) ACT, 2019

S.O. 3110 (E).— In exercise of the powers conferred by sub-section (2) of section 1 of the Motor Vehicles (Amendment) Act, 2019 (32 of 2019), the Central Government hereby appoints the 1st day of September, 2019 as the date on which the following provisions of the said Act shall come into force, namely:—

S. No.	Sections
1.	Section 2 and 3;
2.	Clauses (i) to (iv) of section 4 (both inclusive);
3.	Clauses (i) to (iii) of section 5 (both inclusive);

4.	Section 6;
5.	Clause (i) of section 7 ;
6.	Section 9 and 10;
7.	Section 14;
8.	Section 16;
9.	Clause (ii) of section 17;
10.	Section 20;
11.	Clause (ii) of section 21;
12.	Section 22;
13.	Section 24;
14.	Section 27;
15.	Clause (i) of section 28;
16.	Section 29 to 35 (both inclusive);
17.	Section 37 and 38;
18.	Section 41 and 42;
19.	Section 43;
20.	Section 46;
21.	Section 48 and 49;
22.	Section 58 to 73 (both inclusive);
23.	Section 75;
24.	Sub-clause (i) of clause (B) of section 77;
25.	Section 78 to 87 (both inclusive);
26.	Section 89;
27.	Sub-clause (a) of clause (i) and clause (ii) of section 91; and
28.	Section 92

[No. RT-11012/02/2019-MVL (Pt. 2)]
PRIYANK BHARTI, Jt. Secy.

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NOTIFICATION DATED 30.08.2019 OF MINISTRY OF ROAD TRANSPORT AND HIGHWAYS REGARDING THE DATE OF ENFORCEMENT OF THE MOTOR VEHICLES (AMENDMENT) ACT, 2019

S.O. 3147(E) – In exercise of the powers conferred by sub-section (2) of section 1 of the Motor Vehicles (Amendment) Act, 2019 (32 of 2019), the Central Government hereby appoints the 1st day of September, 2019 as the date on which section 1 of the said Act shall come into force.

[F.No. RT- 11012/02/2019-MVL (Pt. 2)]
PRIYANK BHARTI, Jt. Secy.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS, RULES & AMENDMENTS

THE MADHYA PRADESH ADHIVAKTA KALYAN NIDHI (SANSHODHAN) ADHINIYAM, 2019

(No. 17 of 2019)

[24th August, 2019]

[Received assent of the Governor on the 22nd August, 2019; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated 24th August, 2019.]

BE it enacted by the Madhya Pradesh Legislature in the Seventieth year of the Republic of India as follows:-

1. **Short title.–** This Act may be called the Madhya Pradesh Adhivakta Kalyan Nidhi (Sanshodhan) Adhiniyam, 2019.
2. **Amendment of Section 18.–** In Section 18 of the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 (No.9 of 1982), (hereinafter referred to as the principal Act), in sub-section (1), for the words "twenty rupees and fifty rupees", the words "forty rupees and hundred rupees" shall be substituted.
3. **Amendment of Section 19.–** In Section 19 of the principal Act, –
   (i) in sub-section (1), for the words "twenty rupees", the words "forty rupees" shall be substituted;
   (ii) in sub-section (2), for the words "fifty rupees", the words "hundred rupees" shall be substituted.

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THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (AMENDMENT) ACT, 2019

(No. 25 of 2019)

[5th August, 2019]

An Act further to amend the Protection of Children from Sexual Offences Act, 2012.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

1. **Short title and commencement. –** (1) This Act may be called the Protection of Children from Sexual Offences (Amendment) Act, 2019.
   (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. – In the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the principal Act), in section 2,—

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

'(da)"child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child;'

(b) in sub-section (2), for the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2000", the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2015" shall be substituted.

3. Amendment of section 4.– In the principal Act, section 4 shall be renumbered as section 4(1) thereof and—

(a) in sub-section (1) as so renumbered, for the words "seven years", the words "ten years" shall be substituted;

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

"(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

4. Amendment of section 4. – In section 5 of the principal Act,—

(I) in clause (j),—

(A) in sub-clause (i), the word "or" occurring at the end shall be omitted;

(B) in sub-clause (iii), the word "or" occurring at the end shall be omitted;

(C) after sub-clause (iii), the following sub-clause shall be inserted, namely:—

"(iv) causes death of the child; or";

(II) in clause (s), for the words "communal or sectarian violence", the words "communal or sectarian violence or during any natural calamity or in similar situations" shall be substituted.

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

"**6. Punishment for aggravated penetrative sexual assault. –** (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.".

6. Amendment of section 9. – In section 9 of the principal Act,—

(i) in clause (s), for the words "communal or sectarian violance", the words "communal or sectarian violence or during any natural calamity or in any similar situations" shall be substituted;

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

"(v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity;".

7. Substitution of new section for section 14. – For section 14 of the principal Act, the following section shall be substituted, namely:—

"**14. Punishment for using child for pornographic purposes. –** (1) Whoever uses a child or children for pornographic purposes shall be punished with imprisonment for a term which shall not be less than five years and shall also be liable to fine, and in the event of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.

(2) Whoever using a child or children for pornographic purposes under sub-section (1), commits an offence referred to in section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic acts, shall be punished for the said offences also under section 4, section 6, section 8 and section 10, respectively, in addition to the punishment provided in sub-section (1)."

8. Substitution of new section for section 15. – For section 15 of the principal Act, the following section shall be substituted, namely:—

"15. Punishment for storage of pornographic material involving child. – (1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees, and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both, and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

9. Amendment of section 34. – In section 34 of the principal Act, for the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2000", the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2015" shall be substituted.

10. Amendment of section 42. – In section 42 of the principal Act, for the figures, letter and words "376E or section 509 of the Indian Penal Code", the figures, letters and words "376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000" shall be substituted.

11. Amendment of section 45. – In section 45 of the principal Act, in sub-section (2), clause (a) shall be re-lettered as clause (ab) thereof and before clause (ab) as so re-lettered, the following clauses shall be inserted, namely:—

"(a) the manner of deleting or destroying or reporting about pornographic material in any form involving a child to the designated authority under sub-section (1) of section 15;

(aa) the manner of reporting about pornographic material in any form involving a child under sub-section (2) of section 15;"

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