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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

**JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE**

**HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007**

# FROM EDITOR'S DESK

**C.V. Sirpurkar,**
**Director, JOTRI**

Esteemed Readers

The Department of Justice, Ministry of Law and Justice, Government of India is implementing a Project on Access to Justice for Marginalized People with support from United Nations Development Programme. The project focuses on improving institutional capacities of key justice service providers especially the judiciary to enable them to effectively serve the marginalized. Judicial trainings imparted by Judicial Academies to Judges play a key role in shaping the quality of justice delivery to the poor.

Since, Canada has an advanced and rigorous system of judicial education under the stewardship of Canadian Judicial Institute (CJI), an Exposure Visit was organized in the last week of November 2013 to Canadian Judicial Institute (CJI), Canadian Bar Association (CBA) and Office of the Commissioner for Federal Judicial Affairs, Canada located in Ottawa (Ontario), Canada for Directors of National Judicial Academy and some other Judicial Academies. I was part of the delegation.

The basic role of the Courts in Canada is to help people, resolve disputes fairly and with justice, whether the matter is between individuals or between individuals and the State. In the process, Courts interpret and establish law, set standards and answer questions which affect different aspects of Canadian Society. Canadian Judicial System is based upon Constitution Act, 1867 and Charter of Rights and Freedoms, 1982. Canada observes separation of powers amongst three organs of the State namely, executive, legislature and judiciary. It has bijural and bilinguistic judicial system with common law and civil law traditions. Entire work is transacted simultaneously in English and French languages. The system is oral, adversarial and public. Jury System is still very much alive.

Judges are appointed from amongst the members of Canadian Bar Association, who have at least 10 years of experience. In practice, the members having more than 20 years of experience are appointed as Judges. There is no institutionalized channel of promotions for Judges. Tenure of Judges is 75 years. (Except in some provinces, where the age of retirement for Provincial Court Judges is 70 years). Salary of Judges is very high. There is little difference in salaries of Trial Court Judges and those of the Supreme Court. 30% of Judges are women. 30 to 35% of lawyers are women.

Every Court in Canada including Provincial Courts, is a constitutional Court in the sense that it can grant constitutional remedy but it would be applicable only to the province in which such Provincial Court is situated. Writs, particularly habeas corpus matters, have become rare. Private complaints are infrequent. Extremely low number of writ petitions and private complaints are indicative of the fact that the government and its departments largely function in accordance with the law and police works honestly, diligently and efficiently. In criminal cases, there is a presumption of entitlement to bail. The burden is upon prosecution to show that the accused is not entitled to bail. 95% of all criminal cases begin and end in Provincial Courts. The Judges are empowered to put time limits on oral arguments.

One of the best practices observed by the Indian delegation in Canada, which can be replicated without much difficulty in India as well, is holding of pre-trial conferences. Such conferences are held to chart the course of trial. In criminal cases, pre-trial conferences are invariably held. However, in order to be successful in India, a pre-trial conference must fulfill certain conditions. First and foremost is that the bar must be taken into confidence by explaining to them the merits of the practice before actually introducing it. A pre-trial conference must not be conducted merely as a formality. At least one hour should be earmarked for such conference. The duration may be extended depending upon the gravity of the charge and complexity of a case. The Judge conducting a pre-trial conference must be well prepared on the facts and law involved in the case and must know his mind.

It is worth noting that in Canada, most disputes do not end up in Courts. People tend to settle their differences informally, through alternative dispute resolution mechanism. This greatly reduces the number of cases actually filed in the Courts.

Due to low pendency by any standards, world class infrastructure and experience of Judges, the quality of justice delivered is consistently high. The exposure visit to Canadian Judicial Academy was a great learning experience. Canada is a developed nation. It is a fully evolved democracy, with a very competent and highly sensitized judiciary, which is ably supported by the administration and police. It has world class infrastructure. The Judicial education in Canada is well organized, integrated and structured. However, there are certain specific learning modules, which can be customized to suit Indian conditions and replicated here. The endeavour of JOTRI would be to do precisely that.

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## WELCOME TO HON'BLE THE CHIEF JUSTIC
### SHRI AJAY MANIKRAO KHANWILKAR

Hon’ble Shri Justice Ajay Manikrao Khanwilkar has been appointed as the Chief Justice of High Court of Madhya Pradesh.

His Lordship was born on 30th July, 1957 at Pune in Maharashtra. Obtained Degree in Commerce from Mulund College of Commerce, Mumbai University and Degree in Law from K.C. Law College, Mumbai University. His Lordship was enrolled as an Advocate in the year 1982 and handled Civil, Criminal and Constitutional matters before the Subordinate Courts, Tribunals and High Court of Judicature at Bombay on the Appellate side as well as the Original Side. Started practice exclusively in the Supreme Court of India from the year 1984. Was appointed as Standing Counsel forthe State of Maharashtra, for Supreme Court matters in October, 1985 and also worked as Additional Government Advocate for the State of Maharashtra till December, 1989. Was appointed as Panel Counsel for Union of India in January, 1990 and represented Union of India in several matters of national importance. In August, 1994 was appointed Amicus Curiae by the Hon’ble Supreme Court of India to assist on environmental issues in the case of M. C. Mehta-Pollution Control in respect of West Bengal Industries and Tanneries. Was also appointed as Standing Counsel for the Election Commission

of India for the Supreme Court matters in March, 1995. Was also appointed as Member of the Task Force constituted by the Ministry of Health and Family Welfare, Government of India in November, 1995 for examining and reporting on the amendments needed in the Prevention of Food Adulteration Act. Has also remained Executive Member of the Supreme Court Bar Association and Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association.

His Lordship was appointed Additional Judge of the Bombay High Court in March, 2000 and confirmed as Permanent Judge in April, 2002. Before taking over as Chief Justice of Madhya Pradesh, was Chief Justice of Himachal Pradesh.

His Lordship was Sworn-in as the 22nd Chief Justice of the Madhya Pradesh High Court on November 24, 2013 and took charge of the High Office on November 26, 2013.

We on behalf of Joti Journal welcome His Lordship and wish him a healthy, happy and successful tenure.

Courtesy: The Indian Law Reports (M.P. series)

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***Let the first act of every morning be to make the following resolve for the day:***

- ***I shall not fear anyone on Earth.***
- ***I shall fear only God.***
- ***I shall not bear ill will toward any one.***
- ***I shall not submit to injustice from anyone.***
- ***I shall conquer untruth by truth. And in resisting untruth, I shall putup with all suffering.***

**- Mahatma Gandhi**

# APPOINTMENT OF ADDITIONAL JUDGE IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Rohit Arya has been administered oath of office by Hon'ble Shri Justice K.K. Lahoti, Acting Chief Justice, High Court of Madhya Pradesh on 12th September, 2013 as Additional Judge of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall of South Block of High Court at Jabalpur.

Hon'ble Shri Justice Rohit Arya was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 28th April, 1962. After obtaining degree of B.A. from St. Aloysious College, Jab lpur and LL.B. degree from Rani Durgawati Vishwavidhyalaya, Jabalpur, enrolled as an Advocate in the year 1984 in the rolls of the State Bar Council of M.P. Practiced as an Advocate for more than 29 years in all the disciplines of Law. Obtained proficiency in Civil, Service, Labour, Constitutional, Administrative, Taxation, Corporate and Commercial Laws. As an Advocate represented Government Undertakings, Departments, Corporations and reputed Private Undertakings like SBI, Telecom Department, BSNL, Employees State Insurance Corporation, HINDALCO, NCL, Grasim, etc. Had been Standing Counsel for Income Tax Department, Government of India in the M.P. High Court and in the High Court of Chhattisgarh and had also been Standing Counsel for the Central Government in Central Administrative Tribunal from 1994 to 2000. Designated as Senior Advocate on August 26, 2003 by the High Court of M.P. Practiced in the Supreme Court of India. Empanelled as a Senior Panel Counsel for the State of M.P. in the year 2007. Appeared in numerous landmark cases before this Hon'ble Court and before the Hon'ble Supreme Court of India.

Took oath as Additional Judge, High Court of Madhya Pradesh on 12.09.2013.

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

Courtesy: The Indian Law Reports (M.P. series)

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## The Achilles' heel

***The story is from Greek mythology. When Achilles was a baby, his mother sought to make him invulnerable. So she plunged him into the river Styx – every bit of his body – except his heel by which she held him. He became a great warrior and slow Hector, the champion of Troy. But he carried his boldness too far. He solicited the hand of a lady in the Temple of Athens. As he did so Paris wounded him in the heel and he died.***

Courtesy: The Closing Chapter
By Denning

## Purpose of Education

***Education has been called the technique of transmitting civilization. In order that it may transmit civilization, it has to perform two major functions: it must enlighten the understanding, and it must enrich the character.***

**Nani Palkhivala in "The Treason of the Intellectual",**
**Convocation Address, Bangalore University**

## IMPORTANCE OF LAW

***Without the law, the crown would always go to the loudest voices, the biggest sticks and the readiest of fists.***

**– Nani Palkhivala in 'Truth and Service Above All'**

# धारा 138 परक्राम्य लिखत अधिनियम, 1881 का परिवाद प्रस्तुत होने पर विचारणीय प्रश्न

**प्रदीप कुमार व्यास**
संकाय सदस्य
न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

परक्राम्य लिखत अधिनियम, 1881 की धारा–138 का परिवाद प्रस्तुत होने पर न्यायिक मजिस्ट्रेट प्रथम श्रेणी को कौन–कौन से तथ्य देखना चाहिये, किस विधिक स्थिति को ध्यान में रखना चाहिये ताकि परिवाद प्रस्तुत होते ही शीघ्र कार्यवाही की जा सके, ये प्रश्न प्रायः मजिस्ट्रेट के मस्तिष्क में उत्पन्न होते हैं। कई बार विचारण न्यायालयों में कार्य की व्यस्तता के कारण या एक साथ अधिक संख्या में परिवाद पेश होने पर, अपंजीबद्ध परिवादों की संख्या बढ़ जाती है। यदि परिवाद प्रस्तुत होने पर निम्न तथ्यों को ध्यान में रखा जाय तो इन अपंजीबद्ध परिवादों को तेजी से निपटाया जा सकता है। परिवाद पेश होने पर निम्नलिखित तथ्यों को ध्यान में रखना चाहिये।

**1. न्यायालय फीस :–** न्यायालय फीस (मध्यप्रदेश संशोधन) अधिनियम 2011 के अनुसार न्यायालय फीस अधिनियम के अनुसूची दो में अनुच्छेद एक के क्लॉज बी के आईटम एक, दो एवं तीन में धारा 138 निगोशिएबल इन्सट्रुमेन्ट एक्ट के अपराध के परिवाद में नवीनतम न्यायालय फीस निम्नानुसार देय होती है:–

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| 1. | जहां अनादृत चैक की राशि परिवाद में एक लाख रूपये तक हो। | न्यूनतम दो सौ रूपये के अधीन रहते हुए अनादृत चैक की रकम का पाँच प्रतिशत |
| 2. | जहां अनादृत चैक की राशि परिवाद में एक लाख रू. से अधिक लेकिन पांच लाख रू. तक हो। | न्यूनतम पांच हजार रू. और एक लाख रू. से अधिक की चैक राशि का चार प्रतिशत |
| 3. | जहां अनादृत चैक की राशि परिवाद में पांच लाख रू. से अधिक हो। | न्यूनतम इक्कीस हजार रू. और पांच लाख रू. से अधिक की चैक राशि का तीन प्रतिशत लेकिन अधिकतम एक लाख पचास हजार रू |

प्रत्येक न्यायिक मजिस्ट्रेट प्रथम श्रेणी को अपने टेबल ग्लास के नीचे उक्त अनुसार न्यायालय फीस का चार्ट लगा लेना चाहिए ताकि परिवाद को देखते ही न्यायालय फीस कुछ मिनिट में ही चैक हो सके। निष्पादन लिपिक के टेबल ग्लास के नीचे भी उक्त चार्ट लगवा देना चाहिए ताकि वे भी कुछ ही समय में न्यायालय शुल्क पर्याप्त है या नहीं इसकी जांच कर सकें।

**2. प्रादेशिक क्षेत्राधिकार :–** प्रादेशिक क्षेत्राधिकार देखने के लिए न्यायदृष्टांत के. भास्करन विरूद्ध संकरन वी. बालन, ए.आई.आर 1999 एस.सी. 3762 से मार्गदर्शन लेना चाहिए जिसमें यह प्रतिपादित किया गया है कि धारा 138 एन. आई. एक्ट का अपराध कई कृत्यों से पूर्ण होता है जैसे :–

1. चैक का जारी किया जाना,
2. चैक का (भुगतान हेतु) बैंक में पेश किया जाना,
3. चैक का जिस बैंक के खाते से वह जारी किया गया था उसके द्वारा बिना भुगतान के लौटाया जाना,
4. चैक की राशि की माँग के लिए लिखित सूचना पत्र दिया जाना,
5. चैक जारी करने वाले द्वारा सूचना पत्र मिलने के 15 दिन के भीतर चैक की राशि का भुगतान करने में असफल रहना।

यह आवश्यक नहीं है कि उक्त पाँचों कृत्य एक ही क्षेत्राधिकार में पूर्ण होना चाहिए यह संभव है कि उक्त पाँचों कृत्य पाँच विभिन्न क्षेत्राधिकार में किये जावें लेकिन उक्त पाँचों कृत्यों का पूर्ण होना धारा 138 के अपराध के लिए आवश्यक है और धारा 178 (डी) दण्ड प्रक्रिया संहिता के अनुसार जहां कोई अपराध विभिन्न स्थानीय क्षेत्रों में किये गये कई कार्यों से मिलकर बनता है वहाँ उस अपराध की जांच या विचारण ऐसे स्थानीय क्षेत्रों में से किसी पर भी अधिकारिता रखने वाले न्यायालय द्वारा किया जा सकता है।

न्यायदृष्टांत **हरमन इलेक्ट्रानिक्स प्रा.लि. विरूद्ध नेशनल पैनासोनिक इन्डिया लि., 2009 सी.आर. एल.जे. 1109 (एस.सी.)** में उक्त न्यायदृष्टांत के. भास्करन पर विवेचना करते हुए यह मत दिया है कि जिस न्यायालय के क्षेत्राधिकार से केवल लिखित मांग सूचना पत्र जारी किया जाता है उसे धारा 138 एन.आई. एक्ट के मामले में क्षेत्राधिकार नहीं होता है क्योंकि सूचना पत्र देने के बाद नियत अवधि में चैक जारी करने वाले द्वारा चैक की राशि का भुगतान करने में असफल रहने पर वाद कारण उत्पन्न होता है।

उक्त दोनों न्यायदृष्टांतों में प्रतिपादित विधि पर विचार करने के बाद धारा 138 एन. आई. एक्ट के परिवाद के लिए निम्नलिखित कृत्य में से कोई भी कृत्य जिन स्थानों पर किये गये वहां के न्यायिक मजिस्ट्रेट प्रथम श्रेणी के न्यायालयों को प्रादेशिक क्षेत्राधिकार रहेगा :–

1. चैक का जारी किया जाना,
2. चैक का (भुगतान हेतु) बैंक में पेश किया जाना,
3. चैक का जिस बैंक के खाते से वह जारी किया गया था उसके द्वारा बिना भुगतान के लौटाया जाना,
4. चैक की राशि की माँग के लिए लिखित सूचना पत्र दिया जाना, एवं सूचना पत्र के बाद भी चैक जारी करने वाले द्वारा सूचना पत्र मिलने के 15 दिन के भीतर चैक की राशि का भुगतान करने में असफल रहना।

न्यायदृष्टांत **मोहन मंडेलिया विरूद्ध स्टेट आफ एम.पी., आई. एल. आर. 2011 एम. पी. 562** के अनुसार परिवादी को ग्वालियर में 39 लाख रूपये के चैक सौंपे गये अतः ग्वालियर के न्यायालय को क्षेत्राधिकार होना पाया गया।

इस तरह किसी भी न्यायिक मजिस्ट्रेट प्रथम श्रेणी को उक्त चार कृत्य जिन स्थानों पर किये गये उन्हें देखना चाहिए और इनमें से कोई भी कृत्य यदि उनके न्यायालय के क्षेत्राधिकार में हुआ हो तो प्रादेशिक क्षेत्राधिकार रहेगा और उक्त चार कृत्य में से कोई भी कृत्य उनके न्यायालय के क्षेत्राधिकार नहीं हुआ हो तो उन्हें प्रादेशिक क्षेत्राधिकार नहीं रहेगा।

**3. परिसीमा :–** इन मामलों में एक व्यक्ति उसके खाते का चैक परिवादी को देता है और वह चैक अनादृत होने के बाद परिवादी संबंधित व्यक्ति को लिखित मांग सूचना पत्र, चैक अनादरण की सूचना मिलने के 30 दिन के भीतर, देता है। मांग सूचना पत्र के मिलने के 15 दिन के भीतर चैक जारी करने वाला चैक की राशि देने में असफल रहता है तब धारा 142 बी एन. आई. एक्ट के अनुसार उस दिनांक से एक माह के भीतर लिखित परिवाद पेश होना चाहिए।

इस तरह धारा 138 बी एवं सी तथा धारा 142 बी एन.आई.एक्ट के प्रावधान उक्त अनुसार परिसीमा देखने के लिए ध्यान में रखना चाहिए।

न्यायदृष्टांत **संजय गवलानी विरूद्ध सुनील सतवानी, आई.एल.आर. 2009 एम.पी. 2731** के अनुसार धारा 138 एन. आई. एक्ट के मामलों में 30 दिन की गणना करने में जिस दिनांक को चैक लौटा और परिवादी द्वारा प्राप्त किया गया उस दिनांक को गणना में नहीं लिया जाएगा।

न्यायदृष्टांत **मेसर्स मूनोथ इन्वेस्टमेन्ट लि. विरूद्ध मेसर्स पुट्टूकोला प्रापर्टीज लि., ए.आई.आर. 2001 एस.सी. 2752** के अनुसार मांग सूचना पत्र देने के लिए 30 दिन की अवधि की गणना उस तारीख से की जाएगी जिस तारीख को परिवादी को चैक अनादरण की सूचना प्राप्त हुई इस मामले में परिवादी ने 12 तारीख को चैक भुगतान हेतु प्रस्तुत किया था जो कि 13 तारीख को बैंक द्वारा लौटाया गया था 14 से 16 तारीख तक बैंक में पोंगल का अवकाश था अतः परिवादी को 17 तारीख को चैक अनादरण की सूचना प्राप्त हुई थी अतः अवधि की गणना 17 तारीख से की जाएगी ऐसा प्रतिपादित किया गया है।

न्यायदृष्टांत **मेसर्स साकेत इन्डिया लिमिटेड विरूद्ध मेसर्स इन्डिया सिक्योरिटी लि., ए.आई.आर. 1999 एस. सी. 1090** के अनुसार धारा 142 बी में उल्लेखित एक माह की अवधि चैक जारी करने वाले द्वारा मांग सूचना पत्र की प्राप्ति के 15 दिन की समाप्ति से की जाएगी।

न्यायदृष्टांत **प्रेमचंद्र विजय कुमार विरूद्ध यशपाल सिंह, (2005) 4 एस.सी.सी. 417** भी अवलोकनीय है।

यदि कोई परिवाद उक्त धारा 138 सी. एन.आई.एक्ट में उल्लेखित 15 दिन की अवधि में जो अदायगी के लिए होती है उसके पूर्व भी पेश कर दिया जाता है तो उसे न्यायदृष्टांत नरसिंहदास तपाडिया विरूद्ध गोवर्धन दास प रतानी, ए.आई.आर. 2000 एस.सी. 2946 मार्गदर्शन लेकर

खारिज नहीं करना चाहिए बल्कि प्रसंज्ञान वाद कारण उत्पन्न होने के बाद लेना चाहिए। इस मामले में यह बतलाया गया है कि परिवाद का पेश किया जाना और उस पर प्रसंज्ञान लिया जाना दो अलग–अलग तथ्य हैं।

इस तरह अपरिपक्व या प्री–मेच्योर परिवाद यदि पेश भी हो जाये तो उसे विचारार्थ आगे की तारीख लगाकर रख देना चाहिए व धारा 138 सी. एन.आई.एक्ट में उल्लेखित अवधि अर्थात मांग सूचना पत्र की प्राप्ति के 15 दिन पूरे हो जाने के बाद प्रसंज्ञान लेना चाहिए।

**4. अवधि बाधित परिवाद पेश होने पर :–** यदि कोई परिवाद उक्त अनुसार मांग सूचना पत्र मिलने के 15 दिन बाद चैक के जारी करने वाले द्वारा अदायगी न करने पर, तथा धारा 142 (ख) एन.आई.एक्ट के अनुसार उक्त 15 दिन की अवधि के बाद एक माह के भीतर पेश नहीं किया जाता है तो उसे अवधि बाधित परिवाद माना जाता है।

धारा 142 एन.आई.एक्ट के परन्तु के अनुसार, ''परिवाद का संज्ञान विहित कालावधि के पश्चात न्यायालय द्वारा किया जा सकेगा यदि परिवादी न्यायालय को संतुष्ट कर देता है कि उसके पास ऐसी कालावधि के अन्दर परिवाद पेश न करने के लिए पर्याप्त कारण था।''

अतः यदि अवधि बाधित परिवाद प्रस्तुत होता है तब भी न्यायालय उसे लेंगे और परिवादी द्वारा विलंब का जो कारण बतलाया गया है उस पर पहले विचार करेंगे।

ऐसा परिवाद पेश होने पर अभियुक्त को सूचना पत्र देना चाहिए कि परिवादी ने विलंब क्षमा करने का निवेदन किया है क्यों न विलंब क्षमा कर दिया जाए ऐसा कारण बताओ सूचना पत्र अभियुक्त को देना चाहिए और अभियुक्त को भी विलंब के बिन्दु पर सुनवाई का अवसर देना चाहिए।

इस संबंध में न्यायदृष्टांत **स्टेट आफ महाराष्ट्र विरूद्ध शरदचंद विनायक डोंगरे, ए.आई.आर. 1995 एस.सी. 231, पी. रामचंद्र राव विरूद्ध स्टेट आफ कर्नाटक, ए.आई.आर. 2002 एस.सी. 1856 एवं कृष्ण विरूद्ध स्टेट, 1977 सी.आर.एल.जे. 90 (एम.पी.)** अवलोकनीय है जिनमें यह प्रतिपादित किया गया है कि जहां विलंब क्षमा करने का आवेदन प्रसंज्ञान के पूर्व होता है उस पर अभियुक्त को सुनना आज्ञापक है।

**न्यायदृष्टांत तुलसीराम विरूद्ध महेश चंद्र, 2011 (4) एम. पी. एच. टी. 72** के अनुसार न्यायालय को विलंब क्षमा करने के आवेदन पर विचार करते समय उदार रूख अपनाना चाहिए कठोर और अति तकनीकी दृष्टिकोण नहीं अपनाना चाहिए न्यायालय को मस्तिष्क में यह तथ्य रखना चाहिए कि सारभूत न्याय हो सके।

न्यायदृष्टांत **अनिल कुमार विरूद्ध किशनचंद्र, ए.आई.आर. 2008 एस.सी. 899** के अनुसार धारा 142 एन.आई.एक्ट का परन्तुक, विलंब क्षमा करने बावत् भूतलक्षी या रेट्रोस्पेक्टिव नहीं है।

न्यायदृष्टांत **शिव कुमार विरूद्ध नटराजन, दांडिक अपील क्रमांक 1077/2009** निराकृत दिनांक 15. 05.2009 में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि बैंक से चैक अनादृत हो कर प्राप्त होने के 30 दिन के भीतर ड्रॉवर को मांग सूचना पत्र दिया जाना आज्ञापक है। 30 दिन के भीतर मांग सूचना पत्र दिया जाना परिवाद के प्रचलन योग्य होने के लिए आवश्यक है।

यदि न्यायालय परिवादी को सुनकर और अभियुक्त को सूचना पत्र देकर और सुनवाई का अवसर देकर यह पाती है कि विलंब का पर्याप्त कारण है तो वह विलंब क्षमा कर सकती है और फिर प्रसंज्ञान लेने पर विचार करेगी।

यदि अभियुक्त कारण बताओ सूचना पत्र देने के बाद भी अनुपस्थित रहता है तब परिवादी को सुनकर विलंब के कारण पर विचार करना चाहिए।

विलंब क्षमा पर विचार करते समय विलंब के बिन्दु पर यदि आवश्यक हो तो साक्ष्य भी लिया जा सकता है।

एक बार विलंब का बिन्दु तय हो जाने के बाद प्रारंभिक जांच शुरू होती है और ऐसी जांच में अभियुक्त को सुनवाई का अधिकार नहीं होता है और उसे सुनना न तो वैधानिक होता है और न ही आवश्यक होता है इस संबंध में न्यायदृष्टांत **मोहन मंडेलिया विरूद्ध स्टेट ऑफ एम.पी., आई.एल.आर. 2011 एम.पी. 562** अवलोकनीय है।

## 5. कौन–कौन परिवाद पेश कर सकते हैं?

सामान्यतः परिवादी स्वयं या परिवादी मय अभिभाषक उपस्थित होकर परिवाद पेश करते हैं यह परिवाद प्रस्तुति का परम्परागत तरीका है।

इन मामलों में व्यापारिक व्यवहार के कारण या परिवादी के पास समयाभाव या किसी अन्य कारण से वह मुख्त्यार या पावर ऑफ अटार्नी नियुक्त कर देता है ऐसा मुख्त्यार या पॉवर ऑफ अॅटार्नी भी परिवादी की ओर से परिवाद पेश कर सकता है इस संबंध में न्यायदृष्टांत **रमेश विरूद्ध गणेशचंद्र, 2004 (5) एम.पी. एच.टी. 103** अवलोकनीय है।

कभी–कभी परिवादी की ओर से उसके अभिभाषक भी परिवाद प्रस्तुत कर देते हैं ऐसा परिवाद भी ग्रहण करना चाहिए इस संबंध में न्यायदृष्टांत **केवल कुमार जग्गी विरूद्ध विनोद कुमार साहू, 2008 (4) एम. पी.एल.जे. 213** अवलोकनीय है जिसके अनुसार धारा 138 एन.आई.एक्ट का परिवाद परिवादी की ओर से उसके अभिभाषक भी परिवाद पर हस्ताक्षर करके प्रस्तुत कर सकते हैं।

किसी प्रोप्राईटरी कंर्सन के प्रोप्राईटर का पावर ऑफ अटर्नी होल्डर भी उस कंसर्न की ओर से परिवाद पेश कर सकता है जैसा कि न्यायदृष्टांत **शंकर फाईनेन्स एण्ड इनवेस्टमेन्टस विरूद्ध स्टेट ऑफ ए. पी., (2008) 8 एस.सी.सी. 536** अवलोकनीय है।

उक्त समस्त परिस्थितियों में परिवाद धारा 142 ए एन.आई.एक्ट के अनुसार चैक के अधीन राशि पाने वाले या सम्यक अनुक्रम में चैक के धारक के नाम से किये गये लिखित परिवाद पर ही धारा 138 एन.आई. एक्ट के अपराध का संज्ञान लिया जा सकता है अर्थात परिवाद मूल परिवादी या चैक के अधीन राशि प्राप्त करने वाले के नाम पर होगा जैसे रामलाल पिता श्यामलाल उम्र 40 वर्ष निवासी 236/1 सीयागंज, इन्दौर द्वारा आम–मुख्त्यार मोहनलाल पिता सोहनलाल उम्र 40 वर्ष निवासी 38 राजमोहल्ला, इन्दौर किसी भी दशा में आम–मुख्त्यार अपने नाम से परिवाद पेश नहीं कर सकता जैसा कि उक्त शंकर फाइनेन्स वाले मामले में बतलाया गया है।

यदि चैक के धारक की मृत्यु हो जाये तो उसके वैध प्रतिनिधि भी परिवाद ला सकते हैं जैसा कि न्यायदृष्टांत **रामप्रसाद विरूद्ध श्रीमति सुधा बेन, आई.एल.आर. 2008 एम.पी. एन. ओ. सी. 60** में प्रतिपादित किया गया है।

न्यायदृष्टांत **किशोर गोयल विरूद्ध हनीफ पटेल, आई.एल.आर. 2010 एम.पी. 1994** के मामले में परिवादी ने परिवाद पत्र में यह उल्लेख नहीं किया था कि चैक के धारक की मृत्यु हो चुकी है यह भी उल्लेख नहीं किया था कि उसके कौन–कौन वैध प्रतिनिधि है और परिवादी किस तरह चैक की राशि पाने का अधिकारी है अतः ऐसा परिवाद चलने योग्य नहीं पाया गया था।

लेकिन यदि अभियुक्त की मृत्यु हो चुकी हो तब उसके द्वारा उसके जीवन काल में जारी चैक के लिए उसकी संतान का कोई दायित्व नहीं बनेगा इस संबंध में न्यायदृष्टांत **नीना चौपड़ा विरूद्ध महेन्द्र सिंह, आई.एल.आर. 2011 एम.पी. 2277** अवलोकनीय है।

संतानों पर ऐसे चैक के लिए व्यवहारिक दायित्व बन सकता है।

इस तरह यदि परिवादी के नाम पर प्रस्तुत परिवाद उसके मुख्त्यार या अभिभाषक या परिवादी की मृत्यु की दशा में उसके वैध प्रतिनिधियों द्वारा पेश किया जाता है तब भी ऐसा परिवाद ग्रहण करना चाहिए और उसे लेने से इंकार नहीं करना चाहिए अन्य दशा में परिवाद अवधि बाधित भी हो सकता है अतः उक्त वैधानिक स्थितियों को ध्यान में रखना चाहिए।

**6. अनादरण के कारण के बारे में :–**

न्यायदृष्टांत **एनईपीसी माईकोन लि. विरूद्ध मगमा लेसिंग लि., 2000 (1) एम.पी.एच.टी. 310 एस.सी.** के अनुसार जहां बैंक द्वारा चैक भुगतान किये बिना इस आधार पर लौटाया गया कि खाता बंद है इसे भी अपर्याप्त निधि के कारण चैक अनादृत होना माना जाएगा।

न्यायदृष्टांत **पी.एन. सलीम विरूद्ध पी.जे. थामस, 2004 सी.आर.एल.जे. 3096** के अनुसार यदि किसी पहले से बंद खाते का चैक भी जारी किया गया है और अनादृत हुआ है तब भी वह धारा 138 एन. आई. एक्ट की परिधि में आएगा।

चैक को भुगतान हेतु प्रस्तुत करने के पूर्व यदि चैक जारी करने वाला बैंक को भुगतान रोकने के निर्देश दे देता है ऐसे अनादृत चैक के बारे में भी चैक का जारी करने वाला धारा 138 एन. आई. एक्ट के दायित्व से नहीं बच सकता इस संबंध में न्यायदृष्टांत **मोदी सीमेंट विरूद्ध के.के. नन्दी, ए.आई.आर. 1998 एस.सी. 1057** अवलोकनीय है।

यदि चैक अपूर्ण हस्ताक्षर होने के आधार पर या हस्ताक्षर न मिलने के आधार पर भी अनादृत हुआ है तब भी उसे धारा 138 एन.आई.एक्ट की परिधि में माना जाएगा जैसा कि न्यायदृष्टांत **मेसर्स लक्ष्मी डायकेम विरूद्ध स्टेट ऑफ गुजरात, क्रिमिनल अपील 1870 – 1909/2012 निर्णय दिनांक 27 नवंबर 2012** में माननीय सर्वोच्च न्यायालय ने प्रतिपादित किया है कि चैक यदि किसी भी कारण से अनादृत हुआ हो व मांग सूचना पत्र मिलने के बाद भी चैक जारी करने वाला कोई कदम नहीं उठाता है तब इसे अपर्याप्त निधि के कारण चैक का अनादरण माना जाएगा।

न्यायदृष्टांत **राजकुमार खुराना विरूद्ध स्टेट ऑफ एन.सी.टी. देहली, (2009) 6 एस.सी.सी. 72** के मामले में यह कहा गया है कि चैक यदि इस आधार पर अनादृत हुआ हो कि ड्रॉवर ने चैक गुमने की रिपोर्ट दी है तो इसे धारा 138 एन.आई.एक्ट की परिधि में अपर्याप्त निधि के कारण चैक का अनादरण नहीं माना गया है।

लेकिन उक्त मेसर्स लक्ष्मी डायकेम वाले मामले के बाद स्थिति बदल चुकी है और अब चैक किसी भी कारण से अनादृत हुआ हो और अभियुक्त ने मांग सूचना मिलने के बाद भी कोई कदम नहीं उठाया हो तो इसे प्रसंज्ञान की स्टेज पर धारा 138 एन.आई.एक्ट के क्रम में चैक का अनादरण माना जाएगा।

इस तरह प्रसंज्ञान लेते समय चैक किसी भी कारण से अनादृत हुआ हो तब भी उसे धारा 138 एन. आई.एक्ट की परिधि में अनादृत होना उस स्टेज पर माना जा सकता है।

**7. जांच की साक्ष्य :–**

धारा 138 एन.आई.एक्ट के परिवाद में जांच के प्रक्रम पर भी परिवादी का धारा 145 का एन.आई.एक्ट के तहत शपथ पत्र के रूप में दिया गया साक्ष्य लिया जा सकता है। लेकिन धारा 138 के साथ–साथ भारतीय दण्ड संहिता का कोई अन्य अपराध भी परिवाद में उल्लेखित हो तब परिवादी का धारा 200 दण्ड प्रक्रिया संहिता के तहत शपथ पर परीक्षण आवश्यक होता है क्योंकि दण्ड प्रक्रिया संहिता में धारा 145 एन. आई.एक्ट के समान शपथ पत्र पर साक्ष्य देने जैसा कोई प्रावधान नहीं है।

इस संबंध में न्यायदृष्टांत **महेन्द्र कुमार विरूद्ध आर्मस्ट्रांग, 2005 (2) एम.पी.एल.जे. 419, जितेन्द्र सिंह विरूद्ध भजनलाल 2010 (2) एम.पी.जे.आर. 159, अभिलाषा विरूद्ध दिलीप, आई.एल.आर. 2009 एम.पी. 1836, याकूब खान विरूद्ध प्रदीप श्रीमाल, 2011 (3) एम.पी.एल.जे. 178 एवं दिनेश वैष्णव विरूद्ध किशोर कुमार गुप्ता, आई.एल.आर. 2012 एम.पी. 654** अवलोकनीय है जिनमें सार रूप से यह व्यवस्था दी गयी है कि धारा 138 के परिवाद का संज्ञान परिवादी द्वारा धारा 145 एन.आई.एक्ट. के तहत दिये गये शपथ पत्र के आधार पर लिया जा सकता है।

न्यायदृष्टांत **जानकी वासुदेव भोजवानी विरूद्ध इन्डूसिन्ड बैंक लि., ए.आई.आर. 2005 एस.सी. 439** के अनुसार जो तथ्य किसी व्यक्ति के व्यक्तिगत ज्ञान मे हों उसके बारे में उसका मुख्त्यार उसकी ओर से कथन नहीं दे सकता लेकिन जो तथ्य मुख्त्यार के व्यक्तिगत ज्ञान मे हों उसके बारे में वह भी कथन दे सकता है इस तथ्य को जांच साक्ष्य के समय भी ध्यान रखना चाहिए।

जांच साक्ष्य के समय ही परिवादी से इस संबंध में भी पूछताछ कर लेना चाहिए कि क्या उसी संव्यवहार के संबंध में कोई अन्य परिवाद किसी अन्य न्यायालय में लंबित तो नहीं है क्योंकि न्याय दृष्टांत **दामोदर एस. प्रभु विरूद्ध सैयद बाबा लाल एच., ए.आई.आर. 2010 एस.सी 1907** के अनुसार एक ही संव्यवहार के संबंध में कई परिवाद विभिन्न न्यायालयों में प्रस्तुत किये जाते है जो अनुमति योग्य नहीं हैं परिवादी से ऐसा शपथ पत्र लेना चाहिए कि उस संव्यवहार के संबंध में अन्य कोई परिवाद किसी अन्य न्यायालय में लंबित नहीं हैं।

न्यायदृष्टांत **नेशनल स्माल इन्डस्ट्रीज कार्पोरेशन लि. विरूद्ध स्टेट ऑफ एन.सी.टी. देहली, (2009) 1 एस.सी.सी 407** के अनुसार जहां शासकीय कंपनी या वैधानिक निगम परिवादी होते है तो उसे डी जु री (De Jure) परिवादी माना जाता है और उसकी ओर से अधिकृत हस्ताक्षरकर्ता डी फैक्टो (De Facto) परिवादी होता है यदि अधिकृत हस्ताक्षर–कर्ता लोक सेवक हों तब धारा 200 (क) दण्ड प्रक्रिया संहिता लागू होगी और ऐसे परिवादी को यदि परिवाद उसने पदीय कर्तव्यों के निर्वाहन के दौरान किया है तब न्यायालय उसे परीक्षण से मुक्ति दे सकता है।

**8. 156 (3) दण्ड प्रक्रिया संहिता के बारे में :–**

न्यायदृष्टांत सेन्ट्रल **बैंक ऑफ इंडिया विरूद्ध सक्सोन्स फर्म 2000(1) एम .पी.एल.जे. 149 एस.सी.** के अनुसार धारा 138 एन.आई.एक्ट के अपराध में पुलिस अनुसंधान नहीं कर सकती है क्यों कि धारा 142 एन. आई.एक्ट के तहत धारा 138 एन.आई.एक्ट के अपराध का संज्ञान चैक के अधीन राशि पाने वाले या सम्यक् अनुक्रम में चैक के धारक के लिखित परिवाद पर ही किया जा सकता है।

अतः धारा 138 एन.आई.एक्ट के परिवाद को धारा 156 (3) दण्ड प्रक्रिया संहिता के तहत पुलिस जांच के लिए नहीं भेजना चाहिए।

**9. चैक का नियत अवधि में बैंक में पेश किया जाना :–**

चैक का उसे जारी करने वाले के बैंक में नियत अवधि में पेश किया जाना जरूरी है अन्य दशा में अपराध नहीं बनेगा इस संबंध में न्यायदृष्टांत **अमित दुबे विरूद्ध अरविंद दुबे, 2012 (2) एम.पी.एच.टी. 437** अवलोकनीय है।

न्यायदृष्टांत **श्री ईसहार एलायस स्टीलस लि. विरूद्ध जायसवालस एन.ई.सी.ओ. लि., ए.आई.आर. 2001 एस.सी. 1161** के अनुसार धारा 138 एन.आई.एक्ट में उल्लेखित बैंक में पेयी का बैंक शामिल नहीं है बल्कि चैक के ड्रॉवर या जारी करने वाले के बैंक में वह चैक वैधता तिथि के भीतर प्रस्तुत करना आवश्यक होता है।

**10. चैक का नियत अवधि में कई बार भुगतान हेतु पेश किया जाना :–**

चैक वैधता तिथि तक कितनी भी बार भुगतान हेतु पेश किया जा सकता है इस संबंध में न्याय दृष्टांत सेन्ट्रल बैंक ऑफ इंडिया विरूद्ध सेक्सोन्स फर्म 2000(1) एम.पी.एल.जे. 149 एस.सी. के अनुसार एक चैक उसकी वैधता तिथि में कितनी ही बार भुगतान के लिए प्रस्तुत किया जा सकता है।

पूर्व में वैधानिक स्थिति यह थी कि जैसे ही चैक अनादृत होने के बाद अभियुक्त को मांग सूचना पत्र दिया गया और उसकी तामील हो गई वहां से वाद कारण उत्पन्न होना माना जाता था लेकिन अब वैधानिक स्थिति यह है कि एक चैक कितनी ही बार भुगतान हेतु प्रस्तुत किया जा सकता है और सूचना पत्र अभियुक्त को दिये जा सकते है वाद कारण अंतिम सूचना पत्र की तामील से उत्पन्न होता है इस संबंध में न्यायदृष्टांत एम.एस.आर. लेदर्स विरूद्ध एस. पालिनीअप्पन, दांडिक अपील 261–264/2002 निर्णय दिनांक 26.09.2012 माननीय सर्वोच्च न्यायालय के तीन न्यायमूर्तिगण की

पीठ का न्यायदृष्टांत अवलोकनीय है इसमें पूर्व के न्यायदृष्टांत सदानन्दन भद्रन विरूद्ध माधवन सुनील कुमार, (1998) 6 एस.सी.सी. 514 को ओवररूल्ड कर दिया गया है।

**11. उपसंहार :–** इस तरह धारा 138 एन.आई.एक्ट के परिवाद में :–

1. उक्त अनुसार न्यायालय फीस देखना चाहिए।
2. प्रादेशिक क्षेत्राधिकार के उक्त चार बिन्दु ध्यान रखना चाहिए।
3. परिसीमा काल के उक्त तथ्य ध्यान में रखना चाहिए।
4. अवधि बाधित परिवाद पेश होने पर अभियुक्त को सूचना पत्र व सुनवाई का अवसर देना चाहिए।
5. परिवादी के अतिरिक्त मुख्त्यार, अभिभाषक व परिवादी की मृत्यु हो जाने की दशा में उसके वैध प्रतिनिधि भी परिवाद पेश कर सकते हैं यह ध्यान रखना चाहिए।
6. चैक का अनादरण किसी भी कारण से हो व मांग सूचना पत्र मिलने के बाद भी ड्रावर कोई कदम न उठाए तब प्रसंज्ञान के अवस्था पर उसे धारा 138 के लिए अपर्याप्त निधि के कारण अनादरण मानना चाहिए।
7. परिवादी का धारा 145 एन.आई.एक्ट के तहत शपथ पत्र प्रसंज्ञान के स्तर पर जांच में भी लिया जा सकता है।
8. धारा 138 एन.आई.एक्ट का परिवाद धारा 156 (3) दण्ड प्रक्रिया संहिता के तहत पुलिस अनुसंधान के लिए नहीं भेजना चाहिए।
9. जांच में यह भी पूछ लेना चाहिए कि उसी संव्यवहार का कोई अन्य परिवाद किसी अन्य न्यायालय में लंबित तो नहीं है।
10. यदि परिवाद के तथ्य परिवादी के मुख्त्यार के व्यक्तिगत ज्ञान में हों तो वह भी परिवादी की ओर से जांच के कथन भी दे सकता है यह भी ध्यान में रखना चाहिए।
11. चैक को उसे जारी करने वाले के बैंक में चैक की विधिमान्य अवधि के भीतर (अब तीन माह) प्रस्तुत किया जाना आवश्यक है यह तथ्य भी ध्यान रखना चाहिए।
12. चैक उसके विधिमान्य अवधि में कितनी ही बार भुगतान हेतु बैंक में पेश किया जा सकता है और मांग सूचना पत्र भी दिया जा सकता है लेकिन अंतिम सूचना पत्र की तामील से वाद कारण उत्पन्न होता है यह ध्यान रखना चाहिए।
13. कंपनी और उसके संचालकों के विरूद्ध परिवाद प्रस्तुत होने पर भी उक्त उल्लेखित की गई विधिक स्थिति को ध्यान में रखना चाहिए।

इस तरह न्यायालय समय के प्रारंभिक खण्डों में या अन्तिम खण्डों में या अकार्य शनिवार के दिन उक्त बिन्दुओं को ध्यान में रखते हुए अपंजीबद्ध लंबित परिवादों को निपटा देना चाहिए साथ ही रोज प्रस्तुत परिवादों को उक्त बिन्दुओं को जांच कर तत्काल ही निपटा देना चाहिए।

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# व्यवहार प्रकरणों में स्थगन

**प्रदीप कुमार व्यास**
संकाय सदस्य
न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

व्यवहार प्रकरणों में किसी कार्य को करने हेतु स्थगन दिया जाना चाहिये या नहीं, यह उद्‌भूत होने वाला दिन–प्रतिदिन का महत्वपूर्ण प्रश्न है। माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत मेसर्स शिव कोटेक्स विरूद्ध तिरगुन आटो प्लास्ट प्रा.लि. 2011 ए.आई.आर एस.सी.डब्ल्यू. 5789 में स्थगन के विषय में यह अवलोकित किया है कि यदि स्थगनों को नियंत्रित नहीं किया गया तो देर सबेर पक्षकारों का न्यायदान की व्यवस्था पर से विश्वास उठ जायेगा। इसी तरह न्यायदृष्टांत **विनोद सेठ विरूद्ध देविन्दर बजाज, 2010 ए. आई.आर. एस.सी.डब्ल्यू. 4860** में माननीय सर्वोच्च न्यायालय ने व्यवहार प्रक्रिया संहिता के अंतर्गत असत्य दावों को रोकने के अनेक उपाय दर्शाये गये हैं, जिनमें आदेश 17 नियम 2 व 3 सी.पी.सी. को विलंब कारित करने वाले पक्षकार के विरूद्ध कार्यवाही करने के एक उपाय के रूप में दर्शाया गया है।

**आदेश 17 नियम 1 (1) सी.पी.सी. के अनुसार** – यदि वाद के किसी भी प्रक्रम में पर्याप्त हेतुक दर्शित किया जाता है तो न्यायालय ऐसे कारणों से जो लेखबद्ध किये जायेगे पक्षकारों या उनमें से किसी को भी समय दे सकेगा और वाद की सुनवाई को समय–समय पर स्थगित कर सकेगा :

परंतु ऐसा कोई स्थगन वाद की सुनवाई के दौरान किसी भी पक्षकार को तीन बार से अधिक प्रदान नहीं किया जायेगा।

वर्ष 2002 में समाविष्ट सी.पी.सी. के संशोधन द्वारा उक्त परंतुक जोड़ा गया है जिसके विषय में उक्त न्यायदृष्टांत **मेसर्स शिव कोटेक्स** में माननीय सर्वोच्च न्यायालय ने यह कहा है कि जब न्यायसंगत कारण हो तभी तीन से अधिक स्थगन उचित होते है। न्यायसंगत कारण का अर्थ न केवल पर्याप्त कारण से है बल्कि वह पक्षकार जो ऐसे स्थगन की प्रार्थना कर रहा है वह बाध्यकारी आवश्यकता व न रोके जा सकने वाले कारण के अधीन होना चाहिए।

इस तरह माननीय सर्वोच्च न्यायालय का तीन से अधिक स्थगन देने के बारे में स्पष्ट मत है कि ऐसे स्थगन तभी दिए जाने चाहिए जब स्थगन के लिए दर्शाये गये कारण पक्षकार के नियंत्रण के बाहर हों। इस प्रकरण में यह भी कहा गया कि जहां बड़ी संपत्ति का मामला हो वहां पक्षकार को अधिक गंभीर रहना चाहिए। इस प्रकरण में तीन स्थगन देने के उपरांत वादी का वाद निरस्त किया गया था। अपील में भी यह आदेश स्थिर रहा था। ऐसे समवर्ती निष्कर्ष पर माननीय सर्वोच्च न्यायालय ने मात्र इस आधार पर हस्तक्षेप करना उचित नहीं माना कि इस प्रकरण में बड़ी संपत्ति निहित है एवं यह कहा कि ऐसी अनावश्यक सहानुभूति संरक्षित पक्षकार के लिए मजाक होती है।

न्यायदृष्टांत **सलेम एडवोकेट बार एसोसिएशन विरूद्ध यूनियन ऑफ इंडिया, ए.आई आर. 2005 एससी 3353** में तीन न्यायमूर्तिगण की पीठ ने भी यह प्रतिपादित किया है कि तीन स्थगन का प्रावधान जहाँ परिस्थितियाँ ऐसी हो जो पक्षकार के नियंत्रण के बाहर की हो वहीं तीन से अधिक स्थगन दिये जा सकते है।

न्यायदृष्टांत राजकुमार पटेल विरूद्ध शिवराज सिंह 2009 (2) एम.पी.एच.टी. 285 में माननीय मध्यप्रदेश उच्च न्यायालय ने यह प्रतिपादित किया है कि आदेश 17 नियम 1 सी.पी.सी. का परंतुक विवेकीय है जिसमें तीन से अधिक स्थगन पर रोक है लेकिन इस प्रावधान को तीन से अधिक स्थगन देकर व्यर्थ और निरर्थक नहीं कर देना चाहिए।

इन न्यायदृष्टांतों से मार्गदर्शन लें तब भी यही स्पष्ट होता है, कि व्यवहार में कार्यवाही के लिए तीन से अधिक स्थगन देकर वर्ष 2002 के संशोधन के माध्यम से जोड़े गये इस परंतुक को व्यर्थ या प्रभावहीन नहीं करना चाहिए। बल्कि इसे प्रभावपूर्ण तरीके से लागू करने का प्रयास करना चाहिए।

## अंतिम अवसर

न्यायदृष्टांत **रमेश चंद्र विरूद्ध रामेश्वरदयाल, ए.आई.आर. 1987 एम.पी. 110** में माननीय मध्यप्रदेश उच्च न्यायालय ने यह प्रतिपादित किया है कि प्रमाण समाप्त करने से पूर्व अंतिम अवसर देना चाहिए।

न्यायदृष्टांत **ऋषिराज चौधरी विरूद्ध रामनाथ सिंघल 1996 (1) एम.पी.डब्ल्यू.एन. 183** में यह प्रतिपादित किया गया है कि गवाहों के परीक्षण के लिए अंतिम अवसर दिये गये जिनका उपयोग नहीं किया गया अतः आगामी स्थगन अस्वीकार करने अवैध नहीं है।

इस तरह किसी भी पक्षकार के विरूद्ध कोई भी कठोर कदम उठाने से पहले उसे अंतिम अवसर संबंधित कार्यवाहीं के लिए प्रदान कर के एक बार न्यायालय का आशय उसके ध्यान में ला देना चाहिए। कई बार ऐसा देखा जाता है कि किसी कार्यवाही के लिए प्रकरण कई बार बढ़ाया जा चुका होता है और फिर अचानक एक दिन उस पक्षकार का अवसर समाप्त कर दिया जाता है। माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत **स्टेट बैंक ऑफ इंडिया विरूद्ध कुमारी चंद्रा गोविंद जी, 2000 ए.आई.आर. एस.सी.डब्ल्यू. 3967** में यह प्रतिपादित किया है कि इस आधार पर स्थगन न देना कि पूर्व मे कई स्थगन दिये जा चुके हैं उचित नहीं माना जा सकता पूर्व के स्थगन युक्तियुक्त कारण से दिये गये थे, ऐसा माना जा सकता है।

इस तरह एक बार अंतिम अवसर दे देने से संबंधित पक्ष भी सचेत हो जाता है। यह विधि का कोई नियम नहीं है कि अंतिम अवसर दिया ही जाये लेकिन किसी पक्ष के साथ अन्याय न हो जाये इसे दृष्टिगत रखते हुये कठोर कदम उठाने से पूर्व एक अंतिम अवसर देने की प्रणाली अपनायी जा सकती है।

## अभिभाषक का उपलब्ध न होना

कई बार कोई पक्ष इसलिए स्थगन चाहता है कि उसके अभिभाषक अन्य न्यायालय में व्यस्त एवं अस्वस्थ्य होने आदि के कारण उपलब्ध नहीं है।

यद्यपि **आदेश 17 नियम 1(2)(सी) सी.पी.सी.** के अनुसार पक्षकार के प्लीडर दूसरे न्यायालय में व्यस्त है यह तथ्य स्थगन के लिए आधार नहीं माना जायेगा।

**आदेश 17 नियम 1 (2) (डी) सी.पी.सी.** के अनुसार जहां प्लीडर की बीमारी या अन्य न्यायालय में उसके व्यस्त होने से भिन्न कारण से, मुकदमें का संचालन करने में उसकी असमर्थता को

स्थगन के लिए एक आधार के रूप में पेश किया जाता है वहां न्यायालय तब तक स्थगन मंजूर नहीं करेगा जब तक कि यह समाधान नहीं हो जाता कि ऐसे स्थगन के लिए आवेदन करने वाला पक्षकार समय पर दूसरा प्लीडर नियुक्त नहीं कर सकता था।

प्रायोगिक रूप से उक्त दोनों प्रावधान लागू करने में यह कठिनाई होती है कि कोई भी अभिभाषक एक बार में एक ही न्यायालय में उपस्थित हो सकता है एक दिन में उस अभिभाषक के पास एक से अधिक न्यायालयों के प्रकरण होते हैं ऐसे में किसी पक्षकार से उसी समय दूसरे अभिभाषक की व्यवस्था करने की अपेक्षा करना भी अव्यवहारिक हो सकता है साथ ही किसी भी स्थान पर कुछ अभिभाषक ऐसे होते है जिनके पास अधिक मात्रा में कार्य होता है साथ ही अपनी पंसद का अभिभाषक नियुक्त करना किसी व्यक्ति का संवैधानिक अधिकार भी होता है।

माननीय सर्वोच्चय न्यायालय ने न्यायदृष्टांत ठाकुर सुखपाल सिंह विरूद्ध ठाकुर कल्याण सिंह, ए.आई. आर.1963 एस.सी.146 तीन न्यायमूर्तिगण की पीठ ने यह प्रतिपादित किया है कि जहां एक पक्षकार द्वारा नियुक्त अभिभाषक न्यायालय को संबोधित करने से (अर्थात् प्रकरण के संचालन से) इंकार कर देता है तब उस पक्षकार के लिए यह संभव नहीं है कि उसी समय नया अभिभाषक नियुक्त करे ताकि वह उसी समय बहस कर सके। ऐसे में उस पक्षकार को स्वयं बहस करने का कहना उचित नहीं है इन परिस्थितियों में एक स्थगन देना चाहिए। माननीय सर्वोच्च न्यायालय के अनुसार स्थगन देने से इंकार करने का आदेश विवेकीय होता हैं जिसमें सामान्यतः हस्तक्षेप नहीं किया जाता है।

माननीय सर्वोच्च न्यायालय द्वारा न्यायदृष्टांत बशीर अहमद विरूद्ध महमूद हुसैन शाह, ए.आई.आर. 1995 एस.सी. 1857 के मामले में वादी के प्रतिपरीक्षण के लिए प्रकरण नियत था। अगले दिन के लिए प्रकरण नियत किया गया रात्रि में प्रतिवादी के वकील बीमार हो गये प्रतिवादी ने स्थगन चाहा न्यायालय ने स्थगन अस्वीकार किया और प्रतिवादी का प्रतिपरीक्षण का अधिकार भी समाप्त कर दिया इस आदेश को न्यायसंगत नहीं माना गया प्रतिवादी के लिए उसी दिन नये अभिभाषक नियुक्त करना अव्यवहारिक और खतरनाक हो सकता था न्यायालय को आगामी तिथि के लिए प्रकरण स्थगित करना चाहिये था ताकि प्रतिवादी अभिभाषक नियुक्त कर सके और उन्हें निर्देश दे सके।

न्यायदृष्टांत एन.जी. दस्ताने विरूद्ध श्रीकांत एस. शिवडे ए.आई.आर. 2001 एस.सी. 2028 में तीन न्यायमूर्तिगण की पीठ ने यह प्रतिपादित किया, कि यदि एक अभिभाषक न्यायालय में उपस्थित गवाहों के परीक्षण करने में बार–बार स्थगन मांगता है, तो यह दुराचरण है। धारा 35 अभिभाषक अधिनियम, 1961 के अवलोकन में यह विधि प्रतिपादित की गई।

इस तरह अभिभाषक के अस्वस्थ होने, अन्य न्यायालय में व्यस्त होने आदि के आधार पर स्थगन चाहा जाये तब एक उचित संतुलन बनाना चाहिए और जब वे अभिभाषक अन्य न्यायालय से निवृत्त हो जावे तब उसी दिन कार्यवाही पूर्ण करवाने का अधिकतम प्रयास करना चाहिए। न्यायालय समय के अतिरिक्त समय में भी या मध्यान्ह अवकाश में या अगले कार्यदिवस में सुविधा अनुसार ऐसा किया जा सकता है। इससे अनावश्यक स्थगन मांगने वाले पक्षकार पर रोक लग सकती है और ऐसे पक्षकार की पहचान हो सकती है जो वास्तव में कार्य करना चाहते है या किसी न किसी प्रकार से स्थगन चाहते है और ऐसे विलंब कारित करने वाले पक्षकार पर न्यायालय वैधानिक कठोर कार्यवाही कर सकते है।

## हड़ताल

कभी–कभी न्यायालय का कार्य अभिभाषकगण के हड़ताल, बहिष्कार, कार्य से विरत रहना आदि के कारण भी स्थगित होता है इस संबंध में माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत एक्स कैप्टन हरिश उप्पल विरूद्ध यूनियन ऑफ इंडिया, ए.आई.आर. 2003 एस.सी. 739 पांच न्यायमूर्तिगण की पीठ में यह प्रतिपादित किया है कि अभिभाषकगण को यह अधिकार नहीं है कि वे हड़ताल पर जाये या बहिष्कार करे। एक दिन के विरोध स्वरूप अनुपस्थिति को विरल से विरलतम परिस्थितियों में अनदेखा किया जा सकता है न्यायालयों को ऐसे हड़ताल या बहिष्कार के कारण प्रकरण स्थगित नहीं करना चाहिए।

न्यायदृष्टांत रमोन सर्विसेज प्रा. लि. विरूद्ध सुभाष कपूर, ए.आई.आर. 2001 एस.सी. 207 में यह प्रतिपिादित किया है कि अभिभाषकगण के हड़ताल पर होने के कारण प्रकरण स्थगित नहीं करना चाहिए। अभिभाषक के हड़ताल के कारण अनुपस्थित रहने से पारित एक पक्षीय अज्ञाप्ति को प्रतिकारात्मक खर्च लगाकर अपास्त किया गया और यह निर्देशित किया गया कि यदि पक्षकार चाहे तो ऐसे प्रतिकारात्मक खर्च को संबंधित अभिभाषक से वसूल सकता है।

प्रायोगिक रूप से होता यह है कि ऐसी हड़ताल पर प्रकरण स्थगित कर दिये जाते है जिसे माननीय सर्वोच्च न्यायालय ने उचित नहीं माना है। किसी स्थान विशेष पर नियुक्त न्यायाधीशगण इस संबंध में विधिक व प्रायोगिक स्थिति पर विचार करके एक युक्तियुक्त कदम ऐसे अवसरों पर उठा सकते है साथ ही यह भी ध्यान रखना होगा कि भारत में अधिकांश मामले अशिक्षित या अल्प शिक्षित या न्यायालय की प्रक्रिया को कम समझने वाले लोगों के है जो अपनी ओर से एक अभिभाषक नियुक्त कर लेते हैं और उस पर यह विश्वास करते है कि वह कार्यवाही तत्परता से संचालित कर रहे होंगे ऐसे में अचानक हड़ताल या बहिष्कार कर देने वाले अभिभाषक के कृत्य के लिए क्या पक्षकार को दंडित किया जाना उचित होगा यह भी ध्यान में रखे जाने योग्य है।

## प्रतिकारात्मक खर्च

स्थगन देते समय धारा 35 बी सी.पी.सी. प्रतिकारात्मक खर्च के प्रावधानों को ध्यान में रखते हुए अधिरोपित की जा सकती है ताकि अनावश्यक स्थगन रोके जा सके और विपक्षी को होने वाली क्षतिपूर्ति भी कराई जा सके।

न्यायदृष्टांत उक्त सलेम एडवोकेट बार एसोसिएशन में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि स्थगन के खर्चे या कॉस्ट व्यवहारिक होना चाहिए और विपक्षी को मिले यह भी ध्यान रखना चाहिए।

संशोधन आवेदन के निराकरण के समय प्रतिकारात्मक खर्च लगाते समय न्यायदृष्टांत **मेसर्स रेवाजीतू बिल्डर्स विरूद्ध नारायण स्वामी, ए.आई.आर. 2009 एस.सी. (सप्लीमेंट) 2897** से मार्गदर्शन ले सकते है जिसमें माननीय सर्वोच्च न्यायालय ने प्रतिकारात्मक खर्च अधिरोपित करने के उद्देश्य बताये है जो इस प्रकार है :–

1. ऐसे संशोधन जो दुर्भावनापूर्वक विधिक कार्यवाही को विलंबित करने के लिये पेश होते है उन्हें निरूत्साहित करना।

2. विरोधी पक्ष को विलंब और उससे हुई असुविधा के लिये क्षतिपूर्ति दिलवाना।

3. संशोधन के प्रकाश में उसके विरोध स्वरूप कार्यवाही में लगने वाले खर्च दिलवाना।

4. पक्षकारों को यह स्पष्ट संदेश देना की वे उनके मूल अभिवचन तैयार करने में सावधान रहे।

इस तरह संशोधन आवेदन स्वीकार करते समय प्रतिकारात्मक खर्च अधिरोपित करने में उक्त उद्देशों को ध्यान में रखना चाहिये।

न्यायदृष्टांत **मनोहर सिंह विरूद्ध डी. एस. शर्मा, ए.आई.आर. 2010 एस.सी. 508 में यह प्रतिपादित किया गया है कि धारा 35 बी सी.पी.सी**. के तहत लगाई गई कॉस्ट अदा नहीं की जाती है तब वाद खारिज नहीं किया जा सकता है बल्कि वादी को आगामी अभियोजन से या आगामी कार्यवाही में भाग लेने से रोका जा सकता है और प्रतिवादी को उसके बचाव से अभियोजित करने से रोका जा सकता है।

इस तरह न्यायालयों को स्थगन देते समय न केवल उचित प्रतिकारात्मक खर्च लगाना चाहिए बल्कि उनके न दिये जाने पर संबंधित पक्ष को आगामी कार्यवाही में भाग लेने से रोकना चाहिए। यह भी स्थगनों को रोकने का प्रभावी तरीका हो सकता है।

## पर्याप्त साक्ष्य अभिलेख पर

न्यायदृष्टांत बी.जे. चेट्टी विरूद्ध ए.के. पार्थ सारथी, ए.आई.आर. 2003 एस.सी. 3527 में यह प्रतिपादित किया गया है कि जहां किसी सुनवाई के दिनांक पर अनुपस्थित पक्षकार उसका साक्ष्य या साक्ष्य का तात्विक भाग पेश कर चुका हो वहां उसकी अनुपस्थिति में भी न्यायालय ऐसे कार्यवाही कर सकता है जैसे वह पक्षकार उपस्थित है लेकिन न्यायालय को इस बात से संतुष्ट हो जाना चाहिए और अपनी संतुष्टि अभिलिखित भी करना चाहिए कि अनुपस्थित पक्षकार उसका साक्ष्य या साक्ष्य का तात्विक भाग पेश कर चुका है। इस मामले में यह भी कहा गया कि आदेश 17 नियम 2 सी.पी.सी. का स्पष्टीकरण आज्ञापक नहीं है।

इस संबंध में न्यायदृष्टांत **महालक्ष्मी ट्रेडर्स विरूद्ध सुदर्शन इंडस्ट्रीज, 2007 (2) एम.पी.एल.जे. 174 भी** अवलोकनीय है जिस मामले में न्यायालय ने उक्त संतुष्टि अभिलिखित नहीं की थी जिसे उचित नहीं माना गया।

इस तरह जहां अभिलेख पर पर्याप्त साक्ष्य मौजूद हो वहां न्यायालय उक्त अनुसार संतुष्टि अभिलिखित कर के भी अग्रसर हो सकता है।

## कब आदेश 17 नियम 2 और कब आदेश 17 नियम 3

## सी.पी.सी. लागू होंगे?

न्यायदृष्टांत **प्रकाश चंदेर मनचंदा विरूद्ध श्रीमती जानकी मनचंदा, ए.आई.आर. 1987 एस.सी. 42** के मामले में सुनवाई के लिए नियत दिनांक पर प्रतिवादी अनुपस्थित था एवं प्रतिवादी का

कोई साक्ष्य नहीं हुआ था ऐसे में वहाँ आदेश 17 नियम 2 सी.पी.सी. लागू होगी, आदेश 17 नियम 3 सी.पी. सी. लागू नहीं होगी और न्यायालय को आदेश 9 सी.पी.सी. के तहत एकपक्षीय कार्यवाही करनी थी यह प्रतिपादित किया गया।

न्यायदृष्टांत मोहनदास विरूद्ध घिसीया बाई, ए.आई.आर. 2002 एस.सी. 2436 में वादी प्रमाण पर प्रकरण नियत था वादी ने एक आवेदन लिखित कथन में बेहतर कथन देने के लिए प्रस्तुत किया, जो निरस्त हुआ। दूसरा आवेदन लिखित कथन में कुछ पैरा निरस्त करने के लिए दिया, जो निरस्त हुआ एवं एक आवेदन पुनरीक्षण लगाने के लिए स्थगन देने के लिये दिया, वह भी निरस्त हुआ। न्यायालय ने उक्त प्रकरण को आदेश 17 नियम 3 सी.पी.सी. के तहत खारिज किया। इस मामले में यह कहा गया कि आदेश 17 नियम 2 सी.पी.सी. लागू होंगी क्योंकि वादी का प्रमाण नही हुआ है।

इस संबंध में न्यायदृष्टांत **स्टेट बैंक ऑफ इंडिया, रतलाम विरूद्ध नंदराम (मृत) 1999 (1) एम. पी.एल.जे. 719 एवं रामराव विरूद्ध शांतिबाई 1977 एम.पी.एल.जे. 364** पूर्ण पीठ : ए.आई.आर. 1977 एम.पी. 222 भी अवलोकनीय है।

उक्त रामाराव वाले मामले में पांच न्यायमूर्तिगण की पीठ ने यह प्रतिपादित किया कि जहाँ पक्षकारों की उपस्थिति में चूक हो वहाँ आदेश 17 नियम 2 सी.पी.सी. लागू होगी और जहाँ पक्षकारों की उपस्थिति में चूक न हो और आदेश 17 नियम 3 लागू होने की शर्तें पूर्ण हो रही हों अर्थात वाद के किसी पक्षकार को समय दिया गया था उसके बाद भी वह अपना साक्ष्य पेश करने में या साक्षियों को उपस्थित करने में या वाद की प्रगति के लिये आवश्यक कार्यवाही करने में असफल रहता है तब आदेश 17 नियम 3 सी.पी. सी. लागू होंगी यह मामला आदेश 17 नियम 2 व 3 के लागू होने के संबंध में मार्गदर्शक है।

## सुनवाई की तिथि

प्रकरण में केवल सुनवाई की तिथि पर ही वाद खारिज किया जा सकता है या प्रतिवादी के विरूद्ध एकपक्षीय कार्यवाही के आदेश दिये जा सकते हैं जैसा की आदेश 9 नियम 3 सी.पी.सी. आदेश 9 नियम 6 सी.पी.सी. एवं आदेश 9 नियम 7 एवं आदेश 9 नियम 8 सी.पी.सी. से स्पष्ट है यहां सुनवाई की तिथि शब्द का प्रयोग किया गया है।

न्यायदृष्टांत संग्राम **सिंह विरूद्ध इलेक्शन ट्रिब्यूनल कोटा, ए.आई.आर., 1955 एस.सी. 425 एवं अर्जुन सिंह विरूद्ध मोहिन्द्र कुमार, ए.आई.आर., 1964 एस.सी. 993** के मामलों में वाद प्रश्न के स्थिरीकरण की तिथि को वाद की प्रथम सुनवाई तिथि बतलाया है जबकि आदेश 18 नियम 2 सी.पी.सी. के अनुसार वाद की सुनवाई तिथि पर साक्ष्य अभिलिखित की जाती है या वह तिथि जिस दिन के लिये सुनवाई स्थगित की गई हो पक्षकार अपनी साक्ष्य आरंभ करेंगे साथ ही आदेश 20 नियम 1 सी.पी.सी. के अनुसार विचार करें तो अंतिम तर्क की तिथि भी सुनवाई की तिथि होती है। इस तरह सुनवाई की तिथि पर यदि वादी अनुपस्थित हो तो वाद खारिज किया जा सकता है या प्रतिवादी अनुपस्थित हो तो उसके विरूद्ध एकपक्षीय कार्यवाही करने के आदेश दिये जा सकते हैं।

यदि मामला किसी आवेदन की सुनवाई के लिए नियत हो और कोई पक्ष अनुपस्थित हो तब वाद खारिज करने या प्रतिवादी के विरूद्ध एक पक्षीय कार्यवाही करने के बजाय उस आवेदन को निराकृत करना चाहिए तथा अगले प्रक्रम के लिए प्रकरण नियत कर देना चाहिए और इस संबंध में न्यायदृष्टांत हरदत्त विरूद्ध सत्यनारायण, 1959 एम.पी.एल.जे. नोट 191, जानकी बाई विरूद्ध जानकी दास, 1952 एन.एल.जे. नोट 22 से मार्गदर्शन लेना चाहिए।

## विविध

ऐसी कौन सी परिस्थितियाँ हैं जो पक्षकार के नियंत्रण के बाहर की होती हैं, इसे कुछ उदाहरणों से समझ सकते है :–

1. न्यायदृष्टांत मनोरमा वि. **मनीष, ए.आई.आर. 1967 एम.पी. 139 (डी.बी.**) में गवाहों की तामील उचित पता न होने से नहीं हो सकी थी। इस मामले में यह कहा गया कि न्यायालय को स्थगन अस्वीकार नहीं करना चाहिए था जब तक यह पता न लगता हो कि संबंधित पक्ष ने दुर्भावना–पूर्वक प्रकरण को लंबित करने के लिए गवाहों का गलत पता दिया या अवसर देने पर भी सही पता नहीं दिया।

   इस मामले से यह समझा जा सकता है कि किसी भी पक्षकार को उसे ज्ञात गवाहों के नाम, पते और तलवाना प्रस्तुत करना होता है। गवाहों के तामील उचित पता न होने के कारण नहीं हो पाते हैं वहाँ न्यायालय को यह विचार करना चाहिए कि क्या पक्षकार को सही पता देने के लिए एक अवसर देना चाहिए या नहीं।

2. न्यायदृष्टांत **कुन्दनलाल विरूद्ध गुलजारी मल, ए.आई.आर. 1952 अजमेर 29 (2)** के मामले में प्रकरण प्रमाण के लिए नियत था पक्षकार ने प्रोसेस भी दिया था। कार्यालय की लापरवाही से प्रोसेस जारी नहीं हुआ न्यायालय ने स्थगन से इंकार किया, इसे उचित नहीं माना गया।

   पक्षकार प्रोसेस प्रस्तुत कर सकता है लेकिन उसका जारी किया जाना उसके नियंत्रण में नहीं होता है, इसे इस तरह समझा जा सकता है।

3. न्यायदृष्टांत **अमृतलाल कपूर विरूद्ध कुसुमलता कपूर, (2010) 6 एस.सी.सी. 583** के मामले में प्रतिवादी का एक गवाह शासकीय सेवक था उसके उच्चाधिकारी ने उसे नियुक्ति स्थल से बाहर जाने की अनुमति देने से इंकार कर दिया इसलिए वह उपस्थित नहीं हुआ गवाह किसी उपेक्षा या अक्रियशीलता के कारण पेश नहीं किया जा सका ऐसा मामला नहीं था ऐसे में प्रतिवादी प्रमाण समाप्त करना उचित नहीं माना गया।

4. न्यायदृष्टांत **बी.पी. मोईदीन सेवामन्दिर विरूद्ध ए.एम. कुट्टी, ए.आई.आर. 2008 एस.सी. (सप्लीमेंट) 1123** के मामले में अभिभाषक लंच के पूर्व सत्र में तैयार थे उन्होंने अचानक बीमारी के कारण लंच के बाद तक का स्थगन चाहा ऐसे लघु स्थगन अस्वीकृत नहीं करना चाहिए। ऐसे लघु स्थगन अस्वीकृत करना उचित नहीं माना गया।

5. न्यायदृष्टांत **श्यामलाल विरूद्ध स्टेट ऑफ एम.पी., 1999 (2) डब्ल्यू.एन. 207** के मामले में रिश्तेदार की मृत्यु के कारण स्थगन चाहा ऐसा स्थगन दिया जाना चाहिए यह बतलाया गया।

6. न्यायदृष्टांत **स्टील अथॉरिटी ऑफ इंडिया विरूद्ध रमजान अली, 1999 (1) डब्ल्यू.एन. 147** में न्यायालय का स्टाफ साक्ष्य की तिथि पर हड़ताल पर चला गया था ऐसे में साक्ष्य प्रस्तुत करने के लिए स्थगन दिया जाना चाहिए यह प्रतिपादित किया गया।

7. न्यायदृष्टांत **रघुनाथ प्रसाद विरूद्ध पटवारी देवी, 1999 (2) डब्ल्यू.एन. 110** के मामले में प्रतिवादी का संशोधन स्वीकार किया गया प्रकरण साक्ष्य के लिए स्थगित किया जाना चाहिए। प्रतिवादी यह प्रत्याशा नहीं कर सकता कि उससे संशोधन पर साक्ष्य उसी समय मांगी जायेगी।

8. न्यायदृष्टांत **राजेश कुमार विरूद्ध धल्लूमल, 2005 (4) एम.पी.एल.जे. 286** में यह प्रतिपादित किया गया है कि तकनीकी आधारों पर स्थगन का आवेदन निरस्त नहीं करना चाहिए। इस मामले में मुख्त्यार उपस्थित था, जो अस्वस्थ था इसलिए कथन नहीं दे सका एवं इस मामले में मूल पक्षकार उपस्थित नहीं था इसलिए स्थगन चाहा गया, जो नहीं दिया गया था।

उक्त विवेचन से ये स्पष्ट होता है कि :–

1. अनावश्यक स्थगन को दृढ़ता से रोकना होगा तभी न्याय प्रणाली में लोगों का विश्वास कायम रहेगा। विधायिका के संशोधन को प्रभावी ढंग से लागू करना न्यायालय का कर्त्तव्य है।

2. किसी कार्यवाही के लिए किसी पक्षकार को तीन से अधिक स्थगन तभी देना चाहिए जब स्थगन का कारण पक्षकार के नियंत्रण के बाहर का हो। यहाँ हमें विलंब कारित करने की प्रवृत्ति और पक्षकार के नियंत्रण के बाहर के कारण के अंतर को समझ कर एक संतुलित मार्ग अपनाना चाहिए।

3. धारा 35 बी सी.पी.सी. के प्रावधानों को प्रभावी ढंग से लागू करना चाहिए और एक युक्तियुक्त खर्च स्थगन चाहने वाले पक्षकार पर लगाना चाहिए।

4. पक्षकार को एक अंतिम अवसर देकर जाग्रत किया जा सकता है।

5. तात्विक न्याय व शीघ्र न्याय के बीच एक न्यायिक संतुलन बनाना होगा।

6. वाद की सुनवाई की तिथि व आवेदन पर विचार की तिथि में अंतर समझना चाहिये और उसके अनुसार कार्यवाही करनी चाहिये।

7. कब आदेश 17 नियम 2 सी.पी.सी. लागू होगी और कब आदेश 17 नियम 3 सी.पी.सी. लागू होगी, इस तथ्य को ध्यान में रखना चाहिए।

8. एक अभिभाषक एक समय पर एक दिन में एक ही न्यायालय में उपस्थित हो सकता है ऐसे में न्यायालय के कार्य की प्रगति भी हो और संबंधित अभिभाषक या पक्षकार की उचित कठिनाई भी समझी जा सके ऐसा एक संतुलन बनाना चाहिए। लेकिन संदेश यह जाना चाहिए कि संबंधित न्यायालय में जिस कार्यवाही के लिए प्रकरण नियत है वह कार्य किया ही जाना है।

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# VICTIM'S RIGHT TO APPEAL – AMBIT, SCOPE AND ISSUES

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The Code of Criminal Procedure when originally enacted in the year 1861 did not provide for any right to appeal against acquittal to anyone including the State. It was in the Code of Criminal Procedure of 1898 that Section 417 was inserted enabling the Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The Law Commission of India in its 41st Report given in September, 1969 as also in 48th Report pertaining to the Criminal Procedure Bill, 1970, however, recommended to restrict the right of appeal given to the State Government against an order of acquittal by introducing the concept of 'leave to appeal' and that all appeals against acquittal should come to the High Court though it rejected the right to appeal to "the victim of a crime or his relatives". The Code of Criminal Procedure, 1973 came into force on April 1, 1974 repealing the Code of Criminal Procedure, 1898. The recommendations made by the Law Commission of India, referred to above, largly found favour with the Parliament when it inserted an embargo in sub-Section (3) to Section 378 against entertainment of an appeal against acquittal "except with the leave of the High Court". sub-Section (4) of Section 378 retained the condition of maintainability of an appeal at the instance of a complainant against an order of acquittal passed in a complaint-case only if special leave to appeal was granted by the High Court. Save in the manner as permitted by Section 378, no appeal could lie against an order of acquittal in view of the express embargo created by Section 372 according to which "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force". The Code of Ciminal Procedure (Amendment) Act, 2005 inserted Section 378(1)(a) whereby the appeals against acquittal in certain cases were made maintainable in the Court of Sessions without any leave to appeal. Section 377 was also suitably amended enabling an appeal on the ground of inadequacy of sentence to the court of session if sentence is passed by the Magistrate. The Criminal Procedure (Amendment) Act, 2008 which came into force on 31st December 2009 recognized the right to appeal of a victim and added a new section 2(wa) which defines victim to mean a person who has suffered any loss or injury caused by reason of the act or ommission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir. The Amendment Act has also inserted a proviso in Section 24(8) enabling the court to permit a victim to engage an advocate of his/her choice to assist the prosecution. One more proviso has been added in Section 157(1) to say that

“in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and so far as practicable by woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality”.

The concept of ‘Victim Compensation Scheme’ has also been brought on the Statute Book by the same Amendment Act through a newly-added Section 357A which inter alia provides that “every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime and who, require rehabilitation”.

Sub–Section (3) of Section 357 A further provides that “If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated it may make recommendation for compendation”. Similarly, its sub-Section (4) enables that “where the offender is not traced or identified, but the vicitm is identified, and where no trial takes place, the victim or his dependants may make an application to the State or the District Legal Services Authority for award of compensation”.

The profound and most cherished ‘right to appeal’ conferred upon and/or earned by the innumerable victims after a protracted struggle and which is free from all shackles, is by way of the proviso added to Section 372 whereunder a ‘victim’ can prefer an appeal against (i) an order acquitting the accused; (ii) convicting the accused of a lesser offence; and (iii) imposing inadequate compensation. The appeal of the ‘victim’ lies in the Court to which an appeal ordinarily lies against the order of conviction of such court. The amended Section 372 of the Code reads as follows-

Section 372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Court or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by in the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

This ammendment has given rise to the follwoing issues which need interpretation by Courts.

1. What is the true import and meaning of the expression ‘victim’ as defined under Section 2(wa) read with proviso to Section 372 Cr.P.C. ?

2. Whether ‘complainant’ in a private complaint-case,who is the ‘victim’ and the ‘victim’ other than the ‘complainant’ in such cases are entitled to present appeal against the order of acquittal under proviso to Section 372 or have to seek ‘special leave’ to appeal from the High Court under Section 378(4) Cr.P.C.?

3. Whether the ‘rights’ of a victim under the amended Cr.P.C. are accessory and auxiliary to those perceived to be the exclusive domain of the ‘State’?

4 Where would the appeal of a ‘victim’ preferred under proviso to Section 372 lie when the State also prefers appeal against the order of acquittal under Clause (a) or (b) of Section 378(1) Cr.P.C.?

5. Whether proviso to Section 372 Cr.P.C. inserted w.e.f. December 31, 2009 is prospective or retrospective in nature ?

6. What would be the period of limitation for a ‘victim’ to prefer an appeal under proviso to Section 372 Cr.P.C.?

What is the true import and meaning of the expression ‘victim’ as defined under Section 2(wa) read with proviso to Section 372 Cr.P.C. ?

According to Section 2(wa) of Cr.P.C. ‘victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir.

We find on its plain reading that the legislature has classified the ‘victim’ in two categories i.e. (i) a person who has suffered any loss or injury caused by the act or omission attributed to the accused; and (ii) the ‘guardian’ or ‘legal heirs’ of such ‘victim’. The correct understanding of the first part of the term “victim” is contingent and is subject to the true scope of the words “loss” or “injury” contained therein. Both these words are not defined in the Code, however, its Section 2(y) says that “words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meaning respectively assigned to them in that Code”.

The word ‘injury’ is defined in Section 44 of the Indian Penal Code, which is as follows :-

> “44. The word ‘injury denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.”

However, in criminal laws either in Criminal Procedure or Indian Penal Code the word ‘loss’ is not defined but the words “wrongful loss” are defined in Section 23 of the Indian Penal Code, which is as follows :-

> "23. 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled."

It is, thus, in the context of offences against property, especially under Section 418 and 'mischief' as defined in Section 425 IPC that the term 'wrongful loss' has been used in the Penal Code. The Legislature while defining 'victim' in Section 2(wa) of the code has used the word 'any loss' before 'or injury' and has not restricted it to 'wrongful loss' only. We, thus find that the words 'loss' and 'injury' used in Section 2(wa) are synonymous. This view is also fortified by the use of wide term 'any loss' in clause (b) as compared to 'the loss' in clause (c) of Section 357(1) of the Code.

It is so acte clair that a person who has suffered an injury in body or mind or reputation or to his/her property or if such person has been caused loss of property, to which he is legally entitled to, unlawfully at the hands of another person who has been charged as an accused, is the 'victim' within the meaning of Section 2(wa). Similarly, if as a result of the aggravated form of victimization, such 'victim' of first part does not survive, the second part of the definition of 'victim' as defined in Section 2(wa) of the Code substitutes the first part and becomes operative whereupon the guardian (if such 'victim' was a minor or of unsound mind) or the legal heirs of the deceased victim, as the case may be, step-in for the 'victims' for the varied purposes under the Code.

The phrase "legal heir" has not been defined in the Code or the IPC. In its literal sense the word "legal" means as something which is established, appointed or authorized by law. In ***Angurbala Mullick v. Debabrata Mullick, AIR 1951 SC 293,*** it was held that the word "heirs" cannot normally be limited to "issues" only. It must mean all those persons who are entitled to the property of another under the law of inheritance. ***Vasant Pratap Pandit & Anr. v. Anant Trimbak Sabnis (Dr.), (1994) 3 SCC 481,*** explained that the word "heir" may be construed both in a wider as well as in a narrower sense and therefore, which sense would be applicable to the facts of a particular case would depend upon the intention and scheme of the particular legislation in which the question occurred.

The statements of objects and reasons for amending the Code.....At present, the victims are the worst sufferes in a crime and they don't have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system. .....justifies to interpret the word "heir" in a wider sense .Moreso the 'right to appeal' under proviso to Section 372 at best enables the Appellate Court to call for the records, re-appraise the evidence and determine – (i) whether acquittal of the accused is justified? or (ii) whether the accused has been rightly convicted for a lesser offence? or (iii) whether the compensation determined under Section 357 is inadequate? Such an exercise can be undertaken by the

appellate court on presentation of appeal by any 'legal heir' irrespective of his proximity with the deceased under the personal law. Any narrow construction would defeat the very legislative object behind insertion of Section 2(wa) and proviso to Section 372 of the Code and re-introduce the mischief which the Legislature has intended to remove.

Widest meaning of the term "victim" or that of his/her "legal heir" would meet with all kinds of peculiar or unforeseen situations, two of which are illustratively given below(as per Full Bench decision of ***Panjab & Haryana High Court in M/s. Tata Steel Ltd. v. M/s. Atma Tube Products Ltd. & others in CRM-790 – MA-2010 (O&M) dated 18.3.2013)***

(a) where a major, unmarried person is murdered and the accused person(s)/undertrial(s) was/were acquitted of the charges and the State does not prefer an appeal against the acquittal.

(b) where the entire family is murdered and the accused person(s)/under trial was/were acquitted of the charges and the State does not prefer an appeal against the acquittal.

In both the mis-happening there may not be any person known as 'legal heir' or a 'guardian' to file an appeal against unwarranted acquittal and it will be against all canons of justice to say that the appellate Court in such like situations would be helpless and the offenders will go unpunished. Since the Legislature has finally granted the right to appeal to a 'victim', it is the duty of the Court to trenchantly affirm such right and provide appropriate remedy.

We say so also the reason that the right to 'engage an advocate' or to 'prefer an appeal' under proviso to Section 372 does not ipso facto entitle the apellant to claim compensation as a 'legal heir' or the next of kin of a deceased 'victim'. That being so, every class or category of 'legal heirs' of a deceased 'victim' can have locus to invoke the remedy under proviso to Section 372 of the Code, without reading into Section 2(wa) that if Class-I legal heir of a 'victim' opts out of filing any appeal,the other legal heirs would also suffer from the same disability.The legislative intentment can be given its fullest effect by permitting all legal heirs, irrespective of their classification under the personal law to prefer appeal under proviso to Section 372. Such a purposive interpretation of the expression "legal heir" within the meaning of Section 2(wa) does no violence to nor does it conflict with Section 357 or 357-A of the Code. Even if a Class-II legal heir prefers an appeal say against inadequate compensation, the appellate court in the event of enhancement of compensation shall be obligated to disburse the enhanced amount to those persons only who are entitled to the same under Sections 357(1)(c) or 357-A of the Code, as the case may be. Thus the expression "legal heir" within the meaning of Section 2(wa) of the Code

does not exclude other than the Class-I legal heirs of a deceased 'victim' nor the right to engage an advocate' or prefer an appeal is restricted to those persons only to whom compensation is payable under Sections 357, 357-A of the Code or under the Fatal Accidents Act, 1855.

The above-stated interpretation saves the Court from legislating and re-writing Section 2(wa) and is otherwise in conformity with the pro-victim jurisprudence advanced by the Supreme Court in ***PSR Sadhanantham v. Arunachalam & Anr., (1980) 3 SCC 141, ; M/s JK International v. State Government of NCT of Delhi, (2001) 3 SCC, 462, and Puran Shekhar and Anr. v. Rambilas & Anr. (2001) 6 SCC 338,Ramakanth Rai v. Madan Rai & Ors. (2003) 12 SCC 395;*** etc. Cases.

Thus it appears that every heir who, in law, is entitled to succeed to the estate of a deceased 'victim' in one or the other eventuality, shall fall within the ambit of Section 2(wa) of the Code, even if the estate of such deceased 'victim' is to devolve upon the legal heirs as per the order of preference prescribed under the personal law of such 'victim'.

The word victim as defined in section 2(wa) of the Code is not only to be found in the proviso to section 372. It also finds mention in

(i) the proviso to section 24(8);

(ii) the second proviso to section 157(1);

(iii) section 164-A;

(iv) section 265-B(4)(a);

(v) section 265-C;

(vi) section 265-E;

(vii) section 357-A;

(viii) proviso to section 372;

(ix) reference to section 228-A in the First Schedule to the Code.

The word- victim in all these provisions would have to be given the meaning ascribed to it in section 2(wa), unless, of course the context otherwise requires. In the second proviso to section 157(1), for example, the reference to- victim is only to the rape victim herself (and not to her guardian etc) as the said provision relates to the recording of her statement at her place of residence. Here, the context requires that the- includes part of the definition be discarded. In section 357-A (1), which relates to the victim compensation scheme, the expression used is- the victim or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation. This provision also indicates that the word 'victim' primarily referes to the person who suffers direct loss or

injury because his 'dependants' have been separately mentioned, though they may also have suffered loss or injury or be in need of rehabilitation. Another thing which comes to notice is the use of the word 'or' in the expression 'victim or his dependants', which suggests that compensation is either for the victim or for his/her dependants, in case the victim is no longer alive. This also illustrate the the point that 'victim' refers to the crime victim in the natural and direct sense and not to the dependants etc. Of course, the expression 'dependant' is different from legal heir which appears in the includes part of the definition in section 2(wa), but we need not go into this discussion for the present.

**Whether 'complainant' in a private complaint-case,who is the 'victim' and a 'victim' other than the 'complainant' in such cases are entitled to present appeal against the order of acquittal under proviso to Section 372 or have to seek 'special leave' to appeal from the High Court under Section 378(4) Cr.P.C.?**

The expression "complainant" is not defined in the Code though its Section 2(d) defines "complaint" to mean "any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report". A person, other than the informant in a police-case, who makes the allegation orally or in writing to the Magistrate is a 'complainant' withing the meaning of Section 378(4) of the code. The words "victim" and "complainant" have been thus used and construed in the Code differently and distinctly. Also a 'victim' can be the 'complainant' but it may not be necessarily that every 'complainant' is a 'victim'.

Section 378(4) of the Code enables a complainant to prefer appeal against acquittal of the accused provided that the High Court grants 'special leave' to such appeal. The Legislature has imposed stringent condition on the maintainability of appeal against an order of acquittal in a complaint case, for the acquitttal by the trial court reinforces the presumption of innocence in favour of the accused who has earned acquittal in a case where the complainant himself was the prosecutor unlike the 'victim' in a police-case who does not have any say in the trial. Such being the legislative intentment, there cannot be any scope to doubt that the 'complainant' of Section 378(4) who has failed to establish the complicity can assail such acquittal only with the 'special leave' of the High Court under Section 378(4) only. The fact that the Legislature has brought no changes in this sub-section fortifies its policy to retain the same legal position as it existed before the Amendment Act, 2008.

However, if such a 'victim-cum-complainant' succeeds in bringing the guilt home against the accused and establishes his/her 'victimisation' but is aggrieved by the conviction for a lesser offence or award of inadequate compensation, he/

she shall be entitld to invoke the proviso to Section 372 of the Code. We say so for the reason that in such a case the accused no longer enjoys the protection of presumed innocence. The proven 'victim' also has no other remedy to assail the conviction for a lesser offence or imposition of inadequate compensation except the proviso to Section 372. Any different construction would leave the wrong ,without a remedy. The victims at post-conviction stage constitute one homogenous class and deserve to be treated alike. In such like cases decided by a Magistrate, even the accused has remedy to file appeal to the Sessions Court under Section 374(3) of the Code.

It may be noted here that the Code postulates different procedures for conducting Magisterial or Sessions trials in complaint-cases. In a Magisterial trial, it is the complainant who follows the accusatorial procedure without getting any assitance from the Public Prosecutor. However, if the complaint pertains to an offence triable exclusively by the Court of Session, after such complaint-case is committed by the Magistrate to the Court of Session under Section 209 of the Code, the Public Prosecutor shall open the case and conduct the trial as provided by Sections 225 and 226. The procedural advantage available to a complainant in the complaint-case triable by a Court of Session, is also inconsequential to take a view different from what has been held above, for in such like cases also the Public Prosecutor will have to bank upon the same set of evidence which the complainant had produced at his own before the Magistrate at the pre-committal stage.

What will happen if the victim in a complaint case is different from the 'complainant' or where such 'victim' cannot otherwise be a 'complainant' due to statutroy embargo against the filing of the complaint by some one other than the designated authority of State? Would he/she be entitled to file an appeal under proviso to Section 372 or should he/she be clubbed together with the complainant under Section 378(4) of the Code?

Follwing ***Damodar S. Prabhu v. Sayeed Babalal H. 2010 Cri.L.J. 2860(SC), Madhya Pradesh High Court in Dharmveer Singh Tomar v. Ramraj Singh Tomar 2011 (1) MPHT 491 held that Section 372 of Cr.P.C.*** nowhere specifies that victim also includes complainant of complaint case. The only remedy available to the complainant of complaint cases is to prefer appeal against the judgment of the acquittal before High Court uunder section 378(4) of Cr.P.C. Similarly Madhya Pradesh High Court in ***Krishna Bai v. Batan Bai 2013(2) MPHT 93*** held that the provision of section 378 sub-section (4) of the code is the exclusive provision which deals with the orders of acquittal passed in cases instituted upon complaint.Hence provisions of 378, sub-section (4) of the Code and the amended provison to section 372 of the code opeate in two different areas saprately. The Apex Court in the latest decision in ***Subhash Chand v. State (Delhi Administration)***

***AIR 2013 SC 395*** has held that complainants appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. The complainants remedy, whether he is a private person or a public servant, to question the acquittal lies only in Section 378(4) of the Code, hence the 'victim' will also have to be relegated to that conditionally remedy only. We are of the view that the victim' in complaint-cases cannot have a remedy superior to that of the complainant of such case. Similarly, where a 'victim' is competent to institute a private complaint but permits or consents expressly or impliedly to the filing of such complaint by his family-members, near and dears or an acquaintance, the 'victim' and 'complainant' in such a case cannot be seen differently and would be inseparable, hence the 'victim' will also fall back on Section 378(4) only which specifically refers to filing of appeals against acquittal at the instance of complainant and not under proviso to Section 372 of the Code which has been pre-dominantly incorporated to provide right to appeal to the 'victims' in police-case who are not permitted to participate or have any say during trial.

The above discussion thus can be summed up to say that –

(i) The 'complainant' in a complaint-case who is a 'victim' also, shall continue to avail the remedy of appeal against acquittal under Section 378(4) only except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372;

(ii) The 'victim', who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the un-amended provisions read with Section 378(4) of the Code;

(iii) The Legislature has given no separate entity to a 'victim' in the complaint-case filed by a pulic servant under a special Statute and the appeal against acquittal in such a case can also be availed by the 'complainant' of that case under Section 378(4) of the Code only.

(iv) Those 'victims' of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek 'leave' or 'special leave' to appeal from the High Court in the manner contemplated under Section 378(3) & (4), for the Legislature while enacting proviso to Section 372 has prescribed no such fetter nor has it applied the same language used for appeals against acquittals while enacting sub-Section (3) & (4) of Section 378 of the Code.o

**Whether the 'rights' of a victim under the amended Cr.P.C. are accessory and auxiliary to those perceived to be the exclusive domain of the 'State'?**

The answer of this question entirely depends upon the understanding of the two ancillary questions, namely, (i) whether the right of a 'victim' is subordinate or inferior to that of the State? (ii) whether the fetters imposed on the right to appeal against acquittal on the State under Section 378(3) or on a complaint under Section 378(4) also operate on the right of appeal given to a 'victim' ?

Right to challange a conviction or acquittal or any other sentence or order, emanates only from a Statute. The scheme of the Code after various amendments, confers right of apeal only on four categories of persons;, (i) accused; (ii) State; (iii) victim; and (iv) complainant in complaint cases and none else.

It hardly calls for a debate that the varied rights given to the State, the victim or a complainant under Chapter XXIX of the Code are not inter se dependant and each right operates within its own sphere. For example, the State has got a right to appeal on the ground of inadequacy of sentence [Section 377] but a victim (including complainant who is also a victim in police case) has got no such right though he/she can prefer appeal if the accused is convicted for a lesser offence. State has no right to appeal against conviction of an accused for a lesser offence.Under the scheme of Section 377 not only the state/prosecution can file an appeal based upon inadequacy of sentence, but even the accused can plead for his acquittal or for reduction of the sentence as contemplated under Section 377 (3) of the Code.Only victim can file an appeal against an order of imposing "inadequate compensation" in addition to his right of appeal against acquittal and convicting the accused for a lesser offence and therefore, to club his right and make it dependant upon the exercise of right of appeal at the instance of the State would be not only be unworkable but would run contrary to the scheme and lead to absurdity. The legislative scheme thus does not permit an inter se comparison of the rights or duties granted or assigned to a 'victim' or the State under the afore-stated Chapter of the Code. Having concluded that the right(s) of the 'victim' under the Code including the one translated through proviso to Section 372, are incomparable with and are distinct from those of the State, the second ancillary question, namely, whether the fetters imposed on the right to appeal against acquittal on the State will also operate on the right to appeal given to a 'victim', also stands answered in part. Since the right of a 'victim' to prefer appeal under proviso to Section 372 is independant of and is not contingent upon or subject to the right to appeal of the State under Section 378(1) to (3) of the Code, the conditiion of seeking 'leave' of the High Court expressly imposed on the State under Section 378(3)

cannot be read into proviso to Section 372 where the Legislature consciously did not incorporate such a fetter.

The correct law as emerging from the scheme of the Code, would be that the right of a victim to prefer an appeal (on limited grounds enumerated in proviso to Section 372 of the Code) is a separate independant statute right and is not dependant either upon or is servient to right of appeal of the state. In other words, both the victim and the state or prosecution can file appeals independantly without being dependant on the exercise of the right by the other. Moreover, from the act or omission for which the accused has been charged, there may be more than one victim and the loss suffered by the victims may vary from one victim to the other victims. Therefore, each of such victims will have seprate right of appeal and in such appeals, the grevience of each of the appellant may be different. For instance, an act of arson when a joint property of different persons has been set on fire, the loss suffered by each of the co-sharers may be different. In such a case each co-sharers has a seprate right of appeal and such right of one does not depend even on the filing of such appeal by another victim.

Moreover, if not specifically prohibited by law, the right conferred upon one cannot be subject to the exercise of right by the other. Even if one such appeal by one of the victims has been dismissed that cannnot be a ground of dismissal of the other appeal by another victim although it is desirable that all the appeals should be heard analogously to avoid conflicting decisions. Unless the legislature, by specific provisions confers right of appeal on conditions specified, a court cannot restrict such unfettered right by imposing conditions through judicial interpretation.

Thus the right(s) of a ‘victim’ under the amended Code are substantive and not mere brutam fulmen hence these are not accessory or auxiliary to those of the State and are totally incomparable as both the sets of rights or duties operate in different and their respective fields.Thus a ‘victim’ is not obligated to seek ‘leave’ or ‘special leave’ of the High Court for presentation of Appeal under proviso to Section 372 of the Code.

**Where would the appeal of a ‘victim’ preferred under proviso to Section 372 lie when the State also prefers appeal against the order of acquittal under Clause (a) or (b) of Section 378(1) Cr.P.C.?**

This is indeed a difficult proposition to be solved, for how to provide a uniform appellate forum to a ‘victim’ when he/she prefers an appeal under proviso to Section 372, and the State also prefers its appeal against the same order under Section 378(1)(b) of the Code? Under proviso to Section 372, the victim’s appeal shall lie to the Court to which an appeal lies against the order of conviction

of such Court. To say it differently, the victim shall present the appeal in the same Court where the appeal of the accused, had he been convicted, would have been maintainable. Now, if the order of acquittal is passed by the Magistrate in respect of a cognizable but bailable offence, the victim's appeal shall lie to the Court of Session before whom the accused, if convicted, can prefer his appeal under Section 374(3) of the Code.

If we turn to Section 378(1)(a), it provides that the District Magistrate may ask the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a magistrate in respect of a cognizable and non-bailable offence. Clause (b) of the Code enables the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than the High Court [not being an order under Clause (a)]. There is thus no ambiguity that if an order of acquittal is passed by a Magistrate in respect of a cognizable but bailable offence and the State decides to challenge it, the State's appeals shall lie to the High Court only but if the 'victim' prefers appeal against the same order, it shall lie to the Court of Session.

Similarly, the scheme of the Code nowhere discerns that the Legislature ever intended to create two parallel streams for adjudication of appeal(s) against the same order. Contrary to it, Section 372 lays emphasis that no appeal shall lie from any judgment or order except as provided for by this Code. That apart, the literal interpretation of proviso to Section 372 or Section 378(1)(a)&(b) of the Code leads to a piquant, anomalous and absurd situation of utter confusion where the Court of Session would have no choice but to await the outcome of the appeal preferred by the State before the High Court and then perform its bounden duty to follow that decision of the superior Court to negate, for all intents and purposes, the right to appeal of a 'victim' contrary to the legislative object behind insertion of the proviso to Section 372 of the Code.

Let us now analyse the second part of the proviso added to Section 372. It says that "the victim shall have a right to prefer an appeal..... and such an appeal shall lie to the Court to which an appeal **ordinarily** lies against the order of conviction of such Court". The adverbial expression "ordinarily" is suffixed to the Court where convict's appeal shall lie. The marginal discretion or exception of Forum carved out by the Legislature pertains to the appeal preferable by an accused against his conviction and not of the 'victim' which 'shall' lie to the same Court where the appeal against the order of conviction of such Court is maintainable. To say it differently, if there is no change in the appellate forum for the presentation of appeal by a convict, the victim's appeal shall not lie to any other Court except that Court. Caught in the web of apparent conflict, the Uttarakhand High Court in Criminal Appeal No.139 of 2011, ***Bhagwan Singh v.***

***State of Uttarakhand and another in its order dated 13.12,.2011***, drew force from the word 'ordinarily' mentioned in proviso to Section 372 and made an attempt to reconcile the provisions, holding that the appeal of the 'victim' in such situation should also lie in the High Court and not in the Sessions Court. The expression "ordinarily" has been constured to mean that the appellate forum made available to a 'victim' under proviso to Section 372 is not mandatory in character and can be changed in exceptional or special circumstances.

The afore-stated shift in the venue of appeal to be preferred by a 'victim' from the Court of Session to the High Court, otherwise runs parallel to the legislative scheme inhering Section 378(1)(a), namely, to provide easier, less cumbersome and less time-consuming process of presenting appeal against the unmerited and reckless acquittals by magistrates. In fact, the suggested recourse would substantially nullify the effect of the amendment made in Section 378 by Act No. 25 of 2005 and will re-introduce the unamended provision whereunder all appeals against acquittal used to be maintainable before the High Court only.

Similarly, the victim will be severely prejudiced and tribulated (the accused as well) if his appeal in respect of a 'cognizable' and 'bailable' offence is ordered to lie in the High Court only. Even if the victim is excepted from the rigors of Section 378 (3) or (4), the high cost of litigation in the High Court will dissuade him from appealing. The victim would always be uncertain and at the cross-roads in choosing the forum of appeal which shall depend on the decision of the State before different forums would lead to indescisiveness and adhocism.

The 'draftsman' has inconversantly slipped up while drafting the proviso to Section 372, when he overlooked Section 378(1) as amended by Act No. 25 of 2005. Resulatantly, the laudable legislative policy behind enabling the District Magistrate to present an appeal to the Sessions Court so as to avoid time taxing procedure of seeking State's sanction for filing an appeal has been put on hold.

The only effective modicum to meet with the situation can be to interpret and construe Section 378(1)(a) in such a manner that the State's appeals in respect of all the congnizable offences (whether bailable or non-bailable) are presented to the Court of Session, for such a recourse is the last harmful, non-prejudicial and substantively conforms to the legislative vision underlying the amendments carried out in the Code in the years 2005 and 2009. This can be feasible if the word "and" contained in Clause (a) of Section 378(1) of the Code is read as "or" so that the appeal preferred by the State against an order of acquittal passed by the Magistrate in respect of every conginzable offence, whether bailable or not, lies to the Court of Session only. The action in respect of a non-cognizable offence can be initiated only by filing a private complaint before the Magistrate and against acquittal in such a case the appellate recourse lies under Section 378(4) of the Code.

In the light of the above discussion, it is submitted that while in view of proviso to Section 372 an appeal preferred by a 'victim' against the order of acquittal passed by a Magistrate in respect of a cognizable offence whether bailable or non-bailable shall lie to the Court of Session, the State's appeal under Section 378(1)(a) of the Code against that order shall also be entertained and/or transferred to the same Sessions Court.

**Whether proviso to Section 372 CrPC inserted w.e.f. December 31, 2009 is prospective or retrospective in nature?**

The right to appeal was vested for the first time in 'victim' under proviso to Section 372 of the Code inserted by the Code of Criminal Procedure (Amendment) Act, 2008. Section 1(2) of this Act loudly states that "it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act". The aforesaid Act [except its Section 5, 6 & 21(b)] was indisputably enforced by the Central Government w.e.f. December 31, 2009 through a Gazette notification.

Section 29 of the Amendment Act, 2008 pertaining to amendment of Section 372 of the Code states that "In Section 372 of the principle Act, the following proviso shall be inserted, namely:-

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.".

The legislative intent that provisions of the Amendment Act, 2008 including its Section 29 reproduced above, shall come into force from a future date is very explicit and doubtless to call for any further discussion. A piece of legislation cannot commence or become effective unless it is brought into operation either by the Legislature itself or by its delegate, who is authorised to enforce it, as explained by the ***Supreme Court in (i) State of Orissa v. Chandrashekhar Singh Bhoi etc., (1969) 2 SCC 334;*** and ***(ii) Union of India & Ors. v. Sukumar Sengupta & Ors. (1990)Suppl. SCC 545.***

It is equally well-established that every Statute shall be presumed prospective in operation unless the Legislature expressly or by necessary implication gives retrospective effect to it. No such inference can possibly be drawn, even remotely, in the instant case. Otherwise also, it is one of the cardinal principles of statutory interpretation that a Statute dealing with substantive rights shall be prospective unless there are words in the Statute sufficient to show the intention of the Legislature to affect existing rights. Osborn's Concise Law Dictionary says that "a new law ought to regulate what is to follow, not the past". These principles have been laid down and reiterated in a string of decision

including in ***(i) Keshavan Madhava Menon v. State of Haryana & Ors, (1984) 3 SCC 281;*** and ***(iv) State of Madhya Pradesh v. Rameshwar Rathod, (1990) 4 SCC 21.***

These very principles apply in the case of an amendment in a Statute. If the amendment intends to create a substantive right or if it affects the vested right, it shall ordinarily be prospective in nature though an amendment in the procedural law like relating to form and limitation can be applied retrospectively. These principles have been extensively discussed and summed up by the Hon'ble Supreme Court in a recent decision in ***Ramesh Kumar Soni v. State of Madhya Pradesh, AIR 2013 S C 1896.***

Since right to appeal is a substantive right and it cannot be inferred by implication unless the Statute expressly provides so, the only inescapable conclusion would be to hold that the right to appeal given to a 'victim' under proviso to Section 372 of the Code is prospective and has become enforceable w.e.f. December 31, 2009 only.

Now the question arises when this right to prefer appeal vests in victim i.e.whether on the date of occurance or on the date of registration of F.I. R. or on the date of taking cognisance by the court or on date of the date of passing of the order to be appealed from?

Relying on ***"Garikapati Veeraya v. N. Subbiah Choudhry"A.I.R.1957 S.C.540(Constitution Bench) ,Full Bench of Gujarat High Court in "H. N. Bhavsar v. State of Gujarat"1976 CRI.L.J.84*** held that the right of appeal is a substantive right which crystallises at the date of the institution of action and this right includes a right to go in appeal to the superior Court. The forum to file the appeal is also thus determined as soon as the action is instituted. Till the case is instituted no litigant has any right to the forum in which the case can be instituted. In a criminal case this right of appeal and the right to file the appeal in the forum prescribed by law would precipitate at the date when the Court takes cognizance of an offence against the accused.

Division Bench of Chattisgarh High Court in ***"Bhisam Prasad Bareth v. Dinesh Mahant"2012 CRI.L.J.2157*** held that right of appeal vests from date of commencement of proceedings and appeal is nothing but continuation of proceedings and where incident being of year 2008 prior to insertion of proviso, appeal preferred by victim, not maintainable. Similarly, Division Bench of ***Andhra Pradesh High Court in D. Sudhakar v. Panapu Sreenivasulu and others. 2013 CRI.L.J. 2764*** has held that :

"The second issue that falls for our consideration is that the incident has taken palce on 07.12.2007 and the amendment to Section 372 Cr.P.C. has come into force w.e.f. 31.12.2009, where the victim can prefer an appeal against acquittal. This issue will not hold us for long, in view of the fact that the ***Apex Court in "National Commission of Women v. State of Delhi" 2011 AIR SCW 61***

has already held that the amendment is not applicable to cases where the incident has taken place prior to amendment. Therefore, even on this count, the appellants fails, and as such, the appeal is liable to be dismissed as not maintainable."

Thus A 'victim' is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if matter has been instituted on or after December 31, 2009 irrespective of the date of registration of FIR or the date of occurence etc. To be more specific, it is clarified that it is the date of institution of proceeding and not any other fact situation, which shall determine the right to appeal of a 'victim'.

**What would be the period of limitation for a 'victim' to prefer an appeal under proviso to Section 372 Cr.P.C.?**

There is a divergence of opinion in determining the period of limitation for an appeal preferable by a victim under proviso to Section 372 of the Code. A Division Bench of ***Patna High Court in Raghunath Yadav v. State of Bihar, 2011 (6) RCR (Crl.) 133,*** has viewed that since the period of limitation for filing an appeal under Section 372 by a victim ,the same period of limitation as provided under Article 114 of the Limitation Act will be applicable for filing an appeal under Section 372 of the Code also. The Full Bench of Gujarat High Court in ***Bhavuben Dineshbhai Makwana's v. State of Gujarat 2013 CRI.L.J.4225*** too, with reference to Article 114(a) of the Limitation Act, has held that the period of ninety days should be the reasonable period for a 'victim' to file an appeal as the said period is the longest period of limitation for filing an apeal against an order of acquittal prescribed by the Legislature.

The Delhi High Court in ***Kareemul Hajazi's v. State of any city and others , 2011 (2) AD (Delhi) 252*** however, thought differently and after referring to certain precedents laying down that 'in the absence of prescription of the limitation period, the statutory authority must exercise its jurisdiction within a reasonable period', it decided to bring the 'victim' at par with the 'accused' for the purpose of period of limitation to prefer appeal and held that since an accused is required to prefer appeal to the High Court within sixty days as prescribed under Section 374 of the Code read with Article 115(b) (i) of the Limitation Act, the period of limitation for the appeal of a 'victim' shall also be the same i.e. sixty days.

One of the well-recognized principles of criminal jurisprudnce is that ***'crime never dies'***. The maxim ***'nullum tempus qut locus occurit regi'*** [lapse of time is no bar to Crown in proceedings against offenders] is an age-old rule embedded in criminal justice delivery system. The public policy behind this rule is that a criminal offence is considered as a wrong committed against the State and the Society though it is committed against an individual. The aforesaid rule of prudence has been duly acknowledged by the Parliament as it has prescribed no period of

limitation for filing an appeal under proviso to Section 372 of the Code against an order of acquittal.

Article 114 of the Schedule to the Limitation Act, 1963, however, prescribes period of limitation for State's appeal against order of acquittal and it reads as under :-

| Description of appeal | Period of limitation | Time from which period begins to run . |
|---|---|---|
| Art.114. Appeal From an order of acquittal- | | |
| (a) under sub-Section (1) or sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898 (5 of 1898) | Ninety days | The date of the order appealed from. |
| (b) under sub-Section (3) or Section 417 of that Code. | Thirty days | The date of the grant of special leave. |

Since Article 114 of the Limitation Act refers to Section 417 of the Code of Criminal Procedure, 1898 (since repealed), it is beneficial to reproduce the same and it reads as follows :-

"417. (1) Subject to the provisions of Sub-section (5) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or apellate order of acquittal passed by any Court other than a High Court.

(2) If such an aorder of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-Section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."

From the combined reading of the above-reproduced provisions, it is clear that the State could present its appeal to the High Court within 90 days from the date of passing of the order of acquittal. Similarly, sub-Section (4) of Section 417 provided 60 day's period of limitation to apply for grant of special leave to appeal to the High Court against the order of acquittal passed in a complaint-case. The appeal against in such cases can be filed within 30 days of the date

of grant of special leave to appeal as provided under Clause (b) of Article 114 of the Limitation Act. The Hon'ble Supreme Court in ***State (Delhi Administration) v. Dharampal, AIR 2001 SC 2924*** compared the provisions of old Code with Section 378 of the new Code and held that appeals against acquittal preferred by the State Government or the Central Government continue to be governed by Article 114(a) of the Limitation Act. In other words, those appeals must be filed within 90 days from the date of order appealed from. A 'victim' therefore is also entitled to the said maximum period of limitation i.e. 90 days to prefer his/her appeal against an order of acquittal.

Under Section 378(5) of the Code, an application for the grant of special leave to appeal from an order of acquittal moved by the complainant who is public servant, can be entertained by the High Court within a period of six months and within sixty days in every other case, from the date of the order of acquittal. However, the State or Central Governments are not entitled to take benefit of six month's period given to the complainant-public servant for the purpose of their appeal against an order of acquittal which is required to be preferred within ninety days as per Article 114 of the Limitation Act. The grey area in this regard, if any, also stands clarified by the Supreme Court in ***Dharampal's case*** (supra).

Likewise, the priod of limitation for appeal against the orders other than of acquittal i.e. of 'any other sentence' or 'any order' is governed by Article 115(b) of the Schedule to the Limitaion Act. The orders of imposition of lesser sentence, inadequate sentence or awarding inadequate compensation passed by a Magistrate or the Sessions Court, as the case may mentioned in Clause (b) of Article 115 of the Limitation Act, which is to the following effect :-

| Discription of appeal | Period of limitation | Time from which period begins |
|---|---|---|
| Art.115. Under the Code of Criminal Procedure, 1898 (5 of 1898) | | |
| (a) from a sentence of death passed by a Court of Session or by a High Court in the exercise of its original criminal jurisdiction; | Thirty days | The date of the sentence. |
| (b) from any other sentence or any order not being an order of acquital- | | |
| (i) to the High Court. | Sixty days | The date of the sentence or order. |
| (ii) to any other court. | Thirty days | The date of the sentence or order. |

The legislature has not chosen to provide different period(s) of limitation for the purpose of appeals maintanable at the instance of a 'victim' under proviso to Section 372. It has also not carried out any corresponding amendment in the provisions of the Limitaion Act. Since Article 115(b) thereof does not draw any distinction between the appeals preferable by the State, the 'victim' or the accused, the period of limitation for an appeal preferred by the State, the 'victim' against an order other than that of acquittal or by the accused, shall therefore be governed by Article 115 (b) of the Limitation Act.

The Supreme Court in ***Japani Sahoo v. Chander Shekhar Mohant, (2007) 7 SCC 374,*** observed that mere delay in approaching the court of law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching the final verdict. There is no gainsaying that where no period of limitation is expressly provided to prefer an appeal, the aggrived person is expected to approach the appellate court within a reasonable period. The 'reasonableness' of the period within which an appeal may be preferred, however, is purely a question of fact and will have to be determined keeping in view the peculiar facts and circumstances of each case.

The Legislative intentment behind Articles 114 & 115(b) of the Limitation Act in prescribing the period of limitation for appeals to the High Court or to the Court of Session against different type of orders, is the best guiding factor to determine reasonableness of the period of limitation for an appeal preferable at the instance of a 'victim' also. It would, therefore, be reasonable to view that for appeal against acquittal filed by a 'victim' to the High Court the period of limitation would be 90 days and where such appeal lie to the Sessions Court such period shall be 60 days. For appeal against any other order, the reasonable period would be 60 days to the High Court and 30 days for appeals to the Sessions Court from the orders passed by the Magistrate, as the case may be. To be more specific, the period of limitation for the purpose of filing appeal(s) by a victim shall be as under:-

(a) In case of acquittal -

| | | |
|---|---|---|
| Where appeal lies to High Court | 90 days | From the date of order appealed against . |
| Where appeal lies to any other Court | 60 days | From the date of order appealed against |

.

(b) In case of any other sentence or order -

| | | |
|---|---|---|
| Where appeal lies to High Court | 60 days | From the date of sentence or order. |
| Where appeal lies to any other Court | 30 days | From the date of sentence or order. |

The limitation period of ninety, sixty and thirty days, as the case may be, prescribed above for the maintainability of an appeal by a victim, in our considered view, ought to be counted from the date such 'victim' acquires knowledge of the order appealable under proviso to Section 372.In most of the State cases, the 'victim' has no participatory role at the trial stage and the possiblity of his/her remaining in the dark about the adverse order cannot be lightly brushed aside. The above rule of limitation, therefore, cannot be mechanically enforced even if the victim had no informed knowledge regarding culmination of the trial proceedings as it might cause serious prejudice to his/her rights, close to the extent of snatching away the right to appeal earned by the victims after a long drawn battle.

**Conclusions:-**

(i) The expression "victim" as defined in Section 2(wa) includes all categories of his/her legal heirs for the purpose of engaging an advocate under Section 24(8) or to prefer an appeal under proviso to Section 372 of the Code.

(ii) However, legal heirs comprising only the wife, husband, parent and child of a deceased victim are entitled to payment of compensation under Section 357(1)(c) of the Code. Similarly, only those defendents of a deceased victim who have suffered loss or injury as a result of the crime and require rehabilitation, are eligible to seek compensation as per the Scheme formulated under Section 357-A of the Code.

(iii) The 'complainant' in a complaint-case who is also a 'victim' and the 'victim' other than a 'complainant' in such case, shall have remedy of appeal against acquittal under Section 378(4) only, except where he/she succeeds in establishing the guilt of an accused but is aggrived at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372 of the Code.

(iv) The 'victim', who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the unamended provisions read with Section 378 (4) of the Code.

(v) Those 'victims' of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek 'leave' or 'special leave' to appeal from the High Court in the manner contemplated under Section 378(3) & (4) of the Code.

(vi) The Legislature has given no separate entity to a 'victim' in the complaint-case filed by a pulic servant under a special Statute and the appeal against acquittal in such a case can also be availed by the 'complainant' of that case under Section 378(4) of the Code only.

(vii) The right conferred on a 'victim' to present appeal under proviso to Section 372 is a substantive and independant right which is neither inferior to nor contingent upon the filing of appeal by the State in that case. Resultantly, the condition of seeking 'leave to appeal' or 'special leave to appeal' as contained in Section 378(3) & (4) cannot be imposed for the maintainability of appeal by a 'victim' under proviso to Section 372 of the Code.

(viii) In view of proviso to Section 372 an appeal preferred by a 'victim' against the order of acquittal passed by a Magistrate in respect of a cognizable offence whether bailable or non-bailable shall lie to the Court of Sessions, the State's appeal under Section 378(1)(a) of the Code against that very order shall also be entertained and/or transferred to the same Sessions Court.

(ix) The proviso to Section 372 inserted w.e.f. December 31, 2009 is prospective in application and it is the date of institution of proceeding and not any other fact situation, which shall determine the right to appeal of a 'victim'.

(x) The period of limitaion for an appeal by a 'victim' under proviso to Section 372 of the Code shall be as under:-

(a) In case of acquittal -

| | | |
|---|---|---|
| Where appeal lies to High Court | 90 days | From the date of order appealed against |

.

| | | |
|---|---|---|
| Where appeal lies to any other Court | 60 days | From the date of order appealed against |

.

(b) In case of any other sentence or order -

| | | |
|---|---|---|
| Where appeal lies to High Court | 60 days | From the date of sentence or order. |
| Where appeal lies to any other Court | 30 days | From the date of sentence or order. |

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# PART - II

## NOTES ON IMPORTANT JUDGMENTS

**251. ACCOMODATION CONTROL ACT, 1961 (M.P.) – Section 3 (2)**

**Exemption of some Institutions and Trusts from the provisions of the Act by the State of M.P. by promulgation of the notification No. F.24-(4)-83-XXXII-1 dated 7.9.1989 – Subsequent to notification dated 7.9.1989 issued under sub-section 2 of section 3 of the Act such public trust is not under obligation to plead and prove that its entire income is utilized for the object and purpose of such public trust and such institution.**

**Scindia Devesthan Registered Charitable Trust v. Praveen Kumar Nigam & ors.**

**Order dated 05.07.2013 passed by the High Court of M.P. in M.A. No. 762 of 2012 (Gwalior), reported in I.L.R. (2013) M.P. 2887**

**Extracts from Order:**

Mere perusal of the language of sub-Section 2 of Section 3 of the Act, it is apparent that it gives the right to the State Government to issue the notification exempting any educational religious and charitable Institution or nursing or maternity home, the whole of the income derived from which it utilized for that. Institution or nursing home or maternity home, from all or any of the provision of the Act. So the requisite satisfaction in this regard, whether the income of the public trust is being utilized by it for the object of trust, is required to be examined by the State and all the public trusts and other stated institutions have been exempted by the State before issuing the notification and once the notification was issued by the state from the provisions of the Act, then any of such public trust is not under obligation or bound to plead and prove that the income received by the trust is utilized for fulfilling the object and purpose of such trust. Insuch premises, the Court entertaining such Civil suit or it's appellate authority could neither direct nor expect from such plaintiff public trust to plead and/or prove the income received by such trust is being utilized for the object and purpose of such trust.

For the sake of arguments if the contention of the respondent is accepted. Then each case the question about the income of Trust is being spent or utilized by the trust in fulfilling the object and purpose of the trust, is required to be considered and adjudicated and issuance of notification by the State would have no meaning. The language of the section is very clear which provides that the State Government by notification may exempt from all or any of the provisions of this Act, any accommodation which is owned by any educational, religious or charitable institution or nursing or maternity home, the whose of the income derived from which it utilized for that institution or nursing home. Meaning thereby, the aforesaid satisfaction is to be recorded by the State Government and only

thereafter the notification may be issued. For issuance of notification, the aforesaid requirement is sine-qua-non. Once the State Government has issued a notification, it can be presumed that the aforesaid notification was issued after due. Satisfaction by the State Government in this regard an each case the landlord is not required to plead or prove such a factum. Otherwise, it will encourage unnecessary litigation and the entire purpose of issuance of notification would frustrate.

A part the aforesaid, while considering the validity of the aforesaid notification dated 7.9.1989 by the apex Court in the above cited cases ***Chintamalni Agarwal and ors. 1999 (2) JLJ 379*** and ***Betibai and other J. v. Nathoram and others, (1999) 6 SCC 368***, all probable questions were taken into consideration and the aforesaid notification was held to be valid and constitutional. When the apex Court after considering the matter has upheld the notification valid then the propriety of law does not permit any subordinate Court or to this Court to give any further interpretation to the language or the decision of the Apex Court. The law laid down by the Apex Court being law of land, is binding against each of the citizen, the subordinate Court and this Court. In such premises, either this Court or any other subordinate Court did not have any authority to give any further interpretation or to extend, the scope of the decision of the Apex Court by giving any further or additional findings.

In such premises, on examining the case of ***Boolchand's v. Atal Ram Sindhi Dharmashala Trust, 1998 (1) MPWN Note 113*** it is apparent that such case was decided without taking into consideration the law laid down by the Apex Court in the matter of ***Chintamani Agarwal's case*** (supra) as stated earlier. So, such law laid down by the Single Judge of this Court could not be said to be a good law.

Apart this, in the case of ***Reg. Vidhichand Dharamshala Trust v. Shyam Singh, 2010 (III) MPJR 142*** the Single Judge by giving some further and additional interpretation to the decision of the Apex Court announced in the matter of ***Betibai and others*** (supra), contrary to it's principle and spirit has stated that "thus it is clear that a registered public trust would be able to avail the benefit of exemption so long as it's income is utilized for the trust itself. In a suit for eviction if it is established that the entire income of the trust is not utilized for the trust itself, the plaintiff would no more be entitled to seek the benefit of exemption." The afore said later part of this cited case of ***Reg. Vidhichand*** (supra) being contrary to the law laid down by the Apex Court could not be said to be a correct view. In such premises, the law laid down by the single judge in the matter of ***Boolchand*** (supra) and in the matter of ***Reg. Vidhichand*** (supra) being not correct, is hereby overruled.

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***252. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 13 (1) and 12 (1) (a) & (3)**

**'Waiver' meaning of – Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either expressed or implied from conduct – Waiver is voluntary relinquishment or abandonment, expressed or implied, of a legal right or advantage – The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it – The waiver is a question of conduct and must necessarily be determined on the facts of each case.**

**Saroj Lal Wani v. Kishan Lal**

**Judgment dated 16.09.2013 passed by the High Court of M.P. in Second Appeal No. 668 of 1997, reported in 2013 (4) MPLJ 382**

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**253. ARBITRATION AND CONCILIATION ACT, 1996 – Section 7**
**CONTRACT ACT, 1872 – Section 62**

**Survival of arbitration clause in original agreement when original agreement itself is superseded/novated by another agreement – If agreement containing arbitration clause superseded or novated by subsequent agreement between parties, arbitration clause of the original agreement does not survive.**

**Young Achievers v. IMS Learning Resources Private Limited**

**Judgment dated 22.08.2013 passed by the Supreme Court in Civil Appeal No. 6997 of 2013, reported in (2013) 10 SCC 535**

**Extracts from Judgment:**

We are of the view that survival of the arbitration clause, as sought by the appellant in the agreements dated 01.04.2007 and 01.04.2010 has to be seen in the light of the terms and conditions of the new agreement dated 01.02.2011. An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement. The agreement dated 01.04.2010 contained the following arbitration clause:

> "**20. Arbitration. –** All disputes and questions whatsoever which may arise, either during the substance (sic subsistence) of this agreement or afterwards, between the parties shall be referred to the arbitration of the managing director of IMS Learning Resources Pvt. Ltd. or his nominee and such arbitration shall be in the English language at Mumbai. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in force and award or awards of such arbitrator shall be binding on all the parties to the said dispute."

We have now to examine terms of the subsequent agreement titled “Exit paper” dated 01.02.2011. It is the common case of the parties that the Exit paper/agreement entered into-between the parties does not contain any arbitration clause. It is useful to extract the relevant portion of the Exit paper, which is as follows:

> “With reference to your mail/letter dated 1.2.2011 on closing the centre, from the aforesaid date with mutual consent we have agreed on the following:
>
> **1. Enrolled students –** All enrolled students of IMS with you will be serviced by you with respect to their classes, workshops and conduct of test series, GD/PI and any other servicing required as per the product manual.
>
> **2. Premises –** IMS will reserve the first right of utilization to occupy the premises. In an eventuality of IMS exercising the right to use the premises, then IMS will reimburse the monthly rent for the corresponding months before changing the rental agreement on to IMS name.
>
> **3. Marketing –** From the abovementioned date you are not eligible to do any marketing and promotional activities in the name of IMS.
>
> **4. Brand-** From the abovementioned date you are not eligible to use IMS brand in any form.
>
> **5. Monthly claims –** The partner abides to deposit all the course fees collected for any of IMS programs till now as per the deposit policy of IMS. All monthly claims will be settled till 31.01.2011 and the claims would be released after the date of termination of the partner agreement.
>
> **6. Security Deposit –** The security deposit amount will be refunded back to you after the completion of servicing of all enrolled IMS students. In case of any due on partner to the company (unsettled fees, loan or advance for centre activities etc.), same amount will be deducted from the security deposit.
>
> **7. Non Compete Clause –** The partner has averred that neither he, nor his family members are directly or indirectly interested in any business in direct competition with that of IMS and the partner agrees and undertakes to ensure that neither he nor his family members shall be involved in or connected to any business in direct competition with that of IMS at any time during the currency of this agreement and for a further period of six months thereafter.

**8. Full and final settlement –** I/We accept all the abovementioned points and confirm that upon receipt of the sum stated hereinafter in full and final settlement of all my/our claims, neither me/we nor any person claiming by or through me/us shall have any further claims against IMS whatsoever.

Any violation of points 1,3,4,5 and 7 from the partner's end will attract legal course of action and penalties from IMS ranging from forfeiture of the security deposit and pending claims.

I hereby accept above terms and conditions."

The exit paper would clearly indicate that it is a mutually agreed document containing comprehensive terms and conditions which admittedly does not contain an arbitration clause. We are of the view that the High Court is right in taking the view that the case on hand, is not a case involving assertion by the respondent of accord a satisfaction in respect of the earlier contracts dated 1.4.2007 and 1.4.2010. If that be so, it could have referred to arbitrator in terms of those two agreements going by the dictum in ***Union of India v. Kishorilal Gupta and Bros., AIR 1959 SC 1362.*** This Court in ***Kishorilal Gupta case*** (supra) examined the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. But where the dispute is whether such contract is void ***ab intio***, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. The various other observations were made by this Court in the abovementioned judgment in respect of "settlement of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences". The Principle laid down by the House of Lords in ***Heyman v. Darwins Ltd, (1942) ALL ER 337 (HL)***. was also relied on by this Court for its conclusion. The Collective bargaining principle laid down by the US Supreme Court in ***Nolde Bros. Inc. v. Bakery workers, 430 US 243 (1977)*** case would not apply to the facts of the present case.

We may indicate that so far as the present case is concerned, parties have entered into a fresh contract contained in the exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but a pure and simple novation of the original contract by mutual consent. Above being the factual and legal position, we find no error in the view taken by the High Court. The appeal, therefore, lacks merit and stands dismissed, with no order as to costs.

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- **254.CIVIL PROCEDURE CODE, 1908 – Sections 151 and 152 PARTITION ACT, 1893 – Section 4**

  **(i) Correction of mistakes in a decree – Duty of Court – House numbers incorrectly mentioned in the preliminary decree and also in the final decree – Trial Court is duty bound to correct such mistakes exercising the power conferred on it under Section 152 r/w/s 151 of CPC to secure the ends of justice and to prevent the abuse of process of law – It is not expected from the Court to continue with such mistake – It is the duty of the Court to rectify such mistake even by its own motion on having knowledge about the mistake – The execution Court directed for correction of the preliminary decree.**

  **(ii) Partition suit by transferee of share in dwelling house – Application against the stranger transferee of the share of erstwhile co-owner of dwelling house of undivided family – Stage – It may be at any stage of the proceedings between the parties – Such an application can be maintained after passing a preliminary decree.**

**Rishabh Kumar Jain v. Gyanchand Jain & ors.**

**Order dated 06.09.2012 passed by the High Court of M.P. in Civil Rev. No. 35 of 2011 (Jabalpur), reported in I.L.R. (2013) M.P. 2977**

**Extracts from Order:-**

Now to deal the issue regarding rejection of application under Section 4 of the Partition Act, first of all the provisions contained under Section 4 is required to be reproduced which reads as follows:

> "***Partition suit by transferee of share in dwelling house*** – (1) Where a share of dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.
>
> (2) If in any case described in sub-section (1) two or more members of the family being such shareholder severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

On perusal of the aforesaid, it is a apparent that no express provision has been shown at which stage the application may be filed against the stranger transferee of the share of a erstwhile co-owner of dwelling house of undivided family and such an application can be maintained after passing a preliminary decree in a case where a dwelling house belong to an undivided family has been transferred to a person who is not the member of such family and such transferee sues for property. As per the case of ***Ghannteshwer Ghosh v. Madan Mohan Ghose & ors., (1996) 11 SCC 446*** the Hon'ble Apex court has held that for the applicability of Section 4 of the Partition Act, it may be at any stage of the proceedings between the parties and the following five conditions must be satisfied which read as follows:

> (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
>
> (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
>
> (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
>
> (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and
>
> (5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house."

It the said case it has further been observed that as per the Statement of Objects and Reasons indicating in the Partition Act especially section 4 makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44of the Transfer of Property Act has further been extended by Section 4 with a view to see that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which shall be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co-owners under Section4 is obvioy in further

fructification of the restriction on such a transferee as imposed by Section 44 of the Transfer of Property Act. Section 4 requires for its applicability that such stranger transferee must sue for partiton and only in that eventuality the rights of pre-emption envisaged by Section 4 can be made available to the other contesting co-owners. The Court emphasizing the word “Such transferee sues for partition” as employed in Section 4 clarified the meaning of other words “transferee filing a suit for partition” referring the meaning of the word ‘sue’ held that it indicates of preventive action. In the said context it has been held that the right of pre-emption if the purchaser sues for partition is available to the co-sharer and co-owners applying under Section 4 as envisaged therein. The said view has been reiterated by Hon’ble Apex Court in the case of ***Gautam Paul v. Debi Rani Paul & ors., (2000) & SCC 330***. The said view has been reiterated by the Apex court in the case of ***Babulal v. Habib Noor Khan (Dead) by Lrs. & ors., AIR 2000 SC 2684*** so relied upon by counsel for the respondents, in Para 10 as well as in the case of ***Gautam Paul*** (supra). In the light of the aforesaid legal position the factual backdrop this case required to be analyzed.

In the present case, after passing a preliminary decree on 09.07.1985 and a final decree on 25.11.2008 purchasers who have purchased the property of naval Kishore to the extent of 1/3rd share in the house Nos. 25 and 26 have applied for execution before the Executing Court on 18.1.2010 Thus it is apparent that on passing a decree of partition amongst the legal heirs of Noelal and after purchasing the share of one of the co-sharers, it is required for the execution of the said judgment and decree of partition, it is required to be observed here that in a suit for partition the plaintiff may be treated as defendant and the defendant may be treated as the plaintiff. Navalkishore is one of the defendants and the respondents No.1 and 2 are the purchasers of the share of Navalkishore, however falls within the purview of the phrase “transferee’. After passng he decree of partition, the transferee by filing the execution proceedings prayed for the possession of the share which was purchased by them from Navalkishore and to take over the possession thereof. However, in such circumstances, the application filed by the co-sharer i.e. applicant who is the legal heir of Surkhichand having 1/3rd right in the property of Nonelal is maintainable. It can safely be observed that the transferee is stepping into the shoes of Navalkishore and such a person want to take over the possession of the share of Navalkishore, as per decree of partition however the right to pre-emption arise in favour of the co-sharers.

At this stage the objection so raised by learned counsel Shri Khare with respect to rejection of the application of one of co-sharer during the pendency of suit for partition, and the said proceeding ended by the judgment of Apex Court is required to be explained. In this regard it is to be observed that the earlier application was filed by defendant No. 2 Sunderlal who was the co-sharer during the pendency of the suit for partition which was rejected and the Hon’ble

Apex Court in the light of the judgment of ***Gautam Paul*** (supra) set aside the judgment of this Court. In view of the discussions made herein above, it is apparent that if a transferee sues in a suit for partition then the co-sharer is having a right of pre-emption meaning thereby prior to passing the preliminary decree of partition such right is not available to the co-sharer and after passing of the preliminary deree or final decree passed up to the stage of execution, such right is available to the co-sharers. In that view the matter, it is to be held that the rejection of the application under Section 4 of the Partition Act filed by the applicant in execution proceedings started the transferee in view of the decree of partition passed by the court below sustainable in law and the Trial Court committed jurisdiction error while rejecting such application.

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

**Commission for local investigation – Boundary dispute of the immovable property – Should be decided after demarcation of the disputed property – Report of the commissioner should be considered by the Court at the stage of appreciation of the recorded evidence in the matter.**

## Nirmala Khare (Smt.) v. Surendra Pathak & ors.

**Order dated 12.12.2012 passed by the High Court of M.P. in W.P. No. 5405 of 2011 (Jabalpur), reported in I.L.R. (2013) M.P. 2794**

**Extracts from Order :**

As per the averment of the plaint, the defendant has constructed his house by encroaching some part of the plaintiffs land while as per averments of the written statement, the defendants have constructed their premises only in their plot and not by encroaching any part of the plaintiff's plot. So, in such premises, the measurement of both the plots appears to be relevant in the matter. My such approach is fully fortified by the decision of the Apex Court in the matter of ***Haryana Waqf Board v. Shanti Swarup and others (2008) 8 SCC 671*** in which it was held that the boundary dispute of the immovable property should be decided after demarcation of the disputed property.

In view of the aforesaid discussion, the impugned order Annex. P/1 rejecting the application of the petitioner Annex. P/5 being perverse and contrary to the settled proposition of the law, is not sustainable. Consequently by allowing this petition, the same is set aside. Pursuant to it, by allowing the aforesaid application Annex. P/5, the trial court is directed to appoint the Commissioner and call the measurement/demarcation report of the disputed plots on the record and such report be also considered by such court at the stage of appreciation of the recorded evidence in the matter.

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**256. CRIMINAL PROCEDURE CODE, 1973 – Section 125**
**HINDU MARRIAGE ACT, 1955 – Section 5(1)(i)**
**LEGAL MAXIM:**
**INTERPRETATION OF STATUTES:**

**(i) Solemnization of marriage by husband falsely representing himself single – Proceeding initiated by wife for maintenance under section 125 Cr.P.C. – Husband cannot be allowed to take advantage of his own wrong and turn around to say that wife petitioner is not his "legally wedded wife" – For the purpose of section 125 Cr.P.C. Such a lady would be treated as the wife of the petitioner – Claim of wife would be defeated only where a woman married a man with full knowledge of the first subsisting marriage.**

**(ii) Approach of the Court in dealing with cases under section 125 Cr.P.C. – Provisions of maintenance fall in the category which aim at empowering the destitute and achieving social justice or equality and dignity of the individual – Drift in the approach from "Adversarial" litigation to "social context adjudication" is the need of the hour.**

**(iii) Interpretation of statues – Court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to supress i.e. if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided.**

**(iv) Legal maxim *"Construction ut res magis ualeat guam pereat"* meaning of – Where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way.**

**Badshah v. Urmila Badshah Godse & anr.**

**Judgment dated 18.10.2013 passed by the Supreme Court in Criminal Miscellaneous Petition No. 19530 of 2013, reported in 2013 (III) DMC 518 (SC)**

**Extracts from Judgment:**

The facts emerging on record would reveal that at the time when the petitioner married the respondent No. 1, he had living wife and the said marriage was still subsisting. Therefore, under the provisions of Hindu Marriage Act, the petitioner could not have married second time. At the same time, it has also come on record that the petitioner duped respondent No.1 by not revealing the fact of his first marriage and pretending that he was single.After this marriage both lived together and respondent No.2 was also born from this wedlock. In such circumstances, whether respondent could filed application under Section

125 of the Cr.P.C., is the issue. We would like to pin point that insofar as respondent No.2 is concerned, who is proved to be the daughter of the petitioner, in no case he can shun the liability and obligation to pay maintenance to her. The learned Counsel ventured to dispute the legal obligation qua respondent No.1 only.

The learned Counsel for the petitioner referred to the judgment of this Court in ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhay & anr., (1998) 1 SCC 530.*** In that case, it was held that a Hindu lady who married after coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife" and consequently her claim for maintenance under Section 125, Cr.P.C. is not maintainable. He also referred to later judgments in the case of ***Savitaben Somabai Bhatiya v. State of Gujarat & ors., (2005) 3 SCC 636,*** wherein the aforesaid judgment was followed. On the strength of these two judgments, the learned Counsel argued that the expression "wife" in Section 125 cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He argued that Section 5(1)(i) of the Hindu Marriage Act, 1955 clearly prohibits 2nd marriage during the subsistence of the 1st marriage, and so respondent No.1 cannot claim any equity; that the explanation Clause (b) to Section 125, Cr.P.C. mentions the term "divorce" as a category of claimant, thus showing that only a legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 of the Cr.P.C.

Before we deal with the aforesaid submission, we would like to refer two more judgments of this Court. First case is known as ***Dwarika Prasad Satpathy v. Bidyut Prava Dixit & anr., (1999) 7 SCC 675.*** In this case it was held:

> "The validity of the marriage for the purpose of summary proceeding under Section 125, Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The Standard of Proof of marriage in such proceeding is not as strict as is required in a trial of offence under Section 494 of the IPC. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouse, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu Rites in the proceedings under Section 125, Cr.P.C .From the evidence

which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Section 125, Cr.P.C. which are of summary nature strict proof of performance of essential rites is not required.

It is further held:

It is to be remembered that the order passed in an application under Section 125, Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed Civil Suit which is spending before the Trial Court. In such a situation, this Court in ***S. Sethurathinam Pillai v. Barbara @ Dolly Sethurathinam, (1971) 3 SCC 923,*** observed that maintenance under Section 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties."

No doubt, it is not a case of second marriage but deals with standard of proof under Section 125, Cr.P.C. by the application to prove her marriage with the respondent and was not a case of second marriage. However, at the same time, this reflects the approach which is to be adopted while considering the cases of maintenance under Section 125, Cr.P.C. which proceedings are in the nature of summary proceedings.

Second case which we would like to refer is ***Chanmuniya v. Virendra Kumar Singh Kushwaha & anr., (2011) 1 SCC 141.*** The Court has held that the term "wife" occurring in Section 125, Cr.P.C. is to be given very wide interpretation. This is so stated in the following manner:

"A broad and expansive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C. so as to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125."

No doubt, in ***Chanmuniya*** (supra), the Divison Bench of this Court took the view that the matter needs to be considered with respect to Section 125, Cr.P.C., by Larger Bench and in para 41, three questions are formulated for determination by a Larger Bench which are as follows:

> "1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125, Cr.P.C.?
>
> 2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125, Cr.P.C. having regard to the provisions of the Domestic Violence Act, 2005?
>
> 3. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125, Cr.P.C."

On this base, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the Courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

***Firstly,*** in ***Chanmuniya case,*** (supra) the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125, Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125, Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No. 1 had been married each other.

***Secondly,*** as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into

marital tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125, Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125, Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above For this reason, we are of the opinion that the judgments of this Court in ***Adhav*** (supra) and ***Savitaben*** (supra) cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marries second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.

***Thirdly***, in such cases, purposive interpretation needs to be given to the provisions of Section 125, Cr.P.C. while dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.

The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life. Responsiveness ..... change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to changing

needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.

The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision — ***"libre recherché sceintifique"*** i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfil its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from ***Mohd. Ahmed Khan vs. Shah Bano Begam and ors., AIR 1985 SC 945*** to ***Shabana Bano, v. Imran Khana AIR 2010 SC 305,*** guaranteeing maintenance rights to Muslim women is a classical example.

In ***Rameshchandra Daga v. Rameshwari Daga, AIR 2005 SC 422,*** the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in ***Heydon's, (1854) 3 Co. Rep. 7a, 7b,*** which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction ***ut res magis valeat guam pereat,*** in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social

groups. Its foundation spring is humanistic. In its operation field athough, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

In taking the aforesaid view, we are also encouraged by the following observations of this Court in ***Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70***:

> "The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts."

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**257. CRIMINAL PROCEDURE CODE, 1973 – Section 125 (3) and first proviso thereto**

**Construction of the proviso to Section 125 (3) Cr.P.C. – It does not create a bar or in any way affect the entitlement of a claimant to arrears of maintenance – Only procedure of recovery of maintenance in the manner provided for levying fines and the detention of the defaulter in custody would not be available – However, in such situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.**

## Poongodi and another v. Thangavel

**Judgment dated on 27.9.2013 passed by the Supreme Court in Criminal Appeal No. 1542 of 2013 reported in (2013) 10 SCC 618**

**Extracts from Judgment:**

A reading of the order dated 21-4-2004 (***Thangavel v. Poongoli, Cr. Rev. No. 620 of 2003 (Mad)***) passed by the High Court would go to show that the proviso to Section 125(3) CrPC has been construed by the High Court to be a fetter on the entitlement of the claimants to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) CrPC. Having considered the said provision of the Code we do not find that the same creates a bar or in any way affects the entitlement of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) CrPC, namely, by construing the same to be a levy of a fine 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. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.

The decision of this Court in ***Kuldip Kaur v. Surinder Singh, (1989)1 SCC 405 : AIR 1989 SC 232*** may be usefully recalled wherein this Court has held the provision of sentencing under Section 125 (3) to be a "mode of enforcement" as distinguished from the "mode of satisfaction" of the liability which can only be by means of actual payment. Paragraph 6 of the report to the above effect, namely, that the mode of enforcement i.e. sentencing to custody does not extinguish the liability may be extracted below:

> "6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. 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 the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance "without sufficient cause" to comply with the order. It would indeed be strange to hold that a person who 'without reasonable cause' refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. 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 discharging liability. The section does not say so. Parliament in its wisdom has not said so. Commonsense does not support such a construction. From where does the court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon

an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. That is the reason why we set aside the order under appeal and passed an order in the following terms....."

In another decision of this Court in ***Shantha v. B.G. Shivananjappa, (2005) 4 SCC 468 :AIR 2005 SC 2410*** it has been held that the liability to pay maintenance under Section 125 CrPC is in the nature of a continuing liability. The nature of the right to receive maintenance and the concomitant liability to pay was also noticed in a decision of this Court in ***Shahada Khatoon v. Amjad Ali, (1999)5 SCC 672:1999 AIR SCW 4880.*** Though in a slightly different context, the remedy to approach the court by means of successive applications under Section 125(3) CrPC highlighting the subsequent defaults in payment of maintenance was acknowledged by this Court in ***Shahada Khatoon*** (supra).

The ratio of the decisions in the aforesaid cases squarely applies to the present case. The application dated 5.2.2002 filed by the appellants under Section 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the Respondent. The first proviso to Section 125(3), therefore did not extinguish or limit the entitlement of the appellants to the maintenance granted by the learned trial court, as has been held by the High Court.

In view of the above, we are left in no doubt that the order passed by the High Court needs to be interfered with by us which we accordingly do. The order dated 21.4.2004 of the High Court is set aside and we now issue directions to the respondent to pay the entire arrears of maintenance due to the appellants commencing from the date of filing of the Maintenance Petition (M.C.No.1 of1993) i.e. 4.2.1993 within a period of six months and current maintenance commencing from the month of September 2013 payable on or before 7.10.2013 and thereafter continue to pay the monthly maintenance on or before the 7th of each successive month. If the above order of this Court is not complied with by the respondent, the learned trial court is directed to issue a warrant for the arrest of the respondent and ensure that the same is executed and the respondent taken into custody to suffer imprisonment as provided by Section 125(3) CrPC.

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**258. CRIMINAL PROCEDURE CODE, 1973 – Sections 200, 202, 156(3) and 190**
**PREVENTION OF CORRUPTION ACT, 1988 – Sections 19(1) and 3(2)**

**(i) Jurisdiction of Magistrate under section 156(3) Cr.P.C. to direct an investigation on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C – The Magistrate, who is empowered under section 190 of the Code to take cognizance, alone has the power**

**to refer a private complaint for police investigation under section 156(3) Cr.P.C.**

**(ii) Manner of exercising jurisdiction under Section 156(3) – Requirement of the application of mind by the Magistrate – After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order – Mere statement that he has gone through the complaint, documents and heard the complainant, as such, will not be sufficient, though a detailed expression of his views is neither required nor warranted**

**(iii) Whether requirement of sanction under section 19(1) of Prevention of Corruption Act, 1988 is a pre-condition for ordering investigation under section 156 (3) Cr.P.C, even at a pre-cognizance stage? Requirement to obtain sanction is mandatory – Once it is noticed that there was no previous sanction, Magistrate cannot order investigation against public servant while invoking powers under section 156 (3) Cr.P.C.**

## Anil Kumar and others v. M.K. Aiyappa and another

**Judgment dated 01.10.2013, passed by the Supreme Court in Criminal Appeal No. 1590 of 2013, reported in (2013) 10 SCC 705**

**Extracts from Judgment:**

When a private complaint is filed before the Magistrate, he has two options: he may take cognizance of the offence under Section 190 CrPC or proceed further in enquiry or trial. A magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156 (3) CrPC. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) CrPC.

The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in ***Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668*** examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156 (3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156 (3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/magistrate cannot refer the matter under Section 156 (3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The statement that he has gone through the complaint, documents and heard the complainant,as such, as reflected in the order,will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156 (3) CrPC should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We

have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

We will now examine whether the order directing investigation under Section 156(3) CrPC would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act.

The word "cognizance" has a wider connotation and is not merely confined to the stage of taking cognizance of the offence. When a Special Judge under the Prevention of corruption Act, 1988 refers a complaint for investigation under Section 156(3) CrPC, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 CrPC and the next step to be taken is to follow up under Section 202 CrPC. Consequently, a Special Judge referring the case for investigation under Section 156 (3) is at pre-cognizance stage.

We may now examine whether, in the abovementioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3) CrPC, even at a pre-cognizance stage.

Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under clauses (viii) and (xii) as under:

> "2. (c)(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty:
>
> * * *
>
> (xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the central government or any State Government, or local or other public authority."

The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

> "***19 Previous sanction necessary for prosecution***- (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public, except with the previous sanction
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a state and is not removable from his office save by or with the sanction of the State Government, of that Government;

> (c) in the case of any other person, of the authority competent to remove him from his office."

Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

> "19.(3)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –
>
> (a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;
>
> (b)-(c) * * *

The learned Senior Counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) CrPC.

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

**Examination of accused – Obligation of accused to furnish explanation with respect to incriminating circumstances associated with him – Failure to offer an appropriate explanation or giving a false answer with respect to such incriminating circumstances would amount to supply of missing link for completing the chain of circumstances.**

**S. Govindaraju v. State of Karnataka**

**Judgment dated 19.8.2013 passed by the Supreme Court in Criminal Appeal No. 2280 of 2009, reported in 2013 Cri.L.J. 4710 (SC)**

**Extracts from Judgment:**

It is obligatory on the part of the accused while being examined under Section 313, Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence in order to decide whether or not the chain of circumstances is complete. When the attention of the accused is drawn to circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. (Vide: ***Munish Mabar v. State of Haryana, AIR 2013 SC 912***

This Court in ***Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181 : (AIR 2013 SC (Cri) 1544 : 2013 AIR SCW 3208)*** held as under :

> "Undoubtedly, the prosecution has to prove its case beyond reasonable doubt. However, in certain circumstances, the accused has to furnish some explanation to the incriminating circumstances, which has come in evidence put to him. A false explanation may be counted as providing a missing link for completing a chain circumstances."

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**260. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 and 204**
**PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971 – Section 3**
**Whether order passed under Section 204 of the Cr.P.C. is an order of interim nature? An order directing issuance of process must be held to be intermediate or quasi-final and, therefore, revisional jurisdiction under section 397 could be exercised against the same.**

**Dwarka Prasad Jat v. State of Madhya Pradesh & ors.**
**Order dated 08.05.2013 passed by the High Court of M.P. in Cr.R. No. 571 of 2012, reported in 2013 (IV) MPJR 162**

**Extract from the Order:**

The learned counsel for the applicant has raised mainly two objections. Firstly that the revisionary Court had no right to make an interference in the impugned order passed by the JMFC, Nasrullaganj because the order passed under Section 204 of Cr.P.C. was an order of interlocutory nature. He has placed his reliance upon the judgments passed by Hon'ble the Apex Court in the case of ***Subramanium Sethuraman v. State of Maharashtra and another AIR 2004 SC 4711, Adalat Prasad v. Rooplal Jindal and others (2004) 7 SCC 338*** and ***one order of the single Bench of this Court in the case of Pistabai v. Narendra Singh (2010) 3 M.P. H.T. 59*** was referred. It is also submitted that looking to the evidence adduced by the applicant, prima facie an offence under Section 2 of the Special Act was made out against the respondents no. 2 to 5 and therefore, the revisionary Court could not interfere in the order passed by the JMFC.

On the other hand the learned Panel Lawyer for the State has submitted that he has not to say anything on the merits of the case but, the revisionary, Court rightly took the cognizance in the order passed by the learned JMFC, Nasrullaganj because it was not an interlocutory order. In this context he has placed reliance on the order passed by the single Bench of this Court in the case of ***Yashwasnt Singh and others v. Smt. Sita and another (2010) III MPWN 95*** and ***an order passed by Hon'ble the Apex Court in the Case of Rajendra Kumar Sitaram Pande and others v. Uttam and another (1993) 3 SCC 134***.

After considering the submission made by learned counsel for the parties and looking to the facts and circumstances of the case, it is apparent that the judgments passed by Hon'ble the Apex Court in the case of ***Subramanium Sethuraman*** (supra) and ***Adalat Prasad*** (supra) are related to the judgments of the Criminal Court to review its own order. In the case of Adalat Prasad (supra) Hon'ble the Apex Court did not enter into the question that whether the order passed under Section 204 of the Cr.P.C. was an order of interim nature or not. Under such circumstances, these judgments passed by Hon'ble the Apex Court are not relevant in the present case. In this connection the judgment passed by Hon'ble the Apex Court in the case of ***Rajendra Kumar Sitaram Pande*** (supra) is much clear in which Hon'ble the Apex Court has held as under :-

> "it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore, the bar under sub-section (2) of section 397 would apply. On the other hand, it must be held to be intermediate or quasi-final and, therefore, the revisional jurisdiction under Section 397 cold be exercised against the same."

Such type of view was followed in the order passed by the single Bench of this Court in the case of ***Yashwant Singh*** (supra) and therefore revisional jurisdiction could be exercised under Section 397 of the Cr.P.C. for the order passed under section 204 of the Cr.P.C. and therefore, the learned Additional Sessions Judge did not commit any error of law in making interference by way of a revision in the order passed by the JMFC, Narrullaganj.

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**261. CRIMINAL PROCEDURE CODE, 1973 – Sections 399 and 167 (2) – Proviso (a) (ii)**
**INDIAN PENAL CODE, 1860 – Sections 399 and 402**
**Accused persons taken into custody on 18.02.2013 – Charge sheet filed on 22.04.2013 – Application for compulsive bail filed prior to filing of chargesheet – Trial Court granted bail under section 167 (2) CrPC – In revision, Sessions Court cancelled the bail – Order in revision challenged by way of writ – Held, for offence under section 399 IPC, punishment may extend upto 10 years – Therefore, chargesheet ought to have been filed within 60 days – But the same was not filed within**

**the said period – Further held, Trial Court rightly granted bail under section 167 (2) of the Code – Order passed by the Revisional Court set aside.**

**Babulal and others v. State of M.P.**

**Order dated 01.08.2013 passed by the High Court of M.P. in Misc. Criminal Case No. 3627 of 2013, reported in 2013 (5) MPHT 313**

**Extracts from Order:**

It is clear that the applicants were taken into custody on 18-2-2013 itself for the offences under Sections 399 and 402 of IPC read with Section 25 of the Arms Act. For the said offences the punishment, as prescribed, may be extended up to 10 years. Thus, the challan ought to be filed upto 19th of April, 2013 within the period of 60 days. Admittedly, the challan in the present case has been filed on 22nd of April, 2013 but prior to filing the challan, the accused filed the application under Section 167 (2) of the Cr.PC, seeking benefit of the statutory bail. The Trial Court extended the benefit of bail to the applicants allowing their application, the said order was set aside by the Revisional Court. In view of the analytical discussions of the language of Section 167 (2), Cr.PC, Proviso (a) (ii) and as per the two judgments of the three Judges Bench in the case of ***Uday Mohanlal Acharya v. State of Maharashtra, 2001 AIR SCW 1500*** and ***Sayed mohd. Ahmed Kazmi v. State, GNCTD and others, 2013 Cri.L.J 200 (SC)*** it is to be held that after exercising the right by moving an application seeking statutory bail by the accused, if the challan is filed later, it would not affect the indefeasible right accrues to the applicants to release them on bail. Thus, the Trial Court has rightly granted the benefit of bail to the applicants, and Revisional Court without considering the aforesaid proposition of law passed the order impugned which is hereby set aside.

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**262. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 482**

**GOVANSH VADH PRATISHEDH ADHINIYAM, 2004 (M.P.) – Sections 4, 5, 6, 9, 11 (5) and 17**

**Whether Judicial Magistrate is competent to pass order of interim custody of vehicle, cow progeny and beef seized in respect of an offence under Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 during the pendency of trial or proceedings for confiscation? Held, Yes.**

**Raees v. State of M.P.**

**Order dated 04.07.2013 passed by the High Court of M.P. in Misc. Criminal Case No. 1102 of 2013, reported in 2013 (5) MPHT 233**

**Extracts from Order:**

It is clear that the order of confiscation has not yet been passed by the District Magistrate and the proceedings are pending before him, however, refusal of the interim custody by the two Courts below is unsustainable in law. It is

relevant to note here that even after passing an order of confiscation statutory bar to entertain the application for interim custody by the Criminal Court has not been specified in the Rules, but looking to the fact, against the order of confiscation passed by District Magistrate, the recourse of filing an appeal has been specified, in Rule 6 to the Divisional Commissioner, therefore, the Criminal Court may refrain to grant the interim custody of the vehicle, cow progeny and beef after passing the order of confiscation, however, applying the self imposed restrictions and taking note of the procedure prescribed after the order of confiscation, until and unless, the exceptional circumstances is prevalent, order passing the interim custody ought to be avoided by the Criminal Courts. After the confiscation order parties may be relegated to take recourse as permissible under the provisions of the Adhiniyam and the Rules.

It is to be noted here that keeping the custody of the vehicle, cow progeny and beef for a long time with the prosecution agency, is also not in the fair administration of the justice. Hon'ble the Apex Court in the case of ***Sunderbhai Ambalal Desia v. State of Gujarat, AIR 2003 SC 638*** has emphasised the need for disposal of the property pending trial. It has been observed by the Apex Court that the Court should exercise such power expeditiously and judiciously because it would serve various purposes namely:-

(1) Owner of the article would not suffer because of its remaining unused or by its misappropriation;

(2) Court or the police would not be required to keep the article in safe custody;

(3) If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

(4) The jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

This Court in a case of ***Moh. Amjad s/o Asgar Husain v. State of M.P. and others, M.Cr.C. No. 8765/2012,*** decided on 9-8-2012 has directed to release the vehicle, which was seized under Section 11 (5) of the Adhiniyam, 2004. Thus, considering the legal position as enumerated in the judgment of ***Sunderbhai Ambalal Desia*** (supra) and also looking to the fact that statutory bar to release the vehicle, cow progeny and beef is not within the Adhiniyam and on considering the existing need to release the interim custody of the property, may be directed by the Court in view of the foregoing observations. In the facts of this case, order of refusal of interim custody of the vehicles passed by the Judicial Magistrate, First Class and affirmed by the Revisional Court are set aside.

In view of the discussions made hereinabove both these petitions filed by the petitioners are hereby allowed. The orders impugned passed by the Judicial Magistrate First Class and the Revisional Court are hereby set aside. It is directed that on furnishing the Supurdginama by the petitioners to the sum of Rs. 5,00,000/- each with one surety in the like amount to the satisfaction of Chief Judicial Magistrate concerned, the seized vehicles, bearing registration Nos. MP-09-GF4269 and MP-41-GA 0685 be released subject to complying the following conditions:-

(i) That, applicant shall produce the same before the Trial Court as and when directed to do so.

(ii) That, in the meantime, they shall not alienate the vehicle or make use of vehicle for any unlawful purpose; and

(iii) That, they shall not carry out any change in the colour and outward appearance of the vehicle.

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**263. ELECTRICITY ACT, 2003 – Sections 153,154 and 155**
**CRIMINAL PROCEDURE CODE, 1973 – Sections 220 and 223**
**Whether a Special Court constituted under Electricity Act, 2003 can try offences other than those mentioned under Electricity Act, 2003 – Held, Yes.**

## Anand Dwivedi v. The State of Madhya Pradesh

**Order dated 22.3.2013 passed by the M.P. High Court in Criminal Revsion No 1835 of 2009 (Jabalpur) against the Order dated 28.8.2009 passed by the Special Judge under Electricity Act, Katni in Specal Case No. 329 of 2007**

**Extracts from order:**

On 27.8.2006 at village Kuthal, Police Station Kuthla, District Katni, it was found that two buffaloes were found dead near the stray wire of electric pole. It was found that the applicant took the connection from that pole and he did not take a regular connection but, he took a direct wire from the pole to his house and therfore, due to break of insulating material of the wire that wire was touched with stray wire and therefore, the current was leaked and those two buffaloes died due to electrocution. The FIR was lodged to the Police Station Kuthla and therefore, after due investigation, a charge-sheet for offence punishable under Section 429 of IPC and Section 135 of the Electricity Act was filed before the Special Court.

The charges were framed and some witnesses were examined. Suddenly on 28.8.2009, the learned Special Judge in his own motion directed that no offence punishabble under section 429 of IPC is triable by the Special Judge under Electricity Act and therfore, a separate charge-sheet be filed for that offence.

In a revision preferred against the order dated 28.8.2009 it is held,

It is true that the Special Court under Electricity Act, is constituted for trial of various offences of the Electricity Act. However, according to the provisions of section 155 of the Electricity Act, 2003, it is apparent that the Special Court has all the powers of the Sessions Court. The special Court constituted under the provisions of Corruption Act is no where specially provided to try the other offences except of the offences of Corruption Act. However, in case of ***Vivek Gupta v. CBI and another [(2003) 8 SCC 628],*** Hon'ble the Apex Court has directed that applying the provisions of section 3 and 4 of the PC Act and 220 and 223 of the Cr.P.C. And considering the circumstnaces of the case, special trial can be done for the offence, which are not the offence under the PC Act. The same situation is visible in the Special Act under SC/ST (Prevention of Atrocities) Act. In the light of judgment passed by Hon'ble the Apex Court in case of ***Vivek Gupta*** (Supra), the Special Court under the Electricity Act was not debarred to try the case for offence under section 429 of the IPC. Therefore, it cannot be said that the Special Court under Electricity Act has no power to try the other offences except of the Electricity Act. The applicant has committed theft of Electric energy and in that procedure, the current was leaked to a stray wire and therefore, two buffaloes ded due to electrocution and therefore, the offence under Section 429 of IPC and Section135 of the Electricity act are part and parcel of the same incident and event. Under such circumstances where the Special Court under the Electricity Act has powers of the Court of Sessions and therfore, the case of offence punishable under section 429 of IPC could be tried by the Special Court under Electricity Act according to the provisions of sections 220 and 223 of the Cr.P.C.

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**264. EVIDENCE ACT, 1872 – Sections 3, 138 and 146**

**(i) Contradictions in medical evidence and ocular evidence – Ocular testimony of a witness has greater evidentiary value *vis-a-vis* medical evidence – When medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence – Where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.**

**(ii) Contradictions in evidence – Minor contradictions in the deposition of the witnesses are to be ignored as the same cannot be dubbed as improvements – In case the contradictions are so material that the same go to the root of the case, materially a fact in the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witness and find out as to whether their case deposition inspire confidence – Exaggerations *per se* do not render the evidence brittle – It can be one of the factors to test credibility of the prosecution version.**

**(iii) Evidence of related/interested witnesses – Interested witnesses are those who want to derive some benefit out of the litigation/case – The evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased – In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can and certainly should, be relied upon – In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his depositions cannot be discarded merely on the ground of being closely related to the victim/deceased.**

**(iv) Delay in lodging FIR and its contents – The case of the prosecution cannot be rejected solely on the ground of delay in lodging the FIR – The court has to examine the explanation furnished by the prosecution for explaining the delay – If the prosecution explains the delay, the court should not reject the case of the prosecution solely on this ground – Therefore, the entire incident as narrated by the witnesses has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of the prosecution and even if there is some unexplained delay, the court has to take into consideration whether it can be termed as abnormal – Merely non-mentioning the names of all the accused or their overt acts elaborately or details of injuries said to have been suffered, could not render the FIR vague or unreliable – The FIR is not an encyclopaedia of all the facts – Moreso, it is quite natural that all the names and details may not be given in the FIR, where a large number of accused are involved.**

**(v) Effect of non-cross examination of a witness on a particular fact/circumstance – Defence cannot rely on nor can the court can base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in-chief and defence has not cross-examined him on the said aspect of the matter.**

## Gangabhavani v. Rayapati Venkat Reddy & ors.

**Judgment dated 04.09.2013 passed by the Supreme Court in Criminal Appeal No. 84 of 2011, reported in 2013 Cri.L.J. 4618 (SC).**

**Extracts from Judgment:**

It is settled legal proposition that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless it is reasonably explained may discredit the entire case of the prosecution. However, the opinion given by a medical witness need not be the last word on the subject. Such an opinion is required to be tested by the court.

If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all an opinion is what is formed in the mind of a person regarding a particular fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts, it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent or probable, the court has no liability to go by that opinion merely because it is given by the doctor. "It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'.

Where the eye-witnesses account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eye-witnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

(Vide : ***Ram Narain Singh v. State of Punjab, AIR 1975 SC 1727, State of Haryana v. Bhagirath, AIR 1999 SC 2005; Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (AIR 2011 SC (Cri) 964);*** and ***Rakesh v. State of M.P., (2011) 9 SCC 698***).

Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true the ocular evidence may be disbelieved.

**Contradictons in Evidence**

In ***State of U.P. v. Naresh, (2011) 4 SCC 320***, this Court after considering a large number of is earlier judgments held:

> "In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its enuretyThe court

has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations *per se* do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statements made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

A similar view has been reiterated by this Court in ***Tehsildar Singh & anr. v. State o U.P., AIR 1959 SC 1012, Pudhu Raja & Raja & anr. v. State, Rep. by Inspector of police, JT 2012 (9) SC 252;*** and ***Lal Bahadur v. State (NCT) of Delhi , (2013) 4 SCC 557) : (AIR 2013 SC (Cri) 1013)***.

Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.

**EVIDENCE OF RELATED/INTERESTED WITNESSES**

It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide ***Bhagalool Lodh & Anr. v. State of U.P., AIR 2011 SC 2292;*** and ***Dhari & Ors. v. State of U.P, AIR 2013 SC 308***)

In ***State of Rajsathan v. Smt. Kali & anr., AIR 1981 SC 1390,*** this Court held:

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased"..... .....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the

time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related is not equivalent to 'interested. A 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. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit and falsely implicating the respondents.

(See also ***Chakali Maddilety & ors. v. State of A.P., AIR 2010 SC 3473***)

In ***Sachchey Lal Tiwari v. State of U.P., AIR 2004 SC 5039***, while dealing with the case this Court held:

> ". ..... Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses' .the expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more causal, at any rate in the matter explaining their presence."

In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased.

**Delay in Lodging fir and its contents :**

The case of the prosecution cannot be rejected solely on the ground of delay in lodging the FIR. The court has to examine the explanation furnished by the prosecution for explaining the delay. There may be various circumstances particularly the number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him pursuance of the incident that has taken place. If the prosecution explains the delay, the court should not reject the case of the prosecution solely on this ground. Therefore, the entire incident as narrated by the witnesses has to be

construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of the prosecution and even if there is some unexplained delay, the court has to take into consideration whether it can be termed as abnormal.

(Vide: ***P. Venkataswarlu v. State of A.P., AIR 2003 SC 574*** and ***State of U.P. v. Munesh, AIR 2013 SC 147***).

It is also a settled legal proposition that merely not mentioning all the names of all the accused or their overt acts elaborately or details of injuries said to have been suffered, could not render the FIR vague or unreliable. The FIR is not an encyclopaedia of all the facts. Moreso, it is quite natural that all the names and details may not be given in the FIR, where a large number of accused are involved.

**Non-Cross Examination of a witness on a particular issue :**

This Court in ***Laxmibai (Dead) Thr. L.Rs. & anr. v. Bhagwantbuva (Dead) Thr. L.Rs. & ors., AIR 2013 SC 1204*** examined the effect of non-cross examination of witness on a particular fact/circumstances and held as under:

> "31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witness.
>
> (Emphasis supplied)

(See also: ***Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181 and Gian Chand & Ors. v. State of Haryana, JT 2013 (10) SC 515***)

Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in-chief and the defence has not cross-examined him on the said aspect of the matter.

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**265. EVIDENCE ACT, 1872 – Sections 24, 25 and 26**
**LAND REVENUE CODE, 1959 (M.P.) – Section 230**
**CRIMINAL PROCEDURE CODE, 1973 – Section 40**
**Village Chowkidar and Patel – Mere fact that the village Chowkidar or Patel was obliged to inform the police about any crime which took place in the village doesn't give them status of police officer – Extra-judicial confession made before them is admissible in evidence.**

**Hemraj v. State of M.P.**

**Judgment dated 22.7.2013 passed by the High Court of M.P. in Criminal Appeal No. 103 of 2006 (Indore), reported in 2013 (5) MPHT 80 (DB)**

**Extracts from Judgment:-**

We have already discussed the duties of the village Chowkidar and Patel as provided under section 230 of the M.P. Land Revenue Code and Section 40 of the Cr.P.C. In view of the aforesaid, the mere fact that the village Chowkidar or Patel was obliged to inform the police about any crime which took place in the village they do become police officers so as to make them incompetent to hear the extrajudicial confession of accused which is made soon after the incident and before handing over the accused to the police. Thus, the statement made before P.W. 1 and P.W. 2 by the appellant becomes admissible as extrajudicial confession.

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**266. EVIDENCE ACT, 1872 – Sections 32 (1), 63 and 65**

**(i) Thumb impression on the dying declaration by 100% burnt person – It is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.**

**(ii) Secondary Evidence relating to document – Can be adduced only when the original has been destroyed or lost, or when party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produced in reasonable time – The court is obliged to examine the probative value of documents produced in the court or their contents and decide the question of admissibility of a document in secondary evidence.**

## Kaliya v. State of Madhya Pradesh

**Judgment dated 23.7.2013 passed by the Supreme Court in Criminal Appeal No. 228 of 2008, reported in (2013) 10 SCC 758**

**Extracts from Judgment:**

This Court has examined the issue of putting a thumb impression on the dying declaration by 100% burnt person in ***State of M.P. v. Dal Singh, AIR 2013 SC 2059:(2013) 14 SCC 159*** and after considering a large number of cases including ***Mafabhai Nagarbhai Raval v. State of Gujarat, Laxmi v. Om Prakash, AIR 1992 SC 2186*** and ***Govindappa v. State of Karnataka, AIR 2001 SC 2383*** came to the conclusion as under :

> "20.The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case.
>
> 21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.
>
> 22. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body i.e. of the thumb may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact."

Section 65(c) of the 1872 Act provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. (***Vide H. Siddiqui v. A. Ramalingam, (2011) 4 SCC 240*** and ***Rasiklal Manikchand Dhariwal v. M.S.S. Food Products, (2012) 2 SCC 196.*** However,

the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (***Vide Roman Catholic Mission v. State of Madras, AIR 1966 SC 1457, Marwari Kumhar v. Bhagwanpuri Guru Ganeshpuri, AIR 2000 SC 2629, R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple, AIR 2003 SC 4548, Dayamathi Bai v. K.M. Shaffi, AIR 2004 SC 4082*** and ***LIC v. Ram Pal Singh Bisen , (2010) 4 SCC 491***)

In ***M. Chandra v. M. Thangamuthu, (2010) 9 SCC 712,*** this Court considered this aspect in detail and held as under:

> "47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of the party."

A similar view has been reiterated in ***J. Yashoda v. K. Shobha Rani, AIR 2007 SC 1721***.

Dr. Nirmal Kumar Gupta (PW 18), deposed that 100% burnt patient can also be in a fit mental and physical condition to give a statement. Dr. V.K. Deewan (PW 14), who performed the post-mortem of the deceased Guddi, deposed that she was completely burnt and the burn injuries were ante-mortem. She has died due to asphyxia, due to burn injuries, her death was homicidal. In view

thereof, both the courts below were of the considered opinion that the appellant was responsible for causing the death of Guddi, the deceased.

The defence taken by the appellant that she had gone out of her house to provide water to the buffalo has been disbelieved by the court. As the incident occurred in the house of the appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances Guddi died. The matter was within her special knowledge.

In view of the above, the appeal lacks merit and is accordingly dismissed.

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**267. EVIDENCE ACT, 1872 – Section 57**

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

**(i) Judicial Notice – Of the fact that there is a steady increase in the market value of the land.**

**(ii) Determination of increased market value – Procedure – Reliance upon transaction at a given rate per year – Value of a larger extent of land may be determined on the basis of value of smaller area.**

## Ahsanul Hoda v. State of Bihar

**Judgment dated 01.07.2013 passed by the Supreme Court in Civil Appeal No. 5311 of 2012, reported in AIR 2013 SC 3463**

**Extracts from Judgment:**

This Court in number of cases has taken judicial notice of the fact that there is a steady increase in the market value of the land and has also adopted the procedure for determining the increased market value and relied upon the transaction at a given rate per year.

In ***General Manager, Oil and Natural Gas Corporation Limited v. Rameshbhai Jilvanbhai Patel and another,*** reported in ***(AIR 2008 SC (Supp) 465***, this Court observed that in the absence of other acceptable evidence, a cumulative increase of 10 to 15 per cent, is permissible with reference to acquisitions in 1990. In the decades preceding 1990s, the quantum of increase was considered to be less than 10 per cent per annum.

This Court in ***Sardar Joginder Singh v. State of Uttar Pradesh and another, (2008) 17 SCC 133,*** noticed that the said case related to acquisition in the year 1979 and relying upon the award related to an acquisition of 1969 observed that the general increase between 1969-79 can be taken to be around 8-10 per cent per annum. If this increase is calculated cumulatively, the total increase in 10 years would be around 100 per cent.

The question relating to the value of larger extent of agricultural land, if required to be determined with reference to price fixed for small residential plot, came for consideration before this Court in ***Haridwar Development Authority v. Raghubir Singh and others (AIR 2010 SC 1754*** In the said case, this Court held as follows :

> "When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors. Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small residential plot, to arrive at the market value of a larger agricultural land, in the usual course, will be in the range of 20% to 25%. In this case, the Collector has himself adopted a 25% deduction which has been affirmed by the Reference Court and the High Court. We, therefore, do not propose to alter it."

Therefore, it is clear that mere reliance made by a Court on sale deeds of smaller residential area for determination of market value of larger agricultural area, the same will not render the determination illegal until and unless it is shown that the determination was not proper.

In the instant case, the average value of the sale-deeds relied upon by the Reference Court (Ext.1 and Ext.1/b) was Rs. 401/- at the time of acquisition. Therefore, as the sale-deeds were in relation to smaller plots, the deduction of 37% was made by the Reference Court and thereafter, by allowing appropriate 10% increase in the value of the land from the date of the sale deeds upto the date of Notification under Section 4 of the Act, the Reference Court arrived at a figure of Rs.250/- per decimal. The High Court while arriving at figure of Rs. 100/- per decimal considered only the fact that the sale deeds relied upon were in relation to smaller plots and those sale deeds(Ext.1 and Ext.1/b) were related to homestead land and hence fixed Rs. 10,000/- per acre as compensation. It completely failed to consider the increase in price of land and the deduction made by the High Court is nearly 75% which is not in accordance with law.

As Ext.1 and Ext.1/b which were related to smaller area, were the only sale deeds available for comparison, the same were relied upon by the Reference Court, but the High Court erred completely in disregarding the said sale-deeds and thus arrived at a finding of Rs.100/- per decimal as market value on mere presumption and surmises. There was no evidence on record to arrive at this value and, even if it was a case of deduction, the High Court has not given any reason in support of the same.

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**268. EVIDENCE ACT, 1872 – Sections 65 and 63**

**Proof of Will – Secondary evidence – Whether photocopy of the document is admissible as one of the modes of secondary evidence? Held, Yes – Further held, photocopy can be one of the procedures for leading secondary evidence under section 65 of the Evidence Act.**

## Kalibai and others v. Ajay and another

**Order dated 10.07.2013 passed by the High Court of M.P. in Writ Petition No. 11510 of 2012, reported in 2013 (5) MPHT 223**

**Extracts from Order:**

It is submitted that since the document which respondent No.1 wants to prove is Photostat copy, therefore, the same cannot be allowed to prove by secondary evidence. Learned Counsel placed reliance on a decision in the matter of ***Ratanlal v. Kishanlal, 2012 (1) MPLJ 120,*** wherein this Court held that photocopy is neither a primary no secondary evidence. It is submitted that petition be allowed and impugned order be set aside.

Learned Counsel for the respondent No.1 supports the order and submits that since original Will is in possession of petitioner No.1 who is wife deceased, therefore, respondent No.1 is left with no option except to prove the Will by adducing secondary evidence. Learned Counsel placed reliance on a decision in the matter of ***M. Chandra v. M. Thangmuthu, 2010 AIR SCW 6362,*** wherein Hon'ble Apex Court while dealing with Section 63 of the Evidence Act observed that Section 63 of Evidence Act intended to provide relief to party genuinely unable to produce original through no fault of that party, non-acceptance of duplicate copy of conversion certificate is improper. It is submitted that petition has no merits and the same be dismissed.

In the matter of ***Ratantal*** (supra) the facts of the case were altogether different, therefore, the law laid down in that case is not applicable in the present case. The photocopies are the secondary evidence. The Indian Evidence Act sets out the procedure for receiving the secondary evidence. It has to be shown that primary evidence is not available or that any one of the circumstances such as non-availability or custody of the document in the hands of the adversary will be sufficient grounds for producing secondary evidence. The secondary evidence includes among other documents a document produced by exercise of the mechanical device that ensures the correctness of the original. The photocopies of the document is one such procedure and if a valid ground is given for acceptance of secondary evidence, then there cannot be any objection to the reception of photocopies of documents. The rejection of the documents had arisen only by the fact that the photocopies and therefore, they cannot be received in evidence. There is no merit in such a contention for, if the objection is that there is no basis for not producing the original or that the so called original is not in the custody of the plaintiff himself as contended by the defendants, then it is a matter that has to be brought out in the cross-examination of the witness and the reception of the documents themselves cannot be prohibited. In the facts and circumstances of the case, petition filed by the petitioner has no substance, hence the same stands dismissed.

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**269. EVIDENCE ACT, 1872 – Section 118**

**Child witness – Requirement of corroboration – As a rule of practical wisdom, evidence of child witness must find adequate corroboration.**

**Hamza, State of Kerala v. Muhammadkutty @ Mani & ors.**

**Judgment dated 20.6.2013 passed by the Supreme court in Criminal Appeal No. 268 of 2007, reported in 2013 (III) DMC 566 (SC)**

**Extracts from Judgment :**

The Learned senior counsel for respendents submitted that this is not a case where corroboration of sole testimony of PW-1 could not have been possible. He submitted that the police in its investigation did not find A-1 and A-2 at the house when the incident took place and any neighbour could have been examined as to whether A-1 and A-2 were present at the house when the occurrence took place. He submitted that in the absence of any corroboration of the testimony of PW-1, it is not prudent for the Court to convict A-1 and A-2 on the sole uncorroborated testimony of PW-1.

Under Section 157 of the Indian Evidence Act, the testimony of PW-1 could be corroborated by his statements about the time of when the incident took place. PW-1 has stated:

> "Police came on that night itself. Police has not asked anything to me, I did not tell anything about the incident. Next day evening mother's body buried. Thereafter I went to mother's house. On that night I slept there. I slept there with elder aunt Sareena. On that night I cried remembering mother's memory, I told the whole incident witnessed to aunty. My maternal grandmother Nabeesa and my uncle Hamzaka (mother's brother) then came there. They also heard what I said."

From the aforesaid evidence of PW-1 it appears that PW-1 did not tell anything about the incident to the police on the date of the incident, though the police had come to the house where the incident had taken place. Next day evening after her mother's body was buried, he went to the mother's house and slept there with the elder aunt Sareena and on that night he cried remembering his mother and told the whole incident he witnessed to his aunt Sareena. Sareena has not been examined as a witness to corroborate the testimony of PW-1. PW-1 has also said that his maternal grandmother, Nabeesa and his uncle Hamza then came there and they also heard what he said. Maternal grandmother of PW-1, Nabeesa has also not been examined to corroborate the testimony of PW-1. Only Hamza has been examined as PW-2 who has said that his mother and wife Sareena were told by PW-1 that his mother was murdered by A-1 by stabbing while A-2 held her. PW-2, however, has said that the husband of the deceased used to send money in the name of A-1 and A-2 and the deceased informed her husband that she has not received money and thereafter the

husband of the deceased sent money in the name of the deceased and he had learnt all this from the deceased. From the evidence of PW-2 it is very clear that PW-2 had developed animosity towards A-1 and A-2 on account of what the deceased had told him about A-1 and A-2. Moreover, he has not been able to explain in cross-examination as to why when the incident took place on 26.2.1998, he filed the complaint before the Magistrate two years after on 26.2.2000 if the police had treated the case as one of suicide and not of homicide. Hence, even though the evidence of PW-2 corroborates the testimony of PW-1 his evidence cannot be relied on to lend assurance that PW-1 was giving a true version of the incident. From the deposition of PW-3 and Ex. P-11 (the scene plan of the house in which the incident took place), it appears that there were two windows in the room in which the incident took place, one window opening towards the portico and the other window towards the road. Hence, even if the window opening towards the road was closed, people on the road or the neighbours around the house must have come to know about the incident, but none among the people from road or from amongst the neighbours around the house have been examined on behalf of the prosecution to corroborate the evidence of PW-1. In the absence of any corroboration of the oral testimony of PW-1, the High Court was right in taking the view that it is unsafe to convict A-1 and A-2 only on the evidence of PW-1, who was a child witness and whose evidence did not inspire any confidence.

Learned Counsel for the State is right that the consistent version of PW-1 is that A-1 and A-2 have committed murder of the deceased. But the High Court has rightly relied on the observations of this Court in ***Suresh v. State of U.P. , (1981) 2 SCC 569*** that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book 'The Proof of Guilt', Third Edition, published by Stevens and Sons:

> "Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth."

Hence, the proposition laid down by Courts that as a rule of practical wisdom, evidence of child witness must find adequate corroboration ***Panchhi and ors. v. State of U.P., 1998 SLT 41.***

In ***Suresh v. State of U.P.*** (supra), cited by The Learned senior counsel for respendents the evidence of child witness Sunil was corroborated by the conduct of the accused and from pattern of crime committed by him and hence this Court maintained the conviction of the accused for the murder of his wife Geeta and son Anil on the basis of evidence of a child witness, Sunil, as corroborated by other evidence. This Court specifically observed that if the case was to rest solely on sunil's uncorroborated testimony, the Court might have found it difficult to sustain the conviction of the accused, but there was unimpeachable and most eloquent

materials o record which lent an unfailing assurance that Sunil is a witness of truth and not a witness of imagination as most children of that

age generally are. Similarly, in ***Promode Dey v. State of West Bengal, II (2012) DLT (Cr) 13 (SC)*** cited by The Learned senior counsel for respendents the Court found that soon after the incident on 23.2.2002, the girl child had told her grand-mother and father that it was the accused who had killed the deceased and her grand-mother and father had deposed before the Court in their evidence that they had been told by this child witness that the accused had killed the deceased with a dao. The evidence of this child witness was also corroborated by the fact that the blood stained dao was recovered on the very day of the incident from a Jungle by the side of the house of the accused. The evidence of the girl child that the accused had killed her mother by striking on hear head, back, fingers and throat with a dao was thus believed by the Court because her evidence was adequately corroborated. In this case, as we have found, the evidence of PW-1 is not adequately corroborated.

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***270. GUARDIANS AND WARDS ACT, 1890 – Sections 7 and 47**

**Custody of child – Welfare and wishes of a child are paramount consideration – It is not only the physical but also the mental welfare which has to be taken into consideration – Term 'guardian' has to be measured not only in terms of money and physical comfort but also in terms of moral and ethical welfare of the child.**

**Sharif Khan v. Muniya Khan**

**Order dated 20.03.2013 passed by the High Court of M.P. in Misc. Appeal No. 308 of 2013, reported in 2013 (4) MPLJ 244 (DB)**

**Extracts from the Order:**

In Matters relating to the custody of children, the welfare and wishes of the child are of paramount importance. It is not only the physical but also the mental welfare which has to be taken into consideration by the Courts.

The term guardian has to be taken in its widest possible sense. It has to be measured not only interms of money and physical comfort but also should include moral and ethical welfare of the child. The Hon'ble Supreme Court, in the case of ***Elizabeth Dinshaw v. Arvind M. Dinshaw. AIR 1987 SC 3,*** has held that whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.

Admittedly, the father being a natural guardian of a minor has a preferential right to claim custody of his child but the Court has to see the welfare of the child and not the legal right of a particular party. Hence, after considering the arguments and going through the reasonings on record, we see no reason to allow the appeal. Same is accordingly dismissed.

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**271. HINDU MARRIAGE ACT, 1955 – Sections 5 and 7**
**PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005– Section 2 (f), 2 (a) and 2 (q)**

**(i) Relationship in the nature of marriage and marital relationship – Distinction – Relationship of marriage continues, notwithstanding the fact that there are differences of opinion, marital unrest etc., even if they are not sharing a shared household, being based on law – But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage – Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end – Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the Legislature has used the expression "in the nature of".**

**(ii) Relationship of same sex (gay or lesbians) is not recognised by the Act – Hence, any act, omission, commission or conduct of any of the party would not lead to domestic violence, entitling any relief under the DV Act.**

**(iii) Guidelines for testing a relationship to fall within the expression relationship in the nature of marriage u/s 2(f) of the DV Act – (1) Duration of period of relationship (2) Shared household (3) Pooling of resources and financial arrangements (4) Domestic arrangements (5) Sexual relationship (6) Children (7) Socialization in public (8) Intention and conduct of the parties.**

**Indra Sarma v. V.K.V. Sarma**
**Judgment dated 26.11.2013 passed by the Supreme court in Criminal Appeal No. 2009 of 2013, reported in 2013 (III) DMC 830 (SC)**

**Extracts from Judgment:**

Entering into a marriage, therefore, either through the Hindu Marriage Act or the Special Marriage Act or any other Personal Law, applicable to the parties, is entering into a relationship of "public significance", since marriage being a social institution, many rights and liabilities flow out of that legal relationship. The concept of marriage as a "civil right" has been recognised by various Courts all over the world, for example, ***Skinner v. Oklahoma, 316 US 535 (1942); Perez v. Lippold, 198 P.2d 17, 20.1 (1948); Loving v. Virginia, 388 US 1 (1967)***.

We have referred to, ***in extenso***, about the concept of "marriage and marital relationship" to indicate that the law has distinguished between married and unmarried people, which cannot be said to be unfair when we look at the rights and obligations which flow out of the legally wedded marriage. A married couple

has to discharge legally various rights and obligations, unlike the case of persons having live-in relationship or, marriage-like relationship or defacto relationship.

Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnization of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in ***Pinakin Mahipatray Rawal v. State of Gujarat, (2013) 2 SCALE 198,*** held that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

**Relationship in the Nature of Marriage :**

Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

(a) Consanguinity

(b) Marriage

(c) Through a relationship in the nature of marriage

(d) Adoption

(e) Family members living together as joint family.

The definition clause mentions only five categories of relationships which exhausts itself since the expression “means”, has been used. When a definition clause is defined to “mean” such and such, the definition is ***prima facie*** restrictive and exhaustive. Section 2(f) has not used the expression “include” so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression “relationship in the nature of marriage”.

We have already dealt with what is “marriage”, “marital relationship” and “marital obligations”. Let us now examine the meaning and scope of the expression “relationship in the nature of marriage” which falls within the definition of Section 2(f) of the DV Act. Our concern in this case is of the third enumerated category that is “relationship in the nature of marriage” which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

Distinction between the relationship in the nature of marriage and marital relationship has to be noted first. Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest

etc., even if they are not sharing a shared household, being based on law. But live-in-relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the Legislature has used the expression “in the nature of”.

Reference to certain situations, in which the relationship between an aggrieved person referred to in Section 2(a) and the respondent referred to in Section 2(q) of the DV Act, would or would not amount to a relationship in the nature of marriage, would be apposite. Following are some of the categories of cases which are only illustrative:

***(a) Domestic relationship between an unmarried adult woman and an unmarried adult male –*** Relationship between an unmarried adult woman and an unmarried adult male who lived or, at any point of time lived together in a shared household, will fall under the definition of Section 2(f) of the DV Act and in case, there is any domestic violence, the same will fall under Section 3 of the DV Act and the aggrieved person can always seek reliefs provided under Chapter IV of the DV Act.

***(b) Domestic relationship between an unmarried woman and a married adult male –*** Situations may arise when an unmarried adult women knowingly enters into a relationship with a married adult male. The question is whether such a relationship is a relationship “in the nature of marriage” so as to fall within the definition of Section 2(f) of the DV Act.

***(c) Domestic relationship between a married adult woman and an unmarried adult male –*** Situations may also arise where an adult married woman, knowingly enters into a relationship with an unmarried adult male, the question is whether such a relationship would fall within the expression relationship “in the nature of marriage”.

***(d) Domestic relationship between an unmarried woman unknowingly enters into a relationship with a married adult male –*** An unmarried woman unknowingly enters into a relationship with a married adult male, may, in a given situation, fall within the definition of Section 2(f) of the DV Act and such a relationship may be a relationship in the “nature of marriage”, so far as the aggrieved person is concerned. (e) Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship.

Section 2 (f) of the DV Act though uses the expression “two persons”, the expression “aggrieved person” under Section 2(a) takes in only “woman”, hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.

We should, therefore, while determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence”, have a common sense/balanced approach, after weighing up the various factors which exist in a particular relationship and then reach a conclusion as to whether a particular relationship is a relationship in the “nature of marriage”. Many a times, it is the common intention of the parties to that relationship as to what their relationship is to be, and to involve and as to their respective roles and responsibilities, that primarily governs that relationship. Intention may be expressed or implied and what is relevant is their intention as to matters that are characteristic of a marriage. The expression “relationship in the nature of marriage”, of course, cannot be construed in the abstract, we must take it in the context in which it appears and apply the same bearing in mind the purpose and object of the Act as well as the meaning of the expression “in the nature of marriage”. Plight of a vulnerable section of women in that relationship needs attention. Many a times, the women are taken advantage of and essential contribution of women in a joint household through labour and emotional support have been lost sight of especially by the women who fall in the categories methtioned in (a) and (d), supra. Women who fall under categories (b) and (c), stand on a different footing, which we will deal with later. In the present case, the appellant falls under category (b), referred to in paragraph 37(b) of the judgment.

We have, therefore, come across various permutations and combinations, in such relationship, and so test whether a particular relationship would fall within the expression “relationship in the nature of marriage”, certain guiding principles have to be evolved since the expression has not been defined in the Act.

Section 2(f) of the DV Act defines “domestic relationship” to mean, inter alia, a relationship between two persons who live or have lived together at such point of time in a shared household, through a relationship in the nature of marriage. The expression “relationship in the nature of marriage” is also described as ***de facto*** relationship, marriage – like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship) etc.

Courts and Legislatures of various countries now began to think that denying certain benefits to a certain class of persons on the basis of their marital status is unjust where the need of those benefits is felt by both unmarried and married cohabitants. Courts in various countries have extended certain benefits to heterosexual

unmarried cohabitants. Legislature too, of late, through legislations

started giving benefits to heterosexual cohabitants.

Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. In ***Lata Singh v. State of U.P., AIR 2006 SC 2522,*** it was observed that a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriage etc. We have few other legislations also where reliefs have been provided to woman placed in certain vulnerable situations.

Section 125 Cr.P.C., of course, provides for maintenance of a destitute wife and Section 498A IPC is related to mental cruelty inflicted on women by her husband and in-laws. Section 304-B IPC deals with the cases relating to dowry death. The Dowry Prohibition Act, 1961 was enacted to deal with the cases of dowry demands by the husband and family members. The Hindu Adoptions and Maintenance Act, 1956 provides for grant of maintenance to a legally wedded Hindu wife, and also deals with rules for adoption. The Hindu Marriage Act, 1955 refers to the provisions dealing with solemnization of marriage also deals with the provisions for divorce. For the first time, through, the DV Act, the Parliament has recognized a “relationship in the nature of marriage” and not a live-in relationship simplicitor.

We have already stated, when we examine whether a relationship will fall within the expression “relationship in the nature of marriage” within the meaning of Section 2(f) of the DV Act, we should have a close analysis of the entire relationship, in other words, all facets of the interpersonal relationship need to be taken into account. We cannot isolate individual factors, because there may be endless scope for differences in human attitudes and activities and a variety of combinations of circumstances which may fall for consideration. Invariably, it may be a question of fact and degree, whether a relationship between two unrelated persons of the opposite sex meets the tests judicially evolved.

We may, on the basis of above discussion cull out some 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. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

***(1) Duration of period of relationship***

Section 2(f) of the DV Act has used the expression “at any point of time”, which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending

upon the fact situation.

***(2) Shared household***

The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.

***(3) Pooling of Resources and Financial Arrangements***

Supporting each other, or any one of them, financially, sharing bank accounts, 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.

***(4) 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.

***(5) 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.

***(6) Children***

Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

***(7) Socialization in Public***

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

***(8) Intention and conduct of the parties***

Common intention of 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.

We may note, in the instant case, there is no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a mistress, who cannot enter into relationship in the nature of a marriage. Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course may

at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive.

***D. Velusamy v. D. Patchaimmal, (2010) 10 SCC 4690*** stated that instances are many where married person maintain and support such types of women, either for sexual pleasure or sometimes for emotional support. Woman, a party to that relationship does suffer social disadvantages and prejudices, and historically, such a person has been regarded as less worthy than the married woman. Concubine suffers social ostracism through the denial of status and benefits, who cannot, of course, enter into a relationship in the nature of marriage.

We cannot, however, lose sight of the fact that inequities do exist in such relationships and on breaking down of such relationship, the woman invariably is the sufferer. Law of Constructive Trust developed as a means of recognizing the contributions, both pecuniary and non-pecuniary, perhaps comes to their aid in such situations, which may remain as a recourse for such a woman who find herself unfairly disadvantaged. Unfortunately, there is no express statutory provision to regulate such types of live-in relationships upon termination or disruption since those relationships are not in the nature of marriage. We can also come across situations where the parties entering into live-in-relationship and due to their joint efforts or otherwise acquiring properties, rearing children, etc. and disputes may also arise when one of the parties dies intestate.

Such relationship, it may be noted, may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship. Legislature, of course, cannot promote pre-marital sex, though, at times, such relationships are intensively personal and people may express their opinion, for and against. See ***S. Khushboo v. Kanniammal and another (2010) 5 SCC 600***.

We may now consider whether the tests, we have laid down, have been satisfied in the instant case. We have found that the appellant was not ignorant of the fact that the respondent was a married person with wife and two children, hence, was party to an adulterous and bigamous relationship. Admittedly, the relationship between the appellant and respondent was opposed by the wife of the respondent, so also by the parents of the appellant and her brother and sister and they knew that they could not have entered into a legal marriage or maintained a relationship in the nature of marriage. Parties never entertained any intention to rear children and on three occasions the pregnancy was terminated. Having children is a strong circumstance to indicate a relationship in the nature of marriage. No evidence has been adduced to show that the parties gave each other mutual support and companionship. No material has been produced to show that the parties have ever projected or conducted themselves as husband and wife and treated by friends, relatives and others,

as if they are a married couple. On the other hand, it is the specific case of the appellant that the respondent had never held out to the public that she was his wife. No evidence of socialization in public has been produced. There is nothing to show that there was pooling of resources or financial arrangements between them. On the other hand, it is the specific case of the appellant that the respondent had never opened any joint account or executed any document in the joint name. Further, it was also submitted that the respondent never permitted to suffix his name after the name of the appellant. No evidence is forthcoming, in this case, to show that the respondent had caused any harm or injuries or endangered the health, safely, life, limb or well- being, or caused any physical or sexual abuse on the appellant, except that he did not maintain her or continued with the relationship.

**Alienation of Affection**

Appellant had entered into this relationship knowing well that the respondent was a married person and encouraged bigamous relationship. By entering into such a relationship, the appellant has committed an intentional tort, i.e. interference in the marital relationship with intentionally alienating respondent from his family, i.e. his wife and children. If the case set up by the appellant is accepted, we have to conclude that there has been an attempt on the part of the appellant to alienate respondent from his family, resulting in loss of marital relationship, companionship, assistance, loss of consortium etc., so far as the legally wedded wife and children of the respondent are concerned, who resisted the relationship from the very inception. Marriage and family are social institutions of vital importance. Alienation of affection, in that context, is an intentional tort, as held by this Court in ***Pinakin Mahipatray Rawal case*** (supra), which gives a cause of action to the wife and children of the respondent to sue the appellant for alienating the husband/father from the company of his wife/children, knowing fully well they are legally wedded wife/children of the respondent.

We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in-relationships are not relationships in the nature of marriage. Appellant's and the respondent's relationship is, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential characteristic of a marriage, but a relationship other than "in the nature of marriage" and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" under Section 2(f) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to "domestic violence" under Section 3 of the DV Act.

We have, on facts, found that the appellant's status was that of a mistress,

who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.

We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort.

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**272. HINDU MARRIAGE ACT, 1955 – Section 16**

**HINDU LAW – Partition**

**Availability of benefit of section 16 of Hindu Marriage Act – It comes into operation only in a case in which a marriage in fact proved to have taken place between the persons which may be null and void as per the provisions of the Act – If the factum of marriage is not proved, section 16 (1) is not attracted and the children born out of such relationship cannot get the benefit of section 16(1) of the Act – There must be a marriage, which would be hit by the provisions of this Act and would cover a relationship resulting from any other arrangement than any other marriage – Where there is no proof of solemnisation of marriage, the provisions of section 16 are not attracted.** ***Reshamlal Baswan v. Balwant Singh Jwalasingh Punjabi, 1994 MPLJ 446*****, relied on.**

**Babulal & anr. v. Natthibai & anr.**

**Judgment dated 21.03.2013 passed by the High Court of M.P. in Second Appeal No. 846 of 1997, reported in 2013 (III ) DMC 776 (MP)**

**Extracts from Judgment :**

From a perusal of the plaint itself it is apparent that the respondents have not stated anything about a regular legitimate marriage between Damrulal and Natthibai. The plaint itself states that Natthibai was originally married to one Nand Kishore but she left him as they could not get along together after “Chhod Chhutti” and, thereafter, she came to Khurai to live with Damrulal. The trial Court, after analyzing the evidence of the witnesses on record, has recorded a finding in paragraph 13 of its judgment to the effect that the plaintiff has failed to establish and prove that Natthibai was married to Damrulal in accordance with the customs prevailing in the society or that any ceremony was conducted in that regard. The same finding has been recorded by the appellate Court in paragraph 22 of the impugned judgment. It is also undisputed that this concurrent finding has not been assailed by the respondents. It is, therefore, apparent

that there is concurrent finding of fact to the effect that no marriage or ceremony whatsoever was ever held to solemnize the marriage between Damrulal and Natthibai either in accordance with law or in accordance with the custom prevailing in the society and in the absence of the fact of marriage the question or the issue of the marriage being void or voidable or being in contravention of provisions of Section 11 of the Act does not arise. As the factum of marriage itself has not been established, no right accrues to the respondent No.2 even if he is born from the physical relationship of Damrulal and Natthibai nor does he acquire any rights under Section 16 of the Act.

This Court in the case of ***Reshamlal Baswan v. Balwant Singh Jwala Singh Punjabi, 1994 MPLJ 446***, has answered a similar question involved therein in the following terms:

> "4. Marriage Laws Amendment Act, 1976 provided legitimacy to children of a marriage hit by Section 11 of Hindu Marriage Act. Section 11 provides a procedure for getting a marriage declared void if it contravenes one of the conditions of Section 5 of the said Act. The conditions under which a marriage is said to be void are those mentioned in Clauses (i), (iv) and (v) of Section 5 of the said Act. Marriage between parties having a spouse living at the time of marriage is hit by this provision. This provision has been interpreted to mean that there must be a marriage, which would be hit by the provisions of this Act and would not cover a relationship resulting from any other arrangement than the marriage. That is the reason why it has been held in ***M. Muthayya v. Kamu and ors., AIR 1981 NOC 172 (Mad)***, that in those cases where there is no proof of solemnisation of marriage, the provision in Section 16 is not attracted. The two Courts, in the instant case have found that there was no marriage of any type between respondent Jhunjhibai and the deceased Baswan and hence, it will have to be held that even if Baswan had died after 1976, the benefit of Section 16 of Hindu Marriage Act would not have been available to the appellant. That appears to be the reason why the learned Counsel for the appellant did not seriously press the question as framed by this Court."

Mayne's Hindu Law & Usage, 15th Edition, while discussing the provisions of Section 16 of the Act has stated as under:

> "Section 16 of the Act comes into operation only in a case in which a marriage is in fact proved to have taken place between the persons which may be null and void as per the provisions of the Act. Once the factum of marriage is not proved, Section 16(1) is not attracted and the children

born out of such relationship get the benefit of Section 16(1) of the Act."

In view of the aforesaid provisions of law and the facts and circumstances of this case, even if it is held that respondent No.2 Bhagwan Singh was born out of the physical relationship between Damrulal and Natthibai, respondent No.1, he does not acquire any rights under Section 16 of the Act on account of the fact that there is no proof of marriage, customary or otherwise, between Damrulal and Natthibai. The substantial questions of law framed by this Court are accordingly answered in favour of the appellants/defendants.

As a consequence of the above, I am of the considered opinion that in view of the clear provisions of Section 16 of the Act and the law as laid down by this Court in the case of ***Reshamlal Baswan*** (supra), the first appellate Court has erred in law in decreeing the suit to the extent of the claim of respondent/plaintiff No.2, Bhagwan Singh and, therefore, the impugned judgment and decree dated 23.7.1997 passed by the lower appellate Court is accordingly set aside.

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**273. HINDU SUCCESSION ACT, 1956 – Sections 6 and 8**

**(i) Coparcener – Coparcenary Property ?**
**Coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor.**

**(ii) Nature of property on partition in the hands of a single person – Revival of Coparcenary property?**
**So long, on partition, an ancestral property remains in the hands of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned – But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.**

**(iii) Difference between the nature of property acquired on the death of father and on partition of the ancestral property – In the former, property ceases to be joint family property and all the heirs and legal representatives of deceased would succeed to his interest as tenants in common and not as joint tenants – In a case of this nature, the joint coparcenary did not continue – In the latter, the property is coparcenary property and the son would acquire interest in that and become a coparcener.**

**Rohit Chauhan v. Surinder Singh & ors.**
**Judgment dated 15.07.2013 passed by the Supreme Court in Civil Appeal No. 5475 of 2013, reported in AIR 2013 SC 3525**

**Extracts from Judgment:**

We have bestowed our consideration to the rival submission and we find substance in the submission of the learned counsel for plaintiff appellant. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of ***M. Yogendra v. Leelamma N., (2009) 15 SCC 184,*** in which it has been held as follows:

> "29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

Now referring to the decision of this Court in the case of ***Bhanwar Singhv. Puran, AIR 2008 SC 1490,*** relied on by respondents, the same is clearly distinguishable. In the said case the issue was in relation to succession whereas in the present case we are concerned with the status of the plaintiff vis-a-vis his father who got property on partition of the ancestral property.

A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the

present case, it is an admitted position that the property which defendant No. 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant No.2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth defendant No.2 could have alienated the property only as Karta for legal necessity. It is nobody's case that defendant No.2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale-deeds and release deed, the parties can work out their remedies in appropriate proceeding.

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**274. INDIAN PENAL CODE, 1860 – Section 34**

**Principle of vicarious liability – Can be the result of a pre-meditated decision between several co-accused or in a given case such a common intention can very well develop on the spur of the moment or at the scene of the crime – Direct proof of common intention is seldom available and therefore, such intention can only be inferred from the circumstances appearing from the proved facts of case and the proved circumstances.**

## Raghbir Chand & Ors. v. State of Punjab

**Judgment dated 05.8.2013 passed by the Supreme Court in Criminal Appeal No. 2028 of 2009, reported in 2013 Cri.L.J. 4456 (SC)**

**Extracts from Judgment:**

Common intention which is the gist of the principle of vicarious liability enshrined by Section 34 of the Indian Penal Code can be the result of a pre-meditated decision between several co-accused or in a given case such common intention can very well develop on the spur of the moment or at the scene of the crime. What is of importance and, therefore, must be ascertained is the meeting of minds of the co-accused that the particular criminal act should be committed. Once the court can consider it safe to come to such a conclusion only then apportionment of liability amongst the co-accused would be permissible with the aid of Section 34 of the Indian Penal Code. Liability of an accused under Section 34, therefore, is a matter of inference to be drawn from the facts and circumstances of each case. The above are the principles that have been laid down in al long line of decisions of this Court, few of which can be illustratively referred to hereinabove.

This court in the case of ***Sripathi v. State of Karnataka, AIR 2007 SC 249*** observed as under:

"5. Section 34 has been enacted on the principle of joint liability n the [commission] of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal acct perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the change of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged with the aid of Section 34, be it prearranged or on the spur of the moment but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position n law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab [1977 (1) SCC 746 (AIR 1977 SC 109)] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

6. The section does not say 'the common intention of all' or does it say 'an intention common to all'. Under the provisions of Section 34 the essence f the liability is to be found in the existence of a common intention animating the accused leading to the [commission] of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a parry who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in ***Chinta Pulla Reddy v. State of A.P. [1993 (Supp 3) SCC 134: (AIR 1993 SC 1899 : 1993 AIR SCW 1843 )]*** Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it

is not necessary to show some overt act on the part of the accused." [As observed in ***State of M.P. v. Deshrai, (2004) 13 SCC 1998: (AIR 2004 SC 2764:2004 AIR SCW 924)*** .

In ***Abdul Mannan v. State f Assam in paragraphs 19 and 20*** (of SCC): (Paras 17 and 18 of AIR SCW) this Court made the following following observation:

***"19. The High Court placed reliance on Sheoram Singh v. State of U.P. [(1973) 3 SCC 110: (AIR 1972 SC 2555)*** in which this Court observed as under: (SCC p. 114, para 6) : (Para 6 of AIR)

"6..... it is undeniable that common intention can develop during the course of an occurrence, but there has to be cogent material on the basis of which the court can arrive at that finding and hold an accused vicariously liable for the act of the other accused by invoking Section 34 of the Penal Code."

20. Reliance was also placed on ***Joginder Singh v. State Haryana [AIR 1994 Supreme Court 461: (1993 AIR SCW 3874)*** in which this Court has observed:

"7. It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the over act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. The pre-arranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is the said plan must proceed to act constituting the offence.

Taking into consideration all the previous decisions, this Court in ***Abdul Sayeed v. State of M.P.*** Summed up the law in the following terms:

"48. The aforesaid conclusion takes us to the issue raised by the appellants as to whether the appellants could be convicted with the aid of Section 34, IPC.

49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as

between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34, IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the pre-arranged plan cannot be held guilty of the criminal act with the aid of Section 34, IPC. (See ***Mohan Singh v. State of Punjab [AIR 1963 SC 174.]***)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide ***Krishan v. State of Kerala [1996 (10) SCC 508: (AIR 1997 SC 383: 19896 AIR SCW 3754) and Harbans Kaur v. State of Haryana [2005 (9) SCC 195: (AIR 2005 SC 2589: 2005 AIR SCW 2074)***.

51. Undoubtedly, the ingredients of Section 34 i.e. that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. (Vide ***Hamlet v. State f Kerala [2003 (10) SCC 108: (AIR 2003 SC 3682: 2003 AIR SCW 4178), Pichai v. State of T.N. [2005 (10) SCC 505: (2005 Cri LJ 5111), and Bishna v. State of W.B. [2005 (12) SCC 657: (AIR 2006 SC 302: 2005 AIR SCW 5798)***

52. In ***Gopi Nath v. State of U.P. [2001(6) SCC 620: (AIR 2001 SC 2493: 2001 AIR SCW 2707)*** this Court observed as under:

"8.....Even the dong of separate, similar or diverse acts by several persons so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action – it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed on the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

53. In ***Krishna v. State [2003 (7) SCC 56 : (AIR 2003 SC 2978 : 2003 AIR SCW 3688***) this Court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of Section 34.

54. In ***Girija Shankar v. State of U.P. [2004 (3) SCC 793 : (AIR 2004 SC 1808 : 2004 AIR SCW 810)*** it is observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act:

"9. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only inferred from the circumstances appearing proved circumstances."

55. In ***Virendra Singh v. State of M.P. [2010 (8) SCC 407: (AIR 2011 SC (Cri) 1934: 2011 AIR SCW 31)*** this Court observed that:

"42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

56. Section 34 can be invoked even in those cases where some of the co-accused may be acquitted, provided it can be proved either by direct evidence or inference that the accused and the others have committed an offence in pursuance of the common intention of the group. (Vide ***Prabhu Babaji Navle v. State of Bombay [AIR 1956 SC51]***)

57. Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the

members of the party or it is not possible to prove exactly what part was played by each of them. In the absence of common intention, the criminal liability of a member of the group might differ according to the mode of the individual's participation in the act. Common intention means that each member of the group is aware of the act to be committed."

In the present case, as already noticed, deceased Rajinder Kumar had arrived at the spot after the incident of assault by the accused on PW-2 and PW-4 had commenced. Immediately on arrival of Rajinder Kumar, appellant No. 4 Kamal Kumar, according to the prosecution, gave 4-5 blows in the abdomen of the deceased as a result of which he fell down. The prosecution evidence also demonstrates that after the deceased had fallen down on the ground none of the other accused-appellants had assaulted him. The above facts, in our considered view, cannot constitute a safe and sufficient basis for us to come to the conclusion that an inference of common intention of all the four accused to cause the death of Rajinder Kumar can be safely made so as to hold the accused 1, 2 and 3 vicariously liable for the death of Rajinder Kumar. We, therefore, are of the opinion that the conviction of the accused-appellants 1, 2 and 3 under Section 302 read with section 34 requires interference. We, accordingly, set aside the said conviction and sentence imposed on the accused-appellants No. 1, 2 and 3. However, the evidence of PWs 2, 4 and 5 having established the assault on the injured eye witnesses by the aforesaid accused–appellants 1, 2 and 3 we are of the view that the conviction of the said appellants under Section 324 read with Section 34 and Section 323 should be maintained. We, therefore, affirm the said part of the judgment of the High Court along with the sentences imposed.

This will take us to a consideration of the case of the appellant No. 4 Kamal Kumar. The evidence of PWs 2, 4 and has already been held by us to be credible and acceptable. We will, therefore, have to proceed on the basis that the said appellant had inflicted 4-5 knife blows on the abdomen of the deceased. Learned counsel for the appellant has contended that even if the said evidence is accepted in its entirety no offence under Section 302, IPC is made out against the 4the accused-appellant. In this regard, learned counsel for the appellants has tried to persuade us that in the totality of the facts of the present case, the 4the exception to Section 300, IPC would come into operation so as to make the said appellant liable to the lesser offence under Section 304, IPC. The 4the exception to Section 300, IPC is in the following terms:

"Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue and advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

A decision of this Court of somewhat old vintage (***State of Andhra Pradesh v. Rayavarapu Punnayya & Anr. AIR 1977 SC 45***) may be renoticed to remember what would be the correct approach in dealing with the question whether an offence is murder or culpable homicide not amounting to murder. The following passages from the aforesaid decision may be usefully noticed hereunder:

> "21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is [the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clauses of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exception enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, Penal Code.
>
> 22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."
>
> "6. Murder is considered to be an aggravated form of culpable homicide and to render it a murder the case must come within the four clauses of Section 300. Consequently, it needs consideration at the thresh-old as to whether any of the accused has done any act by which he has caused the

death of another person. Incidentally, it requires a consideration as to whether such act(s) amounted to culpable homicide, as envisaged under Section 299. If the evidence on record could evoke a positive answer in affirmation, the stage for consideration of the applicability or otherwise of Section 300 in the light of the clauses elucidating the offence as well as the exceptions engrafted therein arise. If the facts proved by the prosecution do not satisfy any one of the clauses contained in Section 300, it would only be a case of culpable homicide not amounting to murder, punishable under Section 304, the further question as to under which part of the said provision depending upon the nature of evidence and the necessary ingredients proved to attract one or the clauses of Section 300 is satisfied, yet if the evidence could establish that the case falls under any one of the exceptions still the offence said to have been committed would only be culpable homicide not amounting to murder punishable under Section 304 of the Penal Code. Thus, culpable homicide will not also amount to murder if the case falls within any of the exceptions in Section 300 and only by such process of reasoning and elimination, a case for murder can be held proved."

We have given our anxious consideration to the contention raised on behalf of the accused-appellant. There can be no manner of doubt that the death of Rajinder Kumar was occasioned by the assault committed by the accused-appellant No.4 in the abdominal region of the deceased with a knife. A person inflicting 4-5 knife blows on a vital part of the body i.e. abdomen cannot but be attributed with the requisite intention to cause death or alternatively with the intention of causing such bodily injury as is likely to cause the death of the victim. Having reached the aforesaid conclusion, the next question that has to be determined is whether the act of the accused-appellant will come under any of the exceptions enumerated under Section 300, particularly the 4th exception, as contended by the learned counsel for the appellant. While there can be no doubt that the assault on the deceased was committed without any premeditation and also in a sudden fight and even if it is assumed that the said act was in the heat of passion, what cannot be lost sight of is the infliction of 4-5 knife blows in the abdominal region of the deceased. Had the appellant No. 4 dealt a single blow on the deceased, perhaps, it would have been open for us to seriously consider the applicability of the latter part of the 4th exception to Section 300 to the present case, namely, that the appellant had not taken undue advantage or had not acted in a cruel or unusual manner. In the present case, no such conclusion can be reasonably reached in view of the repeated blows inflicted by accused-appellant No. 4 on a vital part of the body of the deceased. Having carefully weighed the facts and circumstances of the case and the options and

conclusions that the said facts would reasonably admit, we are of the opinion that the correct conclusion in the present case would be that the accused-appellant No. 4 had the requisite intention if not of causing death, at least, of causing such bodily injury which was likely to cause death. The acts attributable to the accused-appellant No.4 do not also attract any of the exceptions enumerated under Section 300 IPC. We, therefore, affirm the conviction and the sentence of the accused-appellant No. 4 under Section 302. Insofar as the conviction of the said accused-appellant for the offences under Sections 324 and 323 read with Section 34 is concerned, we will have no hesitation in affirming the same.

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

**Criminal Medical Negligence – Degree of negligence should be much higher i.e. gross or of a very high nature – Procedure required to be followed for prosecuting doctors on charge of Criminal Negligence – As laid down in *Jacob Mathew's case, AIR 2005 SC 3180*.**

## A.S.V. Narayanan Rao v. Ratnamala and another

**Judgment dated 13.09.2013 passed by the Supreme Court in Criminal Appeal No. 1433 of 2013, reported in (2013) 10 SCC 741**

**Extracts from Judgment:**

This Court in ***Jacob Mathew v. State of Punjab, AIR 2005 SC 3180*** considered exhaustively the various aspects of negligence on the part of a doctor and laid down ***inter alia***:

> "48..... (5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of ***mens rea*** must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot from the basis for prosecution.
>
> (6) The word 'gross; has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304-A IPC has to be read as qualified by the word 'grossly.' "

This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from

frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for prosecuting doctors on charges of criminal negligence. This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed:

> "52..... we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally e expected to give an impartial and unbiased opinion applying the ***Bolam v. Friern Hospital Managment Committee, (1957) 2 All ER 118 (QB)*** test to the facts collected in the investigation doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records."

However, the High Court thought it fit to continue the prosecution of the appellant for two reasons:

> (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hrs in conducting bypass after the angioplasty failed; and
>
> (2) that the appellant did not consult a cardio anaesthesian before conducting an angioplasty.

According to the High Court, both the abovementioned "lapses" on the part of the appellant "clearly show the negligence" of the appellant.

The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr Surajit Dan given before the A.P. State Consumer Disputes Redressal Commission in CD NO. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the abovementioned Dr. Dan's evidence was recorded wherein Dr Dan in his cross-examination stated as follows:

> ".....Whenever cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case.....
>
> He further stated
>
> ".....The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery....."
>
> However, the same doctor also stated:
>
> ".....The time gap between the angioplasty failure and the surgery is not the factor for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

Unfortunately, the last of the above-extracted statements of Dr Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

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**276. INDIAN PENAL CODE, 1860 – Section 375 clause "Fourthly"**
**CRIMINAL PROCEDURE CODE, 1973 – Section 228**
**Man already married – Man contracting second marriage with prosecutrix without taking divorce from his first wife – Physical relation with the prosecutrix from time to time – On being told by the first wife about the marriage of accused with her, prosecutrix lodged an FIR – Availability of plea of consent to accused – Held, when a woman gives her consent to a man to whom she believes to be her husband and she was lawfully married with him, then the offence committed by that man may come within the purview of Section 376 of the IPC.**

**Surekha Singh v. State of M.P. & Ors.**
**Order dated 19.12.2013 passed by the High Court of M.P. in Cr. Rev. No. 309 of 2013 (Jabalpur), reported in I.L.R. (2013) M.P. 3000**

**Extracts from Order :**

The main question in the case is as to whether prima facie the offence under Section 376 of IPC shall be made out or not. In this connection the learned 7th Additional Sessions Judge, Bhopal has mentioned that it is apparent that the accused Satyendra Kumar Vyas Committed intercourse with the prosecutrix due to her consent, and therefore no offence under Section 376 of IPC is made out. At the most offence under Section 493 of IPC may constitute. In this connection, if the Provision under Section 375 and 376 of IPC is perused, then it would be apparent that a woman gives her consent to a man to whom she believes to be her husband and she was lawfully married with him, then the offence committed by that man may come within the purview of Section 376 of IPC. The provision of Section 375 (Fourthly) of IPC may be read as under:

> "With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married."

On the plain reading of the aforesaid provision, it would be apparent that the accused Satyendra Kumar Vyas gave an apprehension that the prosecutrix was her wedded wife and thereafter she permitted him for the intercourse, and therefore, prima facie Satyendra Kumar Vyas has committed the offence under Section 376 of IPC. In this connection the law laid down by Hon'ble the Apex Court in the case of ***Bhupinder Singh v. Union Territory of Chandigarh [(2008) 8 SCC 531]*** may be read. Paras 15 and 16 of the said judgment reads as under:

> "15 Clause "Fourthly" of Section 375 IPC reads as follows:
>
> "375. Rape – As man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions
>
> * * *
>
> ***Fourthly***- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> * * *
>
> 16. Though it is urged with some amount of vehemence than when complainant knew that he was a married man, Clause "Fourthly" of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is

concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab initio. In the event, the appellant-accused could not have lawfully married the complainant. A bare reading of clause "Fourthly" of Section 375 IPC makes this position clear."

In the light of the aforesaid judgment, where the prosecutrix of that case had the knowledge that her husband was already married, still Hon'ble the Apex Court found that the accused was guilty for the offence under Section 376 of IPC. In the present case, the prosecutrix did not know that the accused Satyendra Kumar Vyas was already married and therefore, in the present case the prosecutrix gave her consent due to her marriage performed with the accused Satyendra and hence the crime of acused falls within the purview of Section 375 (Fourthly) of IPC and offence under Section 376 of IPC is ***prima facie*** constituted. The parents of accused Satyendra Kumar Vyas were residing with Satyendra Kumar Vyas and the prosecutrix and they did not inform about the actual position, and therefore they participated in the criminal conspiracy done by the accused Satyendra Kumar Vyas. Under such circumstances, the charge of offence under Section 376 of IPC shall also be framed against the remaining accused persons with the help of Section 120-B and Section 34 of IPC.

On the basis of the aforesaid discussion, it would be apparent that the learned Additional Sessions Judge has committed an error of law in discharging the accused persons from the charge of offence under Section 376 of IPC, and therefore the order passed by the 7th Additional Sessions Judge, Bhopal appears to be preverse.

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**277. INDIAN PENAL CODE, 1860 – Sections 498-A, 304-B and 306**
**EVIDENCE ACT, 1872 – Sections 113-A and 113-B**

**(i) Absence of a viscera report correct effect of – A chemical examination of viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under section 304-B IPC or under section 306 of the IPC or takes place; in a case of an unnatural death inviting section 304-B of the IPC or section 306 of the IPC as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.**

**(ii) Distinction between Sections 304-B and 306 IPC – Section 306 of the IPC is wide enough to take care of an offence under section 304-B also – However, an offence under section 304-B of the IPC has been made a far of serious offence with imposition of minimum period of seven years imprisonment with the sentence going upto imprisonment for life – Offence under section 304-B is treated separately from an offence under section 306 of the**

**IPC – These two sections are not mutually exclusive – If a conviction for causing a suicide is based on section 304-B of the IPC, it will necessarily attract section 306 of the IPC – However, the converse is not true**.

**(iii) "Otherwise than under normal circumstance" – Scope – An unnatural dowry death, whether homicidal or suicidal would attract section 304-B of the IPC.**

## Bhupendra v. State of M.P.

**Judgment dated 11.11.2013 passed by the Supreme Court in Criminal Appeal No. 1774 of 2008, reported in 2013 (III) DMC 726 (SC)**

**Extracts from Judgment:**

***Absence of viscera report:***

Normally, the viscera are preserved and submitted for chemical analysis under the following circumstances: (1) When the investigating officer requests for such an examination; (2) When the medical officer suspects the presence of poison by smell or some other evidence while conducting an autopsy on injury cases; (3) To exclude poisoning, in instances where the cause of death could not be arrived at on post mortem examination and there is no natural disease or injury to account for it, and (4) In decomposed bodies.

In ***Taiyab Khan and others v. State of Bihar (Now Jharkhand), (2005) 13 SCC 455,*** it was urged that the viscera report would have shown whether the dowry death of the appellant's wife occurred on account of consumption of poison. Since the chemical examination report of the viscera was not received, it could not be said to be a case of death by poisoning. This contention was rejected by holding that factually the case was one of an unnatural death. Therefore, since Section 304-B of the IPC refers to death which occurs otherwise than under normal circumstances, the absence of a viscera report would not make any difference to the fate of the case. In other words, for the purposes of Section 304-B of the IPC the mere fact of an unnatural death is sufficient to invite a presumption under Section 113-B of the Evidence Act, 1872.

The view expressed in ***Taiyab Khan*** (supra) was reiterated in ***Ananda Mohan Sen and another v. State of West Bengal, (2007) 10 SCC 774.*** In that case the exact cause of death could not be stated since the viscera preserved by the autopsy surgeon were to be sent to the chemical expert. In fact, one of the witnesses stated that the unnatural death was due to the effect of poisoning but he would be able to conclusively state the cause of death by poisoning only if he could detect poison in the viscera report. This Court noted that it was not in dispute that the death was an unnatural death and held that the deposition of the witness indicated that the death was due to poisoning. It is only the nature of the poison that could not be identified. In view of this, the conviction of the appellant under Section 306 of the IPC was upheld, there being no charge under Section 304-B of the IPC.

These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under Section 306 of the IPC takes place; in a case of an unnatural death inviting Section 304-B of the IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 of the IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.

***Mutual exclusivity of Sections 304-B and 306 of the IPC :***

The second contention is also without any substance. In ***Satvir Singh and others v. State of Punjab and another, (2001) 8 SCC 633,*** this Court drew a distinction between Section 306 of the IPC and Section 304-B of the IPC and Section 304-B of the IPC in the following words:

> "Section 306, IPC when read with Section 113-A of the Evidence Act has only enabled the Court to punish a husband or his relative who subjected a woman to cruelty (as envisaged in Section 498-A, IPC) if such woman committed suicide within 7 years of her marriage. It is immaterial for Section 306, IPC whether the cruelty or harassment was caused "soon before her death" or earlier. If it was caused "soon before her death" the special provision in Section 304-B IPC would be invocable, otherwise resort can be made to Section 306, IPC."

It was held that Section 306 of the IPC is wide enough to take care of an offence under Section 304-B also. However, an offence under Section 304-B of the IPC has been made a far more serious offence with imposition of a minimum period of seven years imprisonment with the sentence going upto imprisonment for life. Considering the gravity of the offence it is treated separately from an offence punishable under Section 306 of the IPC. On this basis, this Court rejected the contention that if a dowry related death is a case of suicide it would not fall within the purview of Section 304-B of the IPC at all. Reliance in this regard was placed on ***Shanti and another v. State of Haryana, (1991) 1 SCC 371*** and ***Kans Raj v. State of Punjab and others, (2000) 5 SCC 207,*** wherein this Court held that a suicide is one of the modes of death falling within the ambit of Section 304-B of the IPC.

In ***Shanti*** (supra) this Court was concerned with a death that had occurred "otherwise than under normal circumstances" as mentioned in Section 304-B of the IPC. It was held that an unnatural dowry death, whether homicidal or suicidal, would attract Section 304-B of the IPC. This expression was also considered in ***Kans Raj*** (supra) where it was held that it would mean death, not in the normal course, but apparently under suspicious circumstances, if not caused by burns or bodily injury. In ***Kans Raj*** (supra) the conviction of the husband of the deceased was upheld both for offences punishable under Section 304-B of the IPC and Section 306 of the IPC also.

We are, therefore, of the opinion that Section 306 of the IPC is much broader in its application and takes within its fold one aspect of Section 304-B of the IPC. These two sections are not mutually exclusive. If a conviction for causing a suicide is based on Section 304-B of the IPC, it will necessarily attract Section 306 of the IPC. However, the converse is not true.

Consequently, we reject the second contention urged by the learned Counsel for the appellant.

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**278. LAND REVENUE CODE, 1959 (M.P.) – Section 131**

**(i) Private easement, connotation of – It is a customary easement i.e. right of way and has wider meaning with that of right of easements as envisaged in the Easements Act, 1992.**

**(ii) Right of way – Customary easement – Plaintiff admitted that suit land is being used as path since the time of ancestors – Right is ancient, reasonable, certain, regular and is neither opposed to public policy nor forbidden by law – Held, no obstruction can be made by the plaintiff in construction of a pucca road on the path for the convenience of public at large.**

**(iii) Essential ingredients of valid custom – Stated.**

**State of M.P. Through Collector, District Dhar v. Smt. Keshar Bai**

**Judgment dated 02.04.2013 passed by the High Court of M.P. (Indore Bench) in S.A. No. 35 of 2000, reported in 2013 (IV) MPJR 197**

**Extracts from Judgment**

Section 131 of M.P. Land Revenue Code, 1959 (in short "Code") speaks about the rights of way and other private easement. According to sub-section (1) of this section if in the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of village, otherwise than by the recognized roads, paths or common land including those road and paths recorded in the village Wajib-ul-arz prepared under Section 342 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned. According to me, this private easement is customary easement and is having wider connotation with that of rights of easement as envisaged in the Indian Easements Act, 1882 (in short "Easements Act"). Sub-section (1) of Section 131 (1) of the Code is not a kin of that of section 4 of easements Act. The scope of section 131 (1) of the code is if a particular route is being used by a cultivator to access to his fields etc. and if any dispute has arisen, the Tahsildar may with reference to previous custom may decide the said disputed by considering the conveniences of parties concerned. Recently, by interpreting section 131 of the Code the Supreme Court in ***Ramkanya Bai***

***(Smt.) and another v. Jagdish and others, 2011 RN 361*** has held that when a person who does not have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such can resist such assertion or obstruct the exercise of the easementary right and also approach the civil Court to declare that the defendant has no easementary right of the nature claimed over his land and/or that the defendant should be prevented from inserting such right of interfering with his possession and enjoyment and such a suit is not barred. Thus, the civil Court is required to see whether the said route was being used as private easement with reference to the previous custom. Since the defendant herself has admitted that the suit land is being used as path by the villagers to carry their cattle, bullock-carts and even tractors from the period of her ancestors, certainly the ancient custom has been proved and therefore when there is specific finding of two Courts below that suit land is being used as path from the time of ancestors of the plaintiff and the villagers were using the path as their customary easement, in these facts and circumstances, I am of the view that plaintiff is not entitled to for any decree of injunction.

To constitute a valid custom, the essential ingredients are as under :

(i) It should be ancient;

(ii) certain;

(iii) reasonable;

(iv) should not be opposed to morality or public policy;

(v) not forbidden by law; and

(vi) regular.

The aforesaid ingredients to tally in the present factual scenario since the plaintiff herself has admitted that the suit land is being used as path throughout from the time of her ancestors. Hence, I am of the view that the plaintiff has no case. The path is already there for considerable long period and is ancient reasonable; certain; regular; is not opposed to public policy; and is not forbidden by law and therefore for the convenience of public at-large of the village if path is being constructed by constructing a pakka raod it cannot be obstructed by plaintiff. The substantial questions of law no. (1) and (2) are thus answered against the plaintiff-respondent and in favour of appellants.

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

**Application for condonation of delay of 6 years and 121 days by the State – Holding that the Court should adopt lenient view with justice-orientated approach and keeping in view the state of the litigation *(Nazul)* land and other circumstances, application allowed.**

## State of M.P. v. Dr. Naresh Grover

**Order dated 16.08.2013 passed by the High Court of M.P. in First Appeal No. 426 of 2012, reported in 2013 (5) MPHT 474**

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**280. M.P. MUNICIPALITIES ACT, 1967 – Section 319**

**Bar of suit in absence of notice – Applies only in respect of anything done or purporting to be done under the Act – Withholding the amount due to the employee on account of leave encashment cannot be said to be an act done or purporting to be done under the provisions of the Act – Hence, suit by municipal employee instituted without giving such notice is maintainable.**

## I.B. Mishra v. Nagar Panchayat, Sohagpur & ors.

**Judgment dated 03.09.2013 passed by the High Court of M.P. in S.A. No. 879 of 2003 (Jabalpur) reported in I.L.R. (2013) M.P., 2917.**

**Extracts from Judgment:**

I have considered the respective submissions made by learned counsel for the parties and have perused the record. The relevant extract of Section 319 of the Act reads as under:

> "**319 Bar of suit in absence of notice-** (1) No suit shall be instituted against any Councillor, officer or servant thereof or any person acting under the direction of any such Council, Councillor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered or left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or usual place of abode, and the plaint shall contain a statement that such notice has been so delivered or left.
>
> (2) Every such suit shall be dismissed unless it is instituted within eight months from the date of the accrual of the alleged cause of action."

Thus, from perusal of Section 319 (1) it is apparent that notice has to be given to the Municipal Council in respect of anything done or purporting to be done under the Act,. If the suit is filed by the plaintiff in respect of anything done or purporting to be done under the Act, then provision of Section 319 of the Act would be attracted. The action of the respondent in withholding the amount which is due to the appellant on account of leave encashment cannot be said to be an act done or purporting to be done under the provisions of the Act therefore, the provisions of Section 319 of the Act has no application in the facts of the

case. Similar view has been taken by a Bench of this Court in ***Indore Nagar Palika Nigam v. Ramakant, 1982 MPWN 182 (S.N. 133)***. The trial Court has held that on 28.3.1998 the cause of action accrued to the plaintiff and the suit was filed on 9.9.1998 i.e. well within limitation. As stated supra, since the provisions of Section 319 of the Act do not apply in the facts of the case therefore, the suit has rightly been held to be within limitation by the trial Court.

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**281. MOTOR VEHICLES ACT, 1988 – Sections 2(30) and 168**

**"Owner" – For the purpose of section 168 of the Motor Vehicles Act, 1988, a person in whose name a motor vehicle stands registered in the R.T.O. on the date of accident can only be described as "owner".**

**Bharat Singh & anr. v. Madan Kunwar & ors.**

**Order dated 10.04.2013 passed by the High Court of M.P. in M.A. No. 734 of 2009 (Indore), reported in I.L.R. (2013) M.P. 2859**

**Extracts from Order :**

After hearing learned counsel for the parties up to considerable length, to appreciate their rival contentions in the present case, it is to be seen that definition of owner as specified in the MV Act would cover the registered owner only or it also includes the person who is in possession of the vehicle under an agreement. To appreciate the aforesaid issue definition so specified under the Motor Vehicles Act is required to be noted which is reproduced as under :

> "2(30) "owner" means person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement", or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

After careful examination of the aforesaid provision, it is clear that, if transfer of a registered vehicle has been made within the State, then within 14 days of such transfer in the manner prescribed by the Central Government along with such documents an intimation to the registering authority in whose jurisdiction the transfer is to be made effective is required to be given. Simultaneously, a copy of the said report is also required to be furnished to the transferee. The manner has been prescribed under the Central Motor Vehicles Rules, 1989. Rule 55 deals with the said contingencies, whereby it is clear that on transfer of ownership of the motor vehicle, transferor is required to report the said fact on form No. 29 to registering authority having jurisdiction. Along with said form, certificate of registration, certificate of insurance and fee as specified under Rule 81, is required to be affixed.

Thus, if compliance as specified under Section 50(1)(a)(i) and Rule 55 has been made by the transferor i.e. respondent No.7, then compliance as specified under Section 50 may be accepted, otherwise the case in hand is not

distinguishable from the case of ***Pushpa alias Leela and others v. Shakuntala and others, (2011) 2 SCC 240***. On perusal of the record of present case, document E. D/1 is an affidavit of Pradeep and Bhanu Pratap Singh Ex D/2 is an intimation given to R.T.O., Mandsaur by respondent No. 7 along with copy of affidavit. Ex D/4 is the UPC indicating name of RTO, Mandsaur and the Insurance Company. Thereby, it is clear that Form No.. 29 as prescribed under Rule 55 of the Central Motor Vehicles Rules has not been sent. The registration certificate, insurance policy and fees have also not been attached. Intimation to the transferee has also not been given as apparent from the UPC. In such circumstances, respondent No.7 has not shown the compliance of the provisions of Section 50(1)(a)(I) of the Motor Vehicles Act, as prescribed in rules.

Learned counsel for respondent No. 7, again at this stage, referring Section 50(1)(b) and 50(3) of the Motor Vehicles Act, has contended that it is not only the duty of the transferor but it is also the duty of the transferee to intimate regarding sale of transaction to the registering authority in whose jurisdiction registration of the vehicle is there. As the transferee has also failed to produce any document to comply with the said provision, however, in consequence thereof as per Section 50(3), transferee or transfer or would be liable to pay the penalty only as specified under Section 177. In such circumstances, applying the principle of equity and good conscience and looking to the transaction of the sale it be presumed that the ownership was transferred and son of the appellants was the owner of offending vehicle on the date of accident. It is further his contention that non-compliance of provision of Section 50(I)(a)(i) would only lead to penal consequence and it is having nothing to do with the compliance of the provisions of the Act. After hearing him and on going through the aforesaid provisions, no doubt, it is dear that the transferor and transferee, both were required to imitate to the registering authority in a manner so prescribed. But, in the present case son of the appellants has denied his ownership disputing the agreement to sale. It is respondent No.7 Pradeep Kumar who has stated that Bhanu Pratap Singh, son of the appellants is the owner, however, burden of proof lies on him. As stated, respondent No.7 is transferor, thus, to prove the fact that the vehicle after sale was in possession of Bhanu Pratap Singh, is required to be proved by respondent N.7. As per the defence taken by respondent No.7, he has proved that as per Section 50(1)(a)(i) the registering authority was intimated by himas per procedure prescribed. In absence of the said proof and looking to the defence taken by Bhanu Pratap Singh that he is not the owner of the vehicle and his name was not registered in R.T.O. and it is not a case of hire-purchase hypothecation or lease agreement, thus the contention advanced by the learned counsel for respondent No.7, is devoid of any substance, hence, repelled.

It is not disputed by respondent No.7 that on the date of accident, the vehicle in question was registered in the RTO in his name, however, in the fact of this case he can only be described is a “owner” for the purpose of Section 158 of the Motor Vehicles Act and to carry out the purpose of the M.V. Act. In

such circumstances, the finding to absolve him from the liability to pay compensation and to fasten such liability against the son of the appellants as recorded by the Claim Tribunal is not in conformity to the provisions of law, hence set aside. In consequence thereto, it is directed that registered owner of the vehicle may satisfy the liability to pay compensation under the impugned award.

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**282. MOTOR VEHICLES ACT, 1988 – Section 123**

**Passenger travelling on the rooftop of bus – Duty of conductor and driver – It is the statutory duty of the conductor and the driver of the bus to have noticed if there are any passengers on the rooftop and asked them to alight from the rooftop and board the bus – The driver of the bus is also enjoined with the duty to ensure that the bus moves only after safe travelling conditions for the passengers.**

**If there was no evidence regarding the deceased refusing to alight from the roof top, in spite of the directions from the driver or the conductor that he was cautioned about the risk, no negligence was fixed on the deceased.**

## Jayamma and others v. Rizvan and others

**Judgment dated 13.01.2012 passed by the High Court of Karantaka in M.F.A. No. 360 of 2008 (M.V.), reported in 2013 ACJ 2834**

**Extracts from Judgment:**

The Hon'ble Supreme Court (sic Division Bench of this High Court) in the case of ***Shivleela v. Karnataka State Road Trans. Corpn., 2004 ACJ 759 (Karnataka),*** observed that the passenger was travelling on the rooftop of the bus and the driver and conductor pleaded that they did not have any knowledge about the deceased having climbed the bus and it was held that the accident was the result of contributory negligence on the part of the deceased as well as the driver and the conductor of the bus and fixed the percentage of negligence between them in the ratio of 50:50.

In the case of ***Managing Director, Karnataka State Road Trans. Corpn. v. Sunanda, 2004 ACJ 889 (Karnataka)***, the Supreme Court (sic Division Bench of this court) held that it was the duty of the conductor and the driver of the bus to have noticed if there were any passengers on the rooftop and asked them to alight from the rooftop and board the bus. The conductor of the bus has to comply with the statutory duty and the driver of the bus was also enjoined with the duty to ensure that the bus moves only after there was safe travelling condition for the passengers. It was held that since there was no evidence to show that the deceased had refused to alight from the rooftop, in spite of the directions from the driver or the conductor or that he was cautioned about the risk, no negligence was fixed on the deceased.

In this regard, a Full Bench of this court, in the case of ***North East Karnataka Road Trans. Corpn. v. Vijayalaxmi, 2012 ACJ 1968 (Karnataka)***, after referring to the aforesaid two decisions, has observed that the conductor or the driver or the owner of the bus must specifically plead the contributory negligence and in support of the said plea, must adduce evidence and if such evidence is adduced, then the court has to appreciate the material on record and decide the question as to the extent of contributory negligence for the accident.

Further, it can be seen that section 123 of the Motor Vehicles Act stipulates that no person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle. In the instant case, admittedly the deceased was travelling on rooftop of the bus and there is no oral or documentary evidence to show that either the driver or the conductor of the bus took due care and caution to see that no person is carried on the rooftop of the bus. Further, it is not in dispute that as on the date of accident, the vehicle in question was duly insured and there is no such evidence, oral or documentary adduced by the insurer, to substantiate its case that they are not liable to pay the compensation. Further, it is also not the case of the insurer that the bus was not covered by insurance and that the driver of the vehicle did not possess a valid driving licence.

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**283. MOTOR VEHICLES ACT, 1988 – Sections 149, 163 and 170**

**(i) Can owner or insurer be allowed to prove contributory negligence or default or wrongful act on the part of injured or claimant? Held, No – Otherwise, it would defeat the very object and purpose of section 163 A of the Act but the matter referred to a larger Bench in the light of *Sinitha's case, 2012 ACJ 1 (SC)*.**

**(ii) Point Nos. (iii) to (v) referred in *Shila Datta's case, 2011 ACJ 2729 (SC) (3 Judge-Bench)* are also referred to a larger bench for consideration.**

## United India Insurance Co. Ltd. v. Sunil Kumar and another

**Judgment dated 29.10.2013 passed by the Supreme Court in C.A. No. 9694 of 2013, reported in 2013 ACJ 2856**

**Extracts from Judgment:**

We are, of the view that liability to make compensation under section 163- A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an inquiry under section 163-A. Section 163-A does not make any provision for apportionment of the liability. If the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default or wrongful act on the part of the victim or claimant, naturally it would defeat the very object and purpose of section 163-A of the Act. Legislature never wanted the claimant to plead or establish negligence on the part of the owner or the driver. Once it is established that death or permanent disablement occurred during the course of the user of the vehicle and the vehicle is insured,

the insurance company or the owner, as the case may be, shall be liable to pay the compensation, which is a statutory obligation.

We therefore, find ourselves unable to agree with the reasoning of the two judge Bench in ***National Insurance Co. Ltd. v. Sinitha, 2012 ACJ 1 (SC)***. Consequently, the matter is placed before the learned Chief Justice of India for referring the matter to a larger Bench for a correct interpretation of the scope of section 163-A of the Motor Vehicles Act, 1988, as well as the point Nos. (iii) to (v) referred to in ***United India Insurance Co. Ltd. v. Shila Datta, 2011 ACJ 2729 (SC)***.

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**284. MOTOR VEHICLES ACT, 1988 – Sections 161 and 166**

**An unknown truck hit a motor cyclist causing death of his wife and infant child – Tribunal did pass award against insurance company of motor bike but the motor cyclist was not found liable for the accident – Finding of Tribunal reversed by Hon'ble the High Court.**

**Varsha v. Manager, Iffco Tokio General Insurance Co. Ltd.**

**Judgment dated 06.11.2012 passed by the High Court of M.P. in M.A. No. 2776 of 2005, reported in 2013 ACJ 2466**

**Extracts from Judgment:**

In the present case, the claim petition was filed by the appellants. The offending motorbike was being driven by appellant No. 3. The truck, which has caused the injuries and also the death of wife and son of appellant No. 3, was not known. In the facts and circumstances of the case since appellant No. 3 was not liable for the accident, therefore, there was no justification on the part of the learned Tribunal to hold the respondent liable for payment of compensation. In the facts and circumstances of the case appeal filed by appellants has no merits and the same stands dismissed and the appeal filed by the respondent stands allowed and the impugned award is set aside. However, it is made clear that the appellants are not liable to refund the amount, which has already been received by the appellants. The amount, which has not been withdrawn by the appellants, shall be paid to the insurance company.

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***285. MOTOR VEHICLES ACT, 1988 – Section 163-A**

**Section 163-A of the Motor Vehicles Act, applicability of – Accident occurred on account of rash and negligent driving of vehicle by the owner – Vehicle was insured for third party and own damage in certain conditions – No additional premium paid by the owner for his personal injuries or death making the Insurance Company liable for payment to his legal heirs – Held, since the deceased owner had not got comprehensive package policy for his personal injuries or death, therefore, claimants are not entitled for compensation for the death of the owner – Further held, provisions of section 163-A of the Act shall have no application in such cases.**

**Deependra Kumar and others v. Oriental Insurance Company Ltd.**

**Order dated 01.08.2013 passed by the High Court of M.P. in Misc. Appeal No. 486 of 2005, reported in 2013 (4) MPLJ 386**

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**286. MOTOR VEHICLES ACT, 1988 – Section 163 (A)**
**MOTOR VEHICLES RULES, 1994 (M.P.) – Rule 240**
**CIVIL PROCEDURE CODE, 1908 – Order 23 Rule (1) (3)**
**Withdrawal of claim petition by specifically mentioning that they want withdrawal of claim due to mistake of law – It means that the claim may be filed again by curing the mistake – In such a case, the court must be cautious enough to grant the liberty *suo motu* and Tribunal is not justified in rejecting the claim by considering the provisions of O.23 R. (1) (3) of CPC.**

**Baijanti (Smt.) & ors. v. Laxmi Prasad Kanoujia & anr.**

**Judgment dated 20.11.2013 passed by the High Court of M.P. in M.A. No. 2046 of 2013 (Jabalpur), reported in I.L.R. (2013) M.P. 2934**

**Extracts from Judgment :**

The appellants/claimants have filed earlier claim before the Tribunal under Section 163(A) of the Motor Vehicle Act. Thereafter, considering the technicalities the claim petition was withdrawn and thereafter, claim petition under Section 166 of the Motor Vehicles Act has been filed which has been dismissed by the learned Tribunal by impugned order on the ground that no liberty to file fresh claim petition has been obtained by the claimants and second claim is barred by provisions of Order 23 Rule 1 Sub–Rule 3.

Learned counsel for the appellants/claimants submitted that he has prayed before the Tribunal for permission to withdraw the claim with liberty to file fresh claim but the order rejecting the earlier claim does not mention about such liberty even then the learned Tribunal is not justified in rejecting the claim as the provisions of Order 23 Rule 1 of CPC are not applicable to the Clam Cases.

Learned Counsel for the appellants/claimants have cited judgment by Hon'ble Punjab and Haryana High Courts passed in the matter of ***Bimla Devi and another v. Raj Bala and others*** dated 10.03.2009 in Civil Revision No. 4995/08 in which it has been held that the provisions of Order 23 Rule 1 of CPC are applicable only to civil suits besides the earlier withdrawal being a conditional withdrawal. The Motor Vehicles Act is beneficial piece of legislation meant for the benefit of the appellants/claimants. It is well settled that the rule and procedure are meant to advance the cause of justice rather than scuttle the same on hyper technicalities.

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

**Assessment of just compensation in injury cases – Injured aged 17 years is a student – Due to accident he shall not be in a position to speak for the rest of his life and shall not be in a position to do anything except breathing for his life – He would require care of a person everyday so as to see that he is given food, bath and even answering natural call – Tribunal awarded Rs. 18,75,800 in various heads – High Court reduced the award to Rs. 12,45,800 – Apex Court upheld the award of Tribunal looking to the condition of injured.**

**R.Venkata Ramana and another v. United India Insurance Co. Ltd. and others**

**Judgment dated 17.09.2013 passed by the Supreme Court in C.A. No. 8083 of 2013, reported in 2013 ACJ 2641**

**Extracts from Judgment:**

From the order of the Tribunal, we find that the appellants had in fact proved that they had spent Rs. 3,49,128 towards medical expenses for treating their son. They had to purchase certain instruments worth Rs. 58,642 for making life of their son comfortable and Rs. 31,000 had been spent towards nursing and Rs.1,37,000 had to be spent for physiotherapy. Looking at the fact that Rajanala Ravi Krishna will have to remain dependent for his whole life on someone and looking at the observations made by the Tribunal in our opinion, his life is very miserable and there would be substantial financial burden on the appellants for the entire life of their injured son. At times it is not possible to award compensation strictly in accordance with the law laid down as in a particular case it may not be just also. We are hesitant to say that it is a reality of life that at times life of an injured or sick person becomes more miserable for the person and for the family members than the death. Here is one such case where the appellants, even during their retired life, will have to take care of their son like a child especially when they would have expected the son to take their care.

Though the High Court has rightly followed the principle laid down in the case ***Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC),*** in our opinion, the amount of compensation awarded by the Tribunal is more just. The Tribunal awarded a lump sum of Rs.10,00,000 and the amount of expenditure incurred by the appellants for treating their son. The total amount awarded by the Tribunal was Rs.18,75,800 which, in our opinion, is not too much and in our opinion, the said amount should be awarded to the appellants.

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

**Assessment of just compensation in death case – Deceased, aged 19 years was a student of engineering course – Claimants/parents aged mother 42 years and father 45 years – High Court awarded ` 2,00,000 compensation – Apex Court awarded a lump-sum compensation of ` 7,00,000.**

## Radhakrishna and another v. Gokul and others

**Judgment dated 31.10.2013 passed by the Supreme Court in C.A. No. 9858 of 2013, reported in 2013 ACJ 2860**

**Extracts from Judgment:**

In the present case, the accident occurred on 20.1.2003. The deceased was 19 years old and was a student of Engineering course. The Tribunal determined the compensation by taking his annual income to be Rs. 15,000 and deducted 1/3rd for personal expenses. In ***Arvind Kumar Mishra v. New India Assurance Co. Ltd., 2010 ACJ 2867 (SC),*** the Bench proceeded on the assumption that after completion of the Engineering course, the appellant could have been appointed as Assistant Engineer and earn ` 60,000 per annum. However, keeping in view the degree of disability, his estimated earning was taken as ` 42,000 per annum and accordingly the amount of compensation was awarded. By applying the same yardstick and having regard to the age of the parents of the deceased, i.e., 45 and 42 respectively, we feel that ends of justice will be served by awarding a lump sum compensation of ` 7,00,000 to the appellants.

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

**Assessment of just compensation in death cases – Deceased aged 22 years was a student of III year in engineering course in computer science – Claimant parents mother aged 42 years and father 46 years – Tribunal awarded ` 2,43,500 – High Court held that keeping in view the future prospects and the scope of engineering jobs in our country, according to which the junior engineer at his initial stage of the career is getting the package of between ` 3,00,000 and ` 5,00,000 per annum and as per evidence of the colleague of the deceased, now-a-days, engineers are getting the job with the package of ` 2,00,000 to ` 2,25,000 per annum – High Court enhanced compensation to ` 12,75,000.**

## Om Prakash Gupta and others v. Wajeer Ahmed Ali Nayak Wadi and another

**Judgment dated 27.02.2013 passed by the High Court of M. P. in M.A. No. 1107 of 2005, reported in 2013 ACJ 2498**

**Extracts from Judgment:**

Taking into consideration the future prospect of the engineers in our country and availability of jobs in such branch so also the expected imaginary salary of the Engineering branch, in the available scenario, especially in view of the deposition of Sandeep, AW 2, who categorically stated about initial package of the job between ` 2,00,000 and ` 2,50,000 per annum, I take the expected imaginary income of the deceased at ` 15,000 per month which he could have earned just after two years on obtaining the degree, had he been alive, the same comes to ` 15,000X 12= ` 1,80,000 per annum and in the available scenario,

claimants being his parents, father and mother, then in view of the decision of the Apex Court in the matter of ***Sarla Verma v. Delhi Transport Corpotation, 2009 ACJ 1298 (SC),*** the court has to deduct first fifty per cent sum on account of expenses of the deceased which he would have spent on himself, had he been alive then the annual expected dependency of the appellant Nos. 1 and 2 comes to ` 90,000 per annum. Keeping in view the age of the mother 42 years, which is less than that of father, in view of the aforesaid case of ***Sarla verma*** (supra), the multiplier of 14 is applicable. On applying the same, the total dependency comes to ` 12,60,000. Besides this, appellant Nos. 1 and 2 are also entitled to get ` 15,000 towards traditional heads like funeral expenses, loss to estate and loss of love and affection.

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

**Assessment of just compensation in death case – Deceased, aged 24 years was a business manager in a private concern – Claimants/parents aged mother 46 years and father 51 years – Tribunal adopted multiplier of 17 and awarded ` 24,65,668 as compensation.**

**High Court adopted multiplier of 12 and awarded ` 15,14,648 as compensation.**

**Apex Court adopted multiplier of 18 and awarded ` 20,64,800 as compensation with funeral expenses of ` 10,000.**

## M. Mansoor and another v. United India Insurance Co. Ltd. and another

**Judgment dated 03.10.2013 passed by the Supreme Court in C.A. No. 8612 of 2013, reported in 2013 ACJ 2849**

**Extracts from Judgment:**

The appellants produced the salary certificate of the deceased Amjath Khan Arabu, which has been marked as Exh. P8. It shows that the deceased was earning ` 18,100 per month. The Claims Tribunal has rightly taken into consideration the aforesaid income for computing the compensation. The annual income comes to ` 2,17,200. If 50 per cent of the said income is deducted for personal and living expenses of the deceased the contribution to the family will be ` 1,08,600. At the time of the accident the deceased Amjath Khan Arabu was a bachelor about 24 years old hence on the basis of the decision in ***Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC),*** applying the multiplier of 18, the amount will come to ` 19,54,800. Besides this amount, the claimants are entitled to get ` 50,000 each for the loss of affection of the son, i.e.,
` 1,00,000 and ` 10,000 on account of funeral and ritual expenses. Therefore, the total amount comes to ` 20,64,800 and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6 per cent per annum from the date of the filing of the claim petition till realization.

**Note:-** Readers are requested to go through the judgment of ***Municipal Corporation of Greater Bombay v. Shri Laxman Iyer and another, AIR 2003 SC 4182*** for multiplier in case where deceased was bachelor and for funeral expenses ***Rajesh and others v. Rajbit Singh and others, 2013 ACJ 1403 (3 Judge Bench)***

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

***Just compensation :***

**(i) The post of driver is a skilled job and his income is ` 6,000 per month the Tribunal should take judicial notice of above facts because ensuring award of just compensation is the statutory duty of tribunal.**

**(ii) Finding of Tribunal on contributory negligence on the basis of filing charge sheet and non-production of F.I.R. reversed by the Apex Court.**

**Minu Rout and another v. Satya Pradyumna Mohapatra and others**

**Judgment dated 02.09.2013 passed by the Supreme Court in C.A. No. 7368 of 2013, reported in 2013 ACJ 2544**

**Extracts from Judgment:**

The case of the appellants is that the accident took place on account of rash and negligent driving of the offending truck by its driver. The offending truck was coming from opposite direction to the car. In the car, there were six persons travelling including the first appellant. The first appellant was examined as P.W.1 and other three eye witnesses were also examined as P.W.2 to P.W.4, who supported the version of P.W.1. They have narrated in their evidence that the accident occurred on 8.11.2004. P.W.2 has stated in his evidence that the accident took place within 15 feet away from the place, when he was going to his village on his bicycle. Two other eye witnesses were also examined as P.W.3 and P.W.4 who have also deposed before the Tribunal stating that Susil Rout sustained grievous injuries on account of the accident and was shifted to the Jajpur Hospital, where he was declared dead. They have also deposed that the occurrence of the accident was on account of rash and negligent driving of the truck. There was head on collision between the offending truck and the car.

P.W.3 was a betel shop owner, whose shop is situated near the spot of the accident. Though he was not examined by the Investigating Officer in the police case he is examined before the Tribunal whose evidence is required to be accepted for the reason that the same is not rebutted by the respondents. P.W.4 has stated in his cross examination that he saw the accident from a little distance from the market place, where about 10 to 20 persons were present. He has further deposed that the truck was in a high speed and the people travelling in the car sustained injuries and the driver of the car Susil Rout suffered grievous injuries and succumbed to the same. He was conscious when he was taken to the Jajpur Hospital on a trekker. The Tribunal, appreciation of the oral and

documentary evidence, has recorded the erroneous finding by placing strong reliance upon the charge-sheet-Exh.1 without considering the fact that the criminal case was abated against the deceased and further has made observation in the judgment that the appellants had not produced the F.I.R. Therefore, it has held that there was 50 per cent contributory negligence on the part of the deceased driver in causing accident. The Tribunal ought to have seen that non production of F.I.R has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 304-A of Indian Penal Code read with the provisions of the Motor Vehicles Act. The Insurance Company, though claimed permission under Section 170(b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased Susil Rout on account of which the accident took place as he was driving the car in a rash and negligent manner. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance upon the charge-sheet-Exh.1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of P.W.2 and P.W.3 in their cross-examination and placed reliance on them to record the finding on issue no.1. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious issue No.1 holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law. The Tribunal has accepted the part of oral evidence of the eye witnesses regarding the scene of accident and it has erroneously placed reliance upon the charge-sheet-Exh.1, which was filed against the driver of the offending truck and deceased to hold there was contributory negligence on his part by ignoring the fact that the criminal case against the deceased was abated. Therefore, we have to hold that the finding of fact recorded on issue No.1 by the Tribunal and affirmed by the High Court in the impugned judgment, is erroneous for want of proper consideration of pleadings and legal evidence by both of them. Accordingly, we have answered point No.1 in favour of the appellants in so far as the finding recorded by the Tribunal on the question of contributory negligence of 50 per cent on the part of the deceased is concerned.

**Answer to point Nos. 2 and 3:**

Appellants claimed compensation under the heading of loss of dependency as they were all dependents upon the earnings of the deceased Susil Rout. It is an undisputed fact that Susil Rout was working as a driver of the car which is a skilled job. Appellants have stated in the claim petition and in the evidence of PW-1 that the deceased was earning Rs.5,000 per month. The oral evidence of

PW-1 is not accepted by the Tribunal, solely for the reason that the appellants did not produce documentary evidence to prove the monthly salary of the deceased as Rs.5,000 per month as claimed by them. However, it had taken monthly income of the deceased at Rs.3,000 for the purpose of determining the multiplicand. Out of Rs.3,000 p.m., 1/3rd amount was deducted towards personal expenses of the deceased and arrived at Rs.3,84,000 towards loss of dependency. Out of that compensation, 50 per cent was deducted towards contributory negligence on the part of the deceased and Rs.1,92,000 was awarded under the above heading. The compensation awarded by the Tribunal is approved by the High Court, which is not only erroneous in law but also suffers from error in law. The Tribunal ought to have taken the salary of the deceased driver at Rs.6,000 by taking judicial notice of the fact that the post of a driver is a skilled job. Though the claim of the appellants is Rs.5000 as monthly salary of the deceased for the purpose of determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000 per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the Appellate Court. In view of the law laid down by this Court in ***Santosh Devi v. National Insurance Company Ltd., 2012 ACJ 1428 (SC)*** 30 per cent of future prospects of the deceased should be added to the monthly income. If 30 per cent is added to the monthly income, it would amount to Rs.7,800 p.m. From the same, 1/3rd should be deducted towards the personal expenses of the deceased, then the remaining amount would come to Rs.5,200 per month. The same is multiplied by 12 amounting to Rs.62,400 which would be the multiplicand. The same must be multiplied by 16 multiplier as the Tribunal has taken the age of the deceased at 35 as mentioned in the post mortem report, which is produced as Exh.5. According to the decision of this Court in ***Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC),*** the multiplier of 16 taken by the Tribunal for computation of loss of dependency is correct. If the 16 multiplier is applied to the multiplicand of Rs.62,400 it comes to Rs.9,98,400 which amount is awarded towards the loss of dependency of the appellants. We have answered point No.1 in favour of the appellants holding that the finding recorded by the Tribunal that there was 50 per cent contributory negligence of both the drivers of the offending truck and the deceased, is erroneous and further 50per cent deduction out of the total loss of dependency compensation determined by the Tribunal is not correct. Therefore, we have to hold that the appellants are entitled to the full amount of Rs.9,98,400. Further, claims Tribunal has erroneously awarded a sum of Rs.5,000 for funeral expenses without taking into consideration the actual amount required to be spent towards funeral expenses and obsequies ceremonies. The Tribunal has also inadequately awarded Rs.3,000 towards loss of love and affection. The Tribunal also erred both on facts and in law as it has completely ignored the fact that the deceased died leaving behind him the first appellant-the widow, his mother and two minor children, who have lost the love and affection of their father. Therefore, this Court, after taking into consideration all the expenses incurred for the funeral

and sudhi ceremonies and towards loss of love and affection by the surviving child and the first appellant wife, by applying the decision in the case of ***General Manager, Kerala State Road Transport Corporation v. Susamma Thomas, 1994 ACJ 1 (SC),*** awards Rs.50,000 which is just and reasonable under the conventional heads. If Rs.50,000 is added to the compensation awarded for the loss of dependency, the total compensation comes to Rs.10,48,400. The Insurance Company is liable to pay the same as the offending vehicle is insured with it and the same is an undisputed fact. The Insurance Company is also liable to pay interest at the rate of 9 per cent per annum, from the date of application till the date of payment in view of the decision of this Court in Municipal Corporation of ***Delhi v. Association of Victims of Uphaar Tragedy, 2012 ACJ 48 (SC).***

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

**Negligence – The tribunal should have considered both oral and documentary evidence produced before it – It should appreciate the same in the proper perspective – Charge-sheet was also field against respondents u/s 279,304-A IPC and Sections 133 and 181 of M.V. Act – Apex Court reversed the finding of tribunal and held driver of tractor trolley liable for accident and awarded Rs. 5 lac. for death of deceased, aged 10 years.**

## Kishan Gopal and another v. Lala and others

**Judgment dated 26.08.2013 passed by the Supreme Court in C.A. No. 7137 of 2013, reported in 2013 ACJ 2594**

**Extracts from Judgment:**

In view of the aforesaid facts, the Tribunal should have considered both the oral and documentary evidence and appreciated the same in the proper perspective and recorded the finding on the contentious issue Nos. 1 and 2 in the affirmative. But it has recorded the finding in the negative on the above issues by adverting to certain statements of evidence of AW 1 and referring to certain alleged discrepancies in the F.I.R. without appreciating entire evidence of AW 1 and AW 2 on record properly and also not assigned valid reasons in not accepting their testimony. The Tribunal should have taken into consideration the pleadings of the parties and legal evidence on record in its entirety and held that the accident took place on 19.7.1992, due to which Tikaram sustained grievous injuries and succumbed to the same and the case was registered by Uniara Police Station under sections 279 and 304-A, Indian Penal Code, read with sections 133 and 181 of the M.V. Act against respondent Nos. 1 and 2. The registration of F.I.R. and filing of the charge-sheet against the respondent Nos. 1 and 2 are not in dispute, therefore, the Tribunal should have no option but to accept the entire evidence on record and recorded the finding on the contentious issue Nos. 1 and 2 in favour of the appellants. Further, it should have held that deceased son died in the tractor accident, driven by respondent No. 1 rashly and negligently, but it has answered the above contentious issue Nos. 1 and 2

in the negative and, therefore, we have to set aside the said erroneous finding as the Tribunal has failed to appreciate the entire evidence both oral and documentary properly to answer the issue Nos. 1 and 2 in the affirmative. From the perusal of the evidence elicited in the cross-examination of the father, AW 1 and AW 2 who reached the spot immediately after the accident, he had seen the accident and narrated that the deceased boy had sustained grievous injuries in the accident and succumbed to the same. Evidence on record proved that the deceased sustained grievous injuries in the accident on account of which he died. Insurance company by cross-examining the witness, AW 2, has categorically admitted the accident, as its counsel had put the suggestion to him which portion of evidence clearly goes to show that in the accident the deceased died, but the Tribunal has failed to appreciate the evidence of AW 2 and also the documentary evidence while recording the finding of fact on the contentious issue No.1. The counter-affidavit of respondent No.1 filed in these proceedings cannot be relied upon by this court at this stage as he did not choose to appear before the Tribunal, though he had filed statement of counter and neither he nor the insurance company adduced rebuttal evidence by obtaining permission from the Tribunal under section 170 (b) of M.V. Act to avail the defence of the insured respondent No.2, as the insurance company has limited defence as provided under section 149 (2) of the M.V. Act. But on the other hand, by reading the averments from the paras extracted from the affidavit of respondent No.1, the driver would support the case of the appellants.

In our considered view, the Claims Tribunal has ignored certain relevant facts and evidence on record while considering the case of the appellants. The High Court, though it has got power to reappreciate the pleadings and evidence on record, has declined to do so and mechanically endorsed the findings of fact on contentious issue Nos. 1 and 2 after referring to certain stray sentences from the evidence of AW 1 and the F.I.R. and it has erroneously held that there is a contradiction between the F.I.R., the claim petition and the evidence of the appellants. It has concurred with the finding of fact recorded on the contentious issues and accepted dismissal of the petition. The concurrent findings of fact are erroneous and invalid and, therefore, the same call for our interference in this appeal. The approach of the High Court to the claim of the appellants is very casual as it did not advert to the oral and documentary evidence placed on record on behalf of the appellants, particularly in the absence of rebuttal evidence adduced by the insurance company, hence the same is liable to be set aside and accordingly we set aside the same.

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**293. MOTOR VEHICLES ACT, 1988 – Sections 166, 168 and 173**

**(i) Nature of a claim petition under the Motor Vehicles Act, 1988 – Is non-adversarial – Rule of the pleadings does not strictly apply as the claimant is required to make an application in a form prescribed under the Act – It is statutory determination of compensation on the occurrence of an accident, after due**

**enquiry, in accordance with the statute – The Tribunal is required to follow such summary procedure as it thinks fit – It may choose one or more persons possessing special knowledge of and matters relevant to enquiry, to assist it in holding the enquiry.**

**(ii) Effect of non-examination of pillion-rider of a scooter driven by deceased – Keeping in view the nature of the jurisdiction that is exercised by a claims Tribunal under the Motor Vehicles Act, 1988, the hapless condition in which the claimants must have been placed after the death of their sole breadwinner and the sufficiently long period of time that has elapsed in the meantime, failure or inability to examine the pillion-rider as a witness is not fatal.**

## Dulcina Fernandes and others v. Joaquim Xavier cruz and another

**Judgment dated 08.10.2013 passed by the Supreme Court in Civil Appeal No. 9094 of 2013, reported in (2013) 10 SCC 646**

**Extracts from Judgment:**

It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pick-up van as set up by the claimants was requied to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (***Bimla Devi v. Himachal RTC, AIR 2009 SC 2819***)

In ***United India Insurance Co. Ltd. v. Shila Datta, AIR 2012 SC 86*** while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:

> "10.(ii) The rules of the pleading do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are ***suo motu*** initiated by the Tribunal.
>
> * * *
>
> (v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.....
>
> (vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

The following further observation available in para 10 of the Report would require specific note:

> "10..... We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a

dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statue.

The cases of the parties before us will have to be examined from the perspective of the principles and propositions laid down in ***Bimla Devi v. Himachal Road Transport Corpn., AIR 2009 SC 2819*** While it is correct that the pillion rider could have best unfolded the details of the accident what cannot be lost sight of is the fact that while the accident occurred on 29.6.1997 the evidence before the Tribunal was recorded after seven years i.e. in the year 2004. Keeping in view the nature of the jurisdiction that is exercised by a Claims Tribunal under the Act we do not think it was correct on the part of the learned Tribunal to hold against the claimants for their failure or inability to examine the pillion rider Rosario Antao as a witness in the case. Taking into account the hapless condition in which the claimants must have been placed after the death of their sole breadwinner and the sufficiently long period of time that has elapsed in the meantime, the learned Tribunal should not have treated the non-examination of the pillion rider as a fatal and fundamental law to the claim made before it by the appellant.

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**294. MOTOR VEHICLES ACT, 1988 – Sections 166 (1) and 147**

**Use of vehicle – Murder of driver – When a truck was standing at the side, the cleaner caused fatal injuries to truck driver – He died.**

**Whether it is accident arising out of use of motor vehicle? Held, No – The insurance company is not liable for compensation.**

## Bajaj Allianz General Insurance Co. Ltd. v. Ashish Patel and another

**Judgment dated 14.03.2011 passed by the High Court of M. P. in M.A. No. 2026 of 2012, reported in 2013 ACJ 2487**

**Extracts from judgment:**

In the present case, it has come on record that the cleaner of the truck caused fatal injuries to the deceased. This fact has been discussed by the Tribunal in para 10 of the judgment. The trial court has also relied upon the statement of Ashish, the son of the deceased, who on oath has stated that on 9.11.2008 when the truck was standing at the site and is father was sleeping therein, the cleaner of truck caused fatal injuries to his father and it was on that basis he succumbed to the injuries. A report to that effect was also lodged on 9.11.2008 at about 6.05 p.m. by him. There is no other evidence available on record to show that the death of the deceased has not taken place in the manner stated and it occurred by way of accident while the truck was being plied. There are no circumstances available on record to show that the death of the deceased was on account of the accident arising out of use of motor vehicle.

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**295. MOTOR VEHICLES ACT, 1988 – Sections 170 (b), 149 and 168**

**Heads for getting compensation for personal injury – (i) Pain and suffering: (ii) Loss of amenities (iii) Shortened expectation of life, if any: (iv) Loss of earnings or loss of earning capacity or in some cases for both and (v) Medical treatment and other special damages.**

**Rekha Jain v. National Insurance Co. Ltd.**

**Judgment dated 01.08.2013 passed by the Supreme Court in Civil Appeal No. 5370 of 2013, reported in AIR 2013 SC 3429**

**Extracts from Judgment:**

It is well settled principle that in granting compensation for personal injury, the injured has to be compensated (1) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life, if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury cases the two main elements are the personal loss and pecuniary loss. Chief Justice Cockburn in ***Fair v. London and Norm Western Railway Co., 21 LT (NS) 326 (1869)*** distinguished the above two aspects thus:

> "In assessing the compensation the jury should take into account two things, first, the pecuniary loss the plaintiff sustains by the accident: secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income".

Lord Reid in ***Baker v. Willoughby, (1969) 3 All ER 1529*** has said:

> "A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned.....

The aforesaid principles laid down by this Court, Appeal Cases, House of Lords and leading authors and experts referred to supra, whose opinions have been extracted above, with all fours, are applicable to the fact situation for awarding just and reasonable compensation in favour of the appellant as she had sustained grievous injuries on her face and other parts of the body which is assessed at 30% permanent disablement by competent doctors.

The finding of fact is recorded by the Tribunal on the question of the accident caused on account of rash and negligent driving on the part of offending truck driver on 17.8.2001, the date of the accident on account of which the appellant herein has sustained grievous injuries and has undergone trauma and mental

agony for over a period of four years. She had also gone through a number of surgeries on account of this accident in which her face has been disfigured. With regard to the nature of injuries sustained by her, the District Medical Board of Sambalpur, represented by the Chief Medical Officer has issued disability certificate certifying that the appellant has suffered disability to the extent of 30%. The finding recorded by the Tribunal on this important aspect of the case on the basis of legal evidence is not challenged either by the owner of the truck or by the Insurance Company and it could not have challenged the finding without obtaining the permission as required under Section 170(b) of the Motor Vehicles Act to avail the defence of the insured to contest the case as has been held by a three Judge bench of this Court in the case of ***National Insurance Co. Ltd. v. Nicolletta Rohtagi & Ors, AIR 2002 SC 3550***. The relevant paragraphs read as under:

> "15. It is relevant to note that Parliament, while enacting sub-section (2) of Section 149 only specified some of the defences which are based on conditions of the policy and, therefore, any other breach of conditions of the policy by the insured which does not find place in sub-section (2) of Section 149 cannot be taken as a defence by the insurer. If Parliament had intended to include the breach of other conditions of the policy as a defence, it could have easily provided any breach of conditions of insurance policy in sub-section (2) of Section 149. If we permit the insurer to take any other defence other than those specified in sub-section (2) of Section 149, it would mean we are adding more defences to the insurer in the statute which is neither found in the Act nor was intended to be included.
>
> 16. For the aforesaid reasons, we are of the view that the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section 149 of the 1988 Act and not more and for that reason if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds."

The said finding of fact has attained the finality and the compensation has been awarded by the Tribunal and affirmed by the High Court. The only aspect which was required to be examined by the High Court in the appeals filed both by the respondent Insurance Company as well as by the appellant was that the quantum of compensation required to be awarded in her favour under the different heads of non-pecuniary damages as per the principles laid down by this Court, House of Lords, Queens Bench and Authors in various judgments and extracts from various texts and books respectively, referred to supra.

In this regard, in ***Baker's case*** (supra), it has been stated by Lord Reid that a man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. Therefore, the functional disability is a forceful alteration of career option of the appellant who has already undergone physical and mental injuries because of the accident. It would amount to adding distress to injury if one is forced to work with difficulty to earn his/her livelihood so as to reduce the burden of the wrongdoer in terms of compensation.

In view of the aforesaid decisions of this Court and various courts and High Court of Karnataka and authors referred to supra, we have to record the finding of fact having regard to the nature of grievous injuries and her disfigured face and that she was acting as an actress in the films, T.V. Serials, etc. her functional disablement is 100%.This relevant aspect of the matter has been conveniently omitted to be considered both by the Tribunal as well as by the High Court while determining compensation under various heads of non-pecuniary damages. For the foregoing reasons, we are of the view that under the different heads of non-pecuniary damages she is entitled to higher compensation in her appeal. For that purpose, we are required to consider her annual income for the purpose of computation of just and reasonable compensation under the aforesaid different heads of non-pecuniary damages. It is in her evidence that her income depends upon the project. She got 30, 000/- for her first film "Maa Pari Kiye Haba" and ` 75, 000/- for Malayalam film 'Paith Digem Alam'. For her performance in a serial, she used to get within ` 7000/- to 10,000/- She had received ` 50,000/- for winning the "Ponds Women of Tomorrow" contest. The said evidence remains unchallenged in the cross examination by the counsel for the respondent Insurance Company. Having regard to her age and qualification and that she was acting in various Oriya and Malayalam films., T.V. Serials and that she was in the beginning stage of her acting career and having regard to the fact that she has acted in various films, she would have definitely had a very good chance for acting in future if she had not suffered the grievous injuries, facial disfigurement and other injuries on account of the accident. She has also stated in her evidence that she is an assessee for income tax. She has got PAN card and has produced the same Having regard to the aforesaid legal evidence on record and in the absence of documentary evidence to show her probable annual income, it would be proper for this Court to take her probable annual income as Rs. 5,00,000/- for the purpose of computation of her future loss of earning. We have already held that though the disability certificate speaks of her disability at 30% on account of disfigurement of the face and other injuries to her body, her physical finesse is completely changed, she has put on weight 4 to 5kgs., she is not fit to act and no film producer will offer her roles in their films to act as an actress. Having regard to the nature of the vocation, we have to hold that she is suffering from 100% functional disability. In the light of the facts of this case and keeping in view the aforesaid evidence on record that she is a film actress and also taking into consideration that in the film world of this country the heroine

will certainly get the substantial sum for acting in films, T.V. Serials, modeling, it would be just and proper for us to take 50% of her annual income for the purpose of computation of her future loss of income keeping in view that throughout her life she may not be in a position to act in the films, albums and modeling. Her annual income is assessed at ` 5,00,000/- 50% of which is ` 2,50,000/- per annum which is multiplied by 17 as the proper multiplier considering her age at the time of accident by 17 as the proper multiplier considering her age at the time of accident by applying the legal principle laid down by this Court in ***Sarla Verma & ors. v. Delhi Transports Corp. & anr., AIR 2009 SC 3104*** which amounts to ` 42,50,000/-. Hence, we award ` 42,50,000/- compensation under the aforesaid head. The Tribunal awarded only ` 2,00,000/- which is enhanced to ` 42,50,000/- under the said head.

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***296. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 142 and 145**
**CRIMINAL PROCEDURE CODE, 1973 – Sections 200, 202 and 482**
**Recording of evidence – In a complaint for offence under section 138 of Negotiable Instruments Act, evidence of complainant in the form of affidavit is admissible in evidence – Examination of complainant, and his witnesses under sections 200 and 202 of the Code, not necessary.**

**Amita Gas Service and another v. Raman Gupta**
**Order dated 05.08.2010 passed by the High Court of M.P. in Misc. Cri. Case No. 427 of 2010, reported in 2013 (4) MPLJ 435**

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**297. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
**Whether application for amendment in the complaint with respect to offence under section 138 of Negotiable Instruments Act is permissible? Held, No – Further held, there is no provision in the Code of Criminal Procedure which permits amendment in the complaint.**

**Lekhraj Singh Kushwah v. Brahmanand Tiwari**
**Order dated 17.07.2013 passed by the High Court of M.P. in Misc. Criminal Case No. 6183 of 2011, reported in 2013 (5) MPHT 184**

**Extracts from Order :**

It is evident that this Court has taken a consistent view in ***Kunstocom Electronics (I) Ltd. v. State of M.P. and another, 2002 (5) MPLJ 178*** and ***Sunder Dev v. Yogesh, Criminal Revision No. 1041/2007,*** decided on 18-3-2008 that there is no provision for amendment in the Code of Criminal Procedure and the amendment in the complaint cannot be permitted, but in the case of ***Pt. Gorelal and another v. Rahul Punjabi, 2009 (5) M.P.H.T. 323= 2010 (II) MPJR 228*** taking note of the

aforesaid cases, it has been held that application for correction of cheque number can be allowed.

The Hon'ble Supreme Court in the matter of ***Sant Lal Gupta and other v. Modern Co-operative Group Housing Society Limited and others, (2010) 13 SCC 336,*** observed in Paras 17 and 18 as under:-

> "17. A Co-ordinate Bench cannot comment upon the discretion exercised or judgment rendered by another Co-ordinate Bench of the same Court. The rule of precedent is binding for the reasons that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate the rules of law from the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a Co-ordinate Bench must be followed.
>
> 18. In ***Rajasthan Public Service Commission v. Harish Kumar Purohit, (2003) 5 SCC 480,*** this Court held that a Bench must follow the decision of a Co-ordinate Bench and take the same view as has been taken earlier. The earlier decision of the Co-ordinate Bench is binding upon any latter Co-ordinate Bench deciding the same or similar issues. It the latter Bench wants to take a different view than that taken by the earlier **Bench, the proper course is for it to refer the matter to a** Larger Bench."

Thus, looking to the fact that Co-ordinate Bench of this Court has consistently held in ***Kunstocom Electronics (I) Ltd.*** (supra) and ***Sunder Dev*** (supra) which has been decided much prior to ***Pt. Gorelal*** (supra) the decision is binding upon latter Co-ordinate Bench. Considering the facts of the instant case that not only in the pleadings of the complaint, but in the notice as well as in the affidavit filed by the respondent, number of cheque has been mentioned as 332534, in my opinion, the learned Courts below have committed illegality in allowing such amendment.

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**298. SPECIFIC RELIEF ACT, 1963 – Section 16(c)**

**(i) Distinction between readiness and willingness – Former refers to financial capacity and the latter to the conduct of plaintiff wanting performance.**

**(ii) Requirement of section 16(c) – The plaintiff must plead and prove that he had performed and always been ready and willing to perform the essential terms of the contract – The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance and while adjudicating the same – Court must take into consideration the conduct of the plaintiff prior and subsequent**

**to the filing of the suit along with other circumstances – Absence of the specific plea by opposite party doesn't absolve the plaintiff to comply with the mandate of statute under section 16(c) – Want of notice by the plaintiffs to the defendant No.1 to get sale deed executed in their favour – The question of bona fide purchaser loses significance where there is non-compliance of s.16 (1) (c) of specific Relief Act**.

## Veer Singh & Ors. v. Uday Singh alias Gotia & Ors.

**Judgment dated 20.6.2013 passed by the M.P. High Court (Gwalior Bench) in F.A. No. 53 of 2000, reported in 2013 (3) JLJ 308**

**Extracts from Judgment:**

The Supreme Court in the matter of ***J.P. Builders v. A Ramadas Rao, reported in (2011) 1 SCC 429,*** while considering the requirement of Section 16 of the Specific Relief Act has held hat in terms of Section 16(C) of the Act, person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The distinction between readiness and willingness is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Section 16 (c) envisages that the plaintiff must plead and prove that he had performed or always been and willing to perform the essential terms of the contract. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance and while adjudging the same. Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing o the suit along with other attending circumstances. It is also settled by the Supreme Court n the case of ***J.P. Builders*** (supra), even in the absence of the specific plea by opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(C) of the Act.

In the case in hand, the plaintiffs have pleaded in para 6 and 9 to this effect that the plaintiffs were ready and willing to perform the contract on their part and are still so but defendant no.1 Uday Singh had not complied the same and the sale deed was not got registered by him. On perusal of the plaint, it is crystal clear that no notice was given by the plaintiffs to the defendant no. 1 for getting the sale deed executed in their favour, whereas, as per agreement to sell Ex. P/1, the sale deed was to be executed till 1.4.1989, but no serious efforts have been made on behalf of the plaintiffs.

Neither specific dates have been mentioned in the plaint nor stated in the statements of the plaintiffs' witnesses regarding saying to the defendant no.1Uday Singh for execution of the sale deed and so, plaintiffs' evidence cannot be relied about their readiness and willingness for performing the contract Ex. P/1 as required under Section 16 (1) (c) of the Specific Relief Act. In such circumstances, it would not be appropriate to grant the decree of specific performance of contract

in favour of the plaintiffs. The Hon'ble Apex Court in the case of ***Madan Satyanarayan v. G. Yelloji Rao and others reported in AIR 1965 SC 1405*** has held as under with regard to grant of relief of specific performance in view of section 22 of Specific Relief Act.

> "Under Section 22 of the Specific Relief Act, relief of specific performance is discretionary but not arbitrary discretion must be exercised in accordance with sound and reasonable and judicial principles. The case providing for a guide to Courts to exercise discretion one way or other only illustrative, they are no exhaustive."

In the above mentioned case, the Hon'ble Court quoted with approval of words of ***Lord Chelmsford in Caesar Lamare Vs. Thoms Dixen reported in (1878) 6 H.L. 414***:

> "the conduct of the party applying for relief is always an important element for consideration".

It is pertinent to mention here hat when the suit for specific performance of contract Ex. P/1 has been dismissed by the lower Court as well as by this Court, there is no need to discuss whether the defendants no. 6 to 9 are bonafide purchaser or not, as admittedly, sale deed Ex. D/1 was executed by the defendant no.1 Uday Singh in favour of defendant no. 6 to 9. The question of bonafide purchaser would have been relevant for consideration, if, compliance of Section 16(1) (c) of Specific Relief Act has been found proved.

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**299. TRANSFER OF PROPERTY ACT, 1882 – Sections 54, 6 (h) and 136**
**CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 73**
**Whether transfer to minor is permissible? Held, Yes – There is no law which prohibits a minor from being a transferee.**

## Ramniwas v. Jagatbahadur Singh and others

**Judgment dated 20.08.2013 passed by the High Court of M.P. in Second Appeal No. 862 of 1998, reported in 2013 (5) MPHT 30**

**Extracts from Judgment:**

A sale is transfer of ownership for a price. Section 54 of the Transfer of Property Act, 1882 (hereinafter in short referred to as "the Act") provides that in case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by registered instrument or by delivery of property. Section 6 (h) of the Act provides that no transfer can be made in so far as it is opposed to the nature of interest affected thereby or for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872 or to a person legally disqualified to be transferee. It is essential for valid sale that transferor should be competent to transfer as per Section 7 of the Act and the transferee should not be subject to legal disqualification as prescribed under Section 6 (h) of the Act. Thus,any living can be

transferee provided he is not disqualified under Section 136 of the Act or under Order 21 Rule 73 of the Code of Civil Procedure, 1973. Thus, from perusal of relevant provisions of the Act, it is evident that there is no provision in the Act, which prohibits a minor from being transferee. Thus, a minor is not disqualified to be transferee. [See: ***Ulfat Rai v. Gauri Shankar, (1911) ILR 33 All 657, Munia v. Perumal, (1914) ILR 37 Mad. 390, Munni Kunwar v. Madan Gopal, (1916) ILR 39 All 62, Balkrishna v. Lakhu and others, AIR 1922 Nagpur 239*** and ***Subba Reddy v. Gurva Reddy, AIR 1930 Madras 425***].

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**300. LAW OF TORTS – Principle of Strict liability**

**Obligation of the Madhya Pradesh Electricity Board to prevent mishap due to electrocution – Board should exercise better vigilance and proper care to prevent the theft or unauthorised use of electricity to prevent mishaps – No steps taken by M.P. Electricity Board to prevent the illegal abstraction of energy from the supply line – Two minors died due to electrocution as a result of live electricity came into contact with a flowing river – Fully attract the well established principles of strict/absolute liability.**

## M.P. Electricity Board and another v. Laxman and others

**Judgment dated 19.06.2013 passed by the High Court of M.P. in First Appeal No. 1 of 1999 (Indore), reported in 2013 (5) MPHT 51**

**Extracts from Judgment:**

Leaned Trial Court on due consideration of evidence reached the conclusion that the children died accidentally due to electrocution because the current had spread over the river water and the bank. That the children were unaware of this when they came in contact with the current and accidentally died. There was negligence on the part of appellants as no steps were taken to prevent the illegal abstraction of energy from the supply lines. In view of these findings, learned Trial Court awarded Rs. 1,00,00/- to Laxman against appellants as compensation and Rs. 10,000/- against Bhima. Thus, in all, Court awarded a sum of Rs. 1,10,000/- as compensation for death of two sons due to electrocution.

We heard arguments at length. Perused the record of the Trial Court. Learned Counsel has taken us through the entire pleadings and evidence in support of his argument that liability was wrongly fastened on the appellants. He submitted that when, after a temporary connection is duly disconnected and then somebody does mischief or theft resulting in accident, under these circumstances MPEB cannot be held responsible. He further submitted that “Principle of strict liability” is inapplicable to the facts of the case. Lastly, he submitted that apportionment is arbitrary, illegal and as such is unsustainable in law.

On a careful scrutiny of the evidence on record, we find that court below has properly appreciated the evidence and recorded correct findings of fact. These findings cannot be categorised as perverse, arbitrary or worthless. They are based on proper analysis and the inferences drawn are not preposterous. Facts established in the case fully attract the well accepted principle of "strict/absolute liability" laid down by Blackburn, J. In ***Ryland v. Fletcher, (18660 LR 1 Ex. 265.*** It is now well-established that the-

> "Neighbour who has brought something on his own property which was not naturally there, harmless to others so long as remained confined to his own property, but which he known to be mischievous if it gets on his neighbour's, should be obliged to make good the damages which ensues if does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have occurred, and it seem but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench……."(quoted from Salmonds & Heuston on Law of Trots, Eighteenth Edition p. 299)

Before parting with the case, we must deal with another point. Court below found that no evidence was adduced by the appellants to show what steps were taken to prevent the theft of electricity. It is a matter of common knowledge that there is wide and gaping gulf between the demand and supply and distribution of energy. In these circumstances nefarious activities gain prominence and people indulge in illegal and unauthorised use of energy and despite prophylactic measures, so far the appellants have not been able to eradicate or curb these tendencies. It was, therefore, all the more necessary for appellants to exercise better vigilance and proper care to prevent the theft or unauthorised theft of electricity to prevent such type of mishaps. Having failed to do so, appellants cannot turn around and say that they are not liable. We find no fault with the apportionment of liability. Accordingly, the appeal fails and is hereby dismissed with costs throughout.

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NOTE : (*) Asterisk denotes short notes

## NOTIFICATION OF CENTRAL GOVERNMENT REGARDING ENFORCEMENT OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013 (14 OF 2013)

***Ministry of Women and Child Development Notification No. S.O. 3606 (E) dated the 9th December, 2013. Published in Gazette of India (Extraordinary part II Section 3(ii) date 9-12-2013 Page 1.)***

In exercise of the powers conferred by sub-section (3) of section 1 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013), the Central Government hereby appoints the 9th day of December, 2013 as the date on which the provisions of the said Act shall come into force.

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## NOTIFICATION OF MINISTRY OF HOME AFFAIRS IN PURSUANCE OF CLAUSE (II) OF SUB-SECTION (1) OF SECTION 105 OF THE CODE OF CRIMINAL PROCEDURE, 1973 REGARDING SERVICE OR EXECUTION OF SUMMONS OR WARRANT IN RELATION TO CRIMINAL MATTERS, ON ANY PERSON IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA

***(Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 1108, dated 17th May, 2013)***

**No. S.O. 575 (E), dated March 8, 2013 –** Whereas arrangements have been made by **the Central Government with the Government of Hong Kong Special Administrative Region of the People's Republic of China** for service or execution summon or warrant in relation to criminal matters, on any person in the Hong Kong Special Administrative Region of the People's Republic day.

Now, therefore, in pursuance of clause (ii) of sub-section (1) of Section 105 of **the Code of Criminal Procedure** (2 of 1974), the Central Government hereby specifies that-

(a) a summons to an accused person, or

(b) a summons to any person requiring him to attend and produce documents or other thing, or to produce it, or

(c) a search-warrant

May be issued by a Court in India in duplicate, to the Court, Judge or magistrate in the Hong Kong Special Administrative Region of the People's Republic of China, having authority under the law for the time being in force in that country, through the Central Authority i.e. Secretary for Justice or his/her duly authorised officer in the Government of the Hong Kong Special Administrative Region of the People's Republic of China to serve such summons or execute such warrant on the person named therein. The concerned court, Judge or Magistrate in India/Hong Kong Special Administrative Region of the People's Republic of China while issuing summons(s) are required to comply with the comprehensive guidelines contained in Ministry of Home Affairs letter No. 25016/17/2007-Legal Cell, dated the 17th February, 2009.

2. The Central Government further directs that such summons or warrant shall be sent to the Ministry of Home Affairs, IS-II Division, Government of India, New Delhi, for transmission to the Central Authority i.e. Secretary for Justice or his or her duly authorised officer in the Government of the Hong Kong Special Administrative Region of the People's Republic of China.

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***Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.***

**– Martin Luther King Jr.**

# PART - IV
## IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

### THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

**No. 14 of 2013***

***[22nd April, 2013.]***

**An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.**

Whereas sexual harassment results in violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under Article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment;

And whereas the protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified on the 25th June, 1993 by the Government of India;

And whereas it is expedient to make provisions for giving effect to the said Convention for protection of women aganist sexual harassment at workplace.

Be it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows :-

### CHAPTER I
**Preliminary**

**1. Short title, extent and commencement. –** (1) This Act may be called the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

(2) It extends to the whole of India.

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

**2. Definitions. –** In this Act, unless the context otherwise requires, -

(a) "aggrieved woman" means -

(i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;

(ii) in relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house;

(b) "appropriate Government" means -

(i) in relation to a workplace which is established, owned, controlled or wholly or substanitally financed by funds provided directly or indirectly -

(A) by the Central Government or the Union territory administration, the Central Government;

(B) by the State Government, the State Government;

(ii) in relation to any workplace not covered under sub-clause (i) and falling within its territory, the State Government;

(c) "Chairperson" means the Chairperson of the Local Complaints Committee nominated under sub-section (1) of Section 7;

(d) "District Officer" means an officer notified under secion 5;

(e) "domestic worker" means a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer;

(f) "employee" means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principle employer whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name;

(g) "employer" means -

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unity of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i), any person responsible for the managment, supervision and control of the workplace.

**Explanation** – For the purposes of this sub-clause "management" includes the person or board or committee responsible for formulation and administration of policies for such organisation;

(iii) in relation to workplace covered under sub-clasues (i) and (ii), the person discharging contractual obligations with respect to his or her employees;

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker;

(h) "Internal Committee" means an Internal Complaints Committee constituted under section 4;

(i) "Local Committee" means the Local Complaints Committee constituted under section 6;

(j) "Member" means a Member of the Internal Committee or the Local Committee, as the case may be;

(k) "prescribed" means prescribed by rules made under this Act;

(l) "Presiding Officer" means the Presiding Officer at the Internal Complaints Committee nominated under sub-secton (2) of section 4;

(m) "respondent" means a person against whom the aggrieved woman has made a complaint under section 9;

(n) "Sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely :-

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) making sexually colured remarked; or

(iv) showing ponography; or

(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

(o) "Workplace" includes -

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unity which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-government organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of a during the course of employment including transportation provided by the employer for undertaking such journey;

(vi) a dwelling place or a house;

(p) 'unorganised sector' in relation to workplace mens an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the member of such workers is less than ten.

**3. Prevention of sexual harassment –** (1) No woman shall be subjected to sexual harassment at any workplace.

(2) The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:-

(i) implied or explicit promise of preferential treatment in her employment; or

(ii) implied or explicit threat of detrimental treatment in her employment; or

(iii) implied or explicit threat about her present or future employment status; or

(iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or

(v) humiliating treatment likely to affect her health or safety.

## CHAPTER II

### Constitution of Internal Complaints Committee

**4. Constitution of Internal Complaints Committee. –** (1) Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the "Internal Complaints Committee"

Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal Committee shall be constituted at all administrative units or offices.

(2) The Internal Committee shall consist of the following members to be nominated by the employer, namely:-

(a) a Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees;

Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section (1) :

Provided further that in case the other officers or administrative units of the workplace do not have a senior level woman empoyee, the presiding officer shall be nominated from any other workplace of the same employer or other department or organisation;

(b) not less than two Members from amongst employes preferably committed to the cause of women or who have had experience in social work or have legal knowledge;

(c) one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment:

Provided that at least one-half of the total Members so nominated shall be women.

(3) The presiding Officer and every Member of the Internal Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified by the employer.

(4) The Member appointed from amongst the non-government organisations or associations shall be paid such fees or allowances for holding the proceedings of the Internal Committee, by the employer, as may be prescribed.

(5) Where the Presiding Officer or any Member of the Internal Committee -

(a) contravenes the provisions of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) he has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his position as to render his continuance in office prejudicial to the public interest, such Presiding Officer or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.

## CHAPTER III
### Constitutional of Local Complaints Committee

**5. Notification of District Officer. –** The appropriate Government may notify a District Magistrate or Additional District Magistrate of the Collector or Deputy Collector as a District Officer for every District to exercise powers or discharge functions under this Act.

**6. Constitution and Jurisdiction of Local Complaints Committee. –** (1) Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Complints Committee" to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been constituted due to having less than ten workers or if the complaint is against the employer himself.

(2) The District Officer shall designate one nodal officer in every block, taluka and tehsil in rural or tribal area and ward or muncipality in the urban area, to receive complaints and forward the same to the concerned Local Complaints Committee within a period of Seven days.

(3) The jurisdiction of the Local Complaints committee shall extend to the areas of the district where it is constituted.

**7. Composition, tenure and other terms and conditions of Local Complaints committee. –** (1) The Local Complaints Committee shall consist of the following members to be nominated by the District Officer, namely: -

(a) a Chairperson to be nominated form amongst the eminent women in the field of social work and committed to the cause of women;

(b) one Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district;

(c) two Members, of whom at least one shall be a woman, to be nominated form amongst such non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment, which may be prescribed:

Provided that at least one of the nominees should, preferably, have a background in law or legal knowledge:

Provided further that at least one of the nominees shall be a woman belonging to the Scheduled Casts or the Scheduled Tribes or the Other Backward Classes or minority community notified by the Central Government, from time to time;

(d) the concerned officer dealing with the social welfare or women and child development in the district, shall be a member ***ex officio***.

(2) The Chairperson and every Member of the Local Committee shall hold office for such period, not exceeding three years, from the date of their appointment as may be specified by the District Officer.

(3) Where the Chairperson or any Member of the Local Complaints Committee -

(a) Contravenes the provision of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his poisition as to render his continunace in office prejudicial to the public interest,

Such Chairperson or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.

(4) The Chairpreson and Members of the Local Committee other than the Members nominated under clauses (b) and (d) of sub-section (1) shall be entitled to such fees or allowances for holding the proceedings of the Local Committee as may be prescribed.

**8. Grants and audit. –** (1) The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the State Government grants of such sums of money as the Central Government may think fit, for being utilised for the payment of fees or allowances referred to in sub-section (4) of section 7.

(2) The State Government may set up an agency and transfer the grants made under sub-section (1) to that agency.

(3) The agency shall pay to the District Officer, such sums as may be required for the payment of fees or allowances referred to in sub-section (4) of section 7.

(4) The accounts of the agency referred to in sub-section (2) shall be maintained and audited in such manner as may, in consultation with the Accountant General of the State, be prescribed and the person holding the custody of the accounts of the agency shall furnish, to the State Government, before such date, as may be prescribed, its audited copy of accounts together with auditors' report thereon.

## CHAPTER IV
### Complaint

**9. Complaint of sexual harassment. –** (1) Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the Internal

Committee if so constituted, or the Local Committee, in case it is not so constituted, within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident:

Provided that where such complaint cannot be made in writing, the Presiding Officer or any Member of the Internal Committee or the Chairperson or any Member of the Local Committee, as the case may be, shall render all reasonable assistance to the woman for making the complaint in writing:

Provided further that the Internal Committee or, as the case may be, the Local Committee may, for the reasons to be recorded in writing, extend the time limit not exceeding three months, if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.

(2) Where the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death or otherwise, her legal heir or such other person as may be prescribed may make a complaint under this section.

**10. Conciliation. –** (1) The Internal Committtee or, as the case may be, the Local Committee, may, before initiating an inquiry under Section 11 and at the request of the aggrieved woman take steps to settle the matter between her and the respondent through conciliation:

Provided that no monetary settlement shall be made as a basis of conciliation.

(2) Where a settlement has been arrived at under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall record the settlement so arrived and forward the same to the employer or the District Officer to take action as specified in the recommendation.

(3) The Internal Committee or the Local Committee, as the case may be, shall provide the copies of the settlement as recorded under sub-section (2) to the aggrieved woman and the respondent.

(4) Where a settlement is arrived at under sub-section (1), no further inquiry shall be conducted by the Internal Committee or the Local Committee, as the case may be.

**11. Inquiry into complaint. –** (1) Subject to the provisions of section 10, the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent

and where no such rules exist, in such manner as may be prescribed or in case of a domestic worker, the Local Committee shall, if prima facie case exist, forward the complaint to the police, within a period of seven days for retistering the case under section 509 of the Indian Penal Code (45 of 1860), and any other relevant provisions of the said Code where applicable :

Provided that where the aggrieved woman informs the Internal Committee or the Local Committee, as the case may be, that any term or condition of the settlement arrived at under sub-section (2) of section 10 has not been complied with by the respondent, the Internal Committee or the Local Committee shall proceed to make an inquiry into the complaint or, as the case may be, forward the complaint to the police:

Provided further that where both the parties are employees, the parties shall, during the course of inquiry, be given an opportunity of being heard and a copy of the findings shall be made available to both the parties enabling them to make representation aganist the findings before the Committee.

(2) Notwithstanding anything contained in section 509 of the Indian Penal Code (45 of 1860), the court may, when the respondent is convicted of the offence, order payment of such sums as it may consider appropriate, to the aggrieved woman by the respondent, having regard to the provisions of section 15.

(3) For the purpose of making an inquiry under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed.

(4) The inquiry under sub-section (1) shall be completed within a period of ninety days.

## CHAPTER V
### Inquiry into Complaint

**12. Action during pendency of inquiry. –** (1) During the pendency of an inquiry, on a written request made by the aggrieved woman, the Internal Committee or the Local Committee, as the case may be, may recommend to the employer to-

(a) transfer the aggrieved woman or the respondent to any other workplace; or

(b) grant leave to the aggrieved woman up to a period of three months; or

(c) grant such other relief to the aggrieved woman as may be prescribed.

(2) The leave granted to the aggrieved woman under this section shall be in addition to the leave she would be otherwise entitled.

(3) On the recommendation of the Internal Committee or the Local Committee, as the case may be, under sub-section (1), the employer shall implement the recommendations made under sub-section (1) and send the report of such implementation to the Internal Committee or the Local Committee, as the case may be.

**13. Inquiry report. –** (1) On the completion of an inquiry under this Act, the Internal Committee or the Local Committee, as the case may be, shall provide a report of its findings to the employer, or as the case may be, the District Officer within a period of ten days from the date of completion of the inquiry and such report be made available to the concerned parties.

(2) Where the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has not been proved, it shall recommend to the employer and the District Officer that no action is required to be taken in the matter.

(3) Where the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be -

(i) to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where now such service rules have been made, in such manner as may be prescribed;

(ii) to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of section 15:

Provided that in case the employer is unable to make such deduction from the salary of the respondent due to his being absent from duty or cessation of employment it may direct to the respondent to pay such sum to the aggrieved woman:

Provided further that in case the respondent fails to pay the sum referred to in clause (ii), the Internal Committee or, as the case may be, the Local Committee may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

(4) The employer or the District Officer shall act upon the recommendation within sixty days of its receipt by him.

**14. Punishment for false or malicious complaint and false evidence. –** (1) Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer, as the case may be, to take action against the woman or the person who has made the complaint under sub-section (1) or sub-section (2) of section 9, as the case may be, in accordance with the provision of the service rules applicable to her or him or where no such service rules exist, in such manner as may be prescribed:

Provided that a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section:

Provided further that the malicious intent on part of the complainant shall be established after an inquiry in accordance with the procedure prescribed, before any action is recommended.

(2) Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that during the inquiry any witness has given false evidence or produced any forged or misleading document, it may recommend to the employer of the witness or the District Officer, as the case may be, to take action in accordance with the provisions of the service rules applicable to the said witness or where no such service rules exist, in such manner as may be prescribed.

**15. Determination of compensation. –** For the purpose of determining the sums to be paid to the aggrieved woman under clause (ii) of sub-section (3) of section 13, the Internal Committee or the Local Committee, as the case may be, shall have regard to -

(a) the mental trauma, pain, suffering and emotional distress caused to the aggrieved woman;
(b) the loss in the career opportunity due to the incident of sexual harassment;
(c) medical expenses incurred by the victim for physical or psychiatric treatment;
(d) the income and financial status of the respondent;
(e) feasibility of such payment in lump sum or in instalments.

**16. Prohibition of publication or making known contents of complaint and inquiry proceedings. –** Notwithstanding anything contained in the Right to Information Act, 2005 (22 of 2005), the contents of the complaint made under section 9, the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and inquiry proceedings,

recommendations of the Internal Committee or the Local Committee, as the case may be, and the action taken by the employer or the District Officer under the provisions of this Act shall not be published, communicated or made known to the public, press and media in any manner:

Provided that information may be disseminated regarding the justice secured to any victim of sexual harassment under this Act without disclosing the name, address, identity or any other particulars calculated to lead to the identification of the aggrieved woman and witnesses.

**17. Penalty for publication or making known contents of complaint and inquiry proceedings. –** Where any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action to be taken under the provisions of this Act, contravenes the provisions of section 16, he shall be liable for penalty in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, in such manner as may be prescribed.

**18. Appeal. –** (1) Any person aggrieved from the recommendations made under sub-section (2) of section 13 or under clause (i) or clause (ii) of sub-section (3) of section 13 or sub-section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations may prefer an appeal to the court or tribunal in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist then, without prejudice to provisions contained in any other law for the time being in force, the person aggrieved may prefer an appeal in such manner as may be prescribed.

(2) The appeal under sub-section (1) shall be preferred within a period of ninety days of the recommendations.

## CHAPTER VI
### Duties of Employer

**19. Duties of employer. –** Every employer shall -

(a) provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace;

(b) display at any conspicuous place in the workplace, the penal consequences of sexual harassments; and the order constituting , the Internal Committee under sub-section (1)of section 4;

(c) Organise workshops and awareness programmes at regular intervals for sensitising the employees with the provisions of the Act and orientation programmes for the members of the Internal Committee in the manner as may be prescribed;

(d) Provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry;

(e) assist in securing the attendance of respondent and witnesses before the Internal Committee or the Local Committee, as the case may be;

(f) make available such information to the Internal Committee or the Local Committee, as the case may be, as it may require having regard to the complaint made under sub-section (1) of section 9;

(g) provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code (45 of 1860) or any other law for the time being in force;

(h) cause to initiate action, under the Indian Penal Code (45 of 1860) or any other law for the time being in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;

(i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct;

(j) monitor the timely submission of reports by the Internal Committee.

## CHAPTER VII
### Duties and Powers of District Officer

**20. Duties and Powers of District Officer. –** The District Officer shall,-

(a) monitor the timely submission of reports furnished by the Local Committee;

(b) take such measures as may be necessary for engaging non-governmental organisations for creation of awareness on sexual harassment and the rights of the women.

## CHAPTER VIII
### Miscellaneous

**21. Committee to submit annual report. –** (1) The internal Committee or the Local Committee, as the case may be, shall in each calender year prepare, in such form and at such time as may be prescribed, an annual report and submit the same to the employer and the District Officer.

(2) The District Officer shall forward a brief report on the annual reports received under sub-section (1) to the State Government.

**22. Employer to include information in annual report. –** The employer shall include in its report the number of cases filed, if any, and their disposal under this Act in the annual report of his organisation or where no such report is required to be prepared, intimate such number of cases, if any, to the District Officer.

**23. Appropriate Government to monitor implementation and maintain data. –** The appropriate Government shall monitor the implementation of this Act and maintain data on the number of cases filed and disposed of in respect of all cases of sexual harassment at workplace.

**24. Appropriate Government to take measures to publicise the Act. –** The appropriate Government may, subject to the availability of financial and other resources, -

(a) Develop relevant information, education, communication and training materials, and organise awareness programmes, to advance the understanding of the public of the provisions of this Act providing for protection against sexual harassment of woman at workplace;

(b) Formulate orientation and training programmes for the members of the Local Complaints Committee.

**25. Power to call for information and inspection of records. –** (1) The appropriate Government, on being satisfied that it is necessary in the public interest or in the interest of women employees at a workplace to do so, by order in writing, -

(a) Call upon any employer or District Officer to furnish in writing such information relating to sexual harassment as it may require;

(b) Authorise any officer to make inspection of the records and workplace in relation to sexual harassment, who shall submit a report of such inspection to it within such period as may be specified in the order.

(2) Every employer and District Officer shall produce on demand before the officer making the inspection all information, records and other documents in his custody having a bearing on the subject matter of such inspection.

**26. Penalty for non-compliance with provisions of Act. –** (1) Where the employer fails to -

(a) constitute an Internal Committee under sub-section (1) of section 4;

(b) take action under sections 13, 14 and 22; and

(c) contravenes or attempts to contravene or abets contravention of other provision of this Act or any rules made there under, he shall be punishable with fine which may extend to fifty thousand rupees.

(2) If any employer, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, he shall be liable to -

(i) twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence:

Provided that in case a higher punishment is prescribed under any other law for the time being in force, for the offence for which the

accused is being prosecuted, the court shall take due cognizance of the same while awarding the punishment;

(ii) Cancellation, of his licence or withdrawal, or non-renewal, or approval, or cancellation of the registration, as the case may be, by the Government or local authority required for carrying on his business or activity.

**27. Cognizance of offence by courts. –** (1) No court shall take cognizance of any offence punishable under this Act or any rules made thereunder, save on a complaint made by the aggrieved woman or any person authorised by the Internal Committee or Local Committee in this behalf.

(2) No Court inferior to that of a metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Every offence under this Act shall be non organizable.

**28. Act not in derogation of any other law –** The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

**29. Power of appropriate Government to make rules. –** (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) the fees or allowances to be paid to the Members under sub-section (4) of section 4;

(b) nomination of members under clause (c) of sub-section (1) of section 7;

(c) the fees or allowances to be paid to the Chairperson, and Members under sub-section (4) of section 7;

(d) the person who may make complaint under sub-section (2) of section 9;

(e) the manner of inquiry under sub-section (1) of section 11;

(f) the powers for making an inquiry under clause (c) of sub-section (2) of section 11;

(g) the relief to be recommended under clause (c) of sub-section (1) of section 12;

(h) the manner of action to be taken under clause (i) of sub-section (3) of section 13;

(i) the manner of action to be taken under sub-sections (1) and (2) of section 14;

(j) the manner of action to be taken under section 17;

(k) the manner of appeal under sub-section (1) of section 18;

(l) the manner of organising workshops, awareness programmes for sensitising the employees and orientation programmes for the members of the Internal Committee under clause (c) of section 19; and

(m) the form and time for preparation of annual report by Internal Committee and the Local Committee under sub-section (1) of section 21.

(3) Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(4) Any rule made under sub-section (4) of section 8 by the State Government shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

**30. Power to remove difficulties. –** (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

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# SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) RULES, 2013

***Ministry of Women and Child Development Notification No. G.S.R. 769 (E) dated the 9th December, 2013. Published in Gazette of India (Extraordinary) Part II Section 3(i) date 9-12-2013 Pages 4-6.***

In exercise of the powers conferred by section 29 of the ***Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013),*** the Central Government hereby makes the following rules, namely :-

**1. Short title and commencement. –** (1) These rules may be called the **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013.**

(2) They shall come into force on the date of their publication in the Official Gazette.

**2. Definitions. –** In these rules, unless the context otherwise requires, -

(a) "Act" means the Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013);

(b) "complaint" means the complaint made under section 9;

(c) "Complaints Committee" means the Internal Committee or the Local Committee, as the case may be;

(d) "incident" means an incident of sexual harassment as defined in clause (n) of section 2;

(e) "section" means a section of the Act;

(f) "special educator" means a person trained in communication with people with special needs in a way that addresses their individual differences and needs;

(g) words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

**3. Fees or allownces for Member of Internal Committee. –** (1) The member appointed from amongst non-government organisations shall be entitled to an allowance of two hundred rupees per day for holding the proceedings of the Internal Committee and also the reimbursement of travel cost incurred in travelling by train in tier air condition or air conditioned bus and auto rickshaw or taxi, or the actual amount spent by him on travel, whichever is less.

The employer shall be responsible for the payment of allowances referred to in sub-rule (1).

**4. person familiar with issues relating to sexual harassment. –** Person familiar with the issues relating to sexual harassment for the purpose of clause (c) of sub-section (1) of section 7 shall be a person who has expertise on issue relating to sexual harassment and may include any of the following:-

(a) a social worker with at least five years' experience in the field of social work which leads to creation of societal conditions favourable towards empowerment of women and in particular in addressing workplace sexual harassment;

(b) a person who is familiar with labour, service, civil or criminal law.

**5. Fees or allowances for chairperson and Members of Local Committee. –** (1) The chairperson on the Local Committee shall be entitled to an allowances of two hundred and fifty rupees per day for holding the proceedings of the said Committee.

(2) The Members of the Local Committee other than the Members nominated under clauses (b) and (d) of sub-section (1) of section 7 shall be the said entitled to an allowance of two hundred rupees per day of holding the proceedings of the said

Committee and also the reimbursement of travel cost incurred in travelling by train in three tier air condition or air conditioned bus and auto rickshaw or taxi, or the actual amount spent by him on travel, whichever is less.

The District Officer shall be responsible for the payment of allowances referred to in sub-rules (1) and (2).

**6. Complaint of sexual harassment. –** For the purpose of sub-section (2) of section 9,-

(i) where the aggrieved woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed by -

(a) her relative or friends; or

(b) her co-worker; or

(c) an officer of the National Commission for women or State Women's Commission; or

(d) any person who has knowledge of the incident, with the written consent of the aggrieved woman;

(ii) where the aggrieved woman is unable to make a complaint on account of her mental incapacity, a complaint may be filed by -

(a) her relative of friend; or

(b) a special educator, or

(c) a qualified psychiatrist or psychologist; or

(d) the guardian or authority under whose care she is receiving treatment or care; or

(e) any person who has knowledge of the incident jointly with her relative or friend or a special educator or qualified psychiatrist or psychologist, or guardian or authority under whose care she is receiving treatment or care;

(iii) where the aggrieved woman for any other person is unable to make a complaint, a complaints may be filed by any person who has knowledge of the incident, with her written consent;

(iv) where the aggrieved woman is dead, a complaint may be filed by any person who has knowledge of the incident, with the written consent of her legal heir.

**7. Manner of inquiry into complaint. –** (1) Subject to the provisions of section 11, at the time of filing the complaint, the complainant shall submit to the Complaints Committee, six copies of the complaint along with supporting documents and the names and addresses of the witnesses.

(2) On receipt of the complaint, the Complaint Committee shall send one of the copies received from the aggrieved woman under sub-rule (1) to the respondent within a period of seven working days.

(3) The respondent shall file his reply to the complaint along with his list of documents, and names and addresses of witnesses, within a period not exceeding ten working days from the date of receipt of the documents specified under sub-rule (1).

(4) The Complaints Committee shall make inquiry into the complaint in accordance with the principles of natural justice.

(5) The Complaints Committee shall have the right to terminate the inquiry proceedings or to give an ex parte decision on the complaint, if the complainant or respondent fails, without sufficient cause, to present herself or himself for three consecutive hearings convened by the Chairperson or Presiding Officer, as the case may be :

Provided that such termination on ex parte order may not be passed without giving a notice in writing, fifteen days in advance, to the party concerned.

(6) The parties shall not be allowed to bring in any legal practitioner to represent them in their case at any stage of the proceedings before the Complaints Committee.

(7) In conducting the inquiry, a minimum of three Members of the Complaints Committee including the Presiding Officer or the Chairperson, as the case may be, shall be present.

**8. Other relief to complainant during pendency of inquiry. –** The complaints Committee at the written request of the aggrieved woman may recommend to the employer to -

(a) restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, and assign the same to another officer.

(b) restrain the respondent in case of an educational institution from supervising any academic activity of the aggrieved woman.

**9.** Manner of taking action for sexual harassment. – Except in cases where service rules exist, where the Complaints Committee arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be, to take any action including a written apology, warning, reprimand or censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service or undergoing a counselling session or carrying out community service.

10. Action for false or malicious complaint or false evidence. – Except in case where service rules exist, where the Complaints Committee arrives at the conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or District Officer, as the case may be, to take action in accordance with the provisions of rule 9.

**11. Appeal. –** Subject to the provisions of section 18, any person aggrieved from the recommendations made under sub-section (2) section 13 or under clauses (i) or clause (ii) of sub-section (3) of Section 13 of sub section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations may prefer an appeal to the appellate authority notified under clause (a) of section 2 of the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).

**12. Penalty for contravention of provision of section 16. –** Subject to the provisions of section 17, if any person contravenes the provisions of section 16, the employer shall recover a sum of five thousand rupees as penalty from such person.

**13. Manner to organise workshop, etc. –** Subject to the provisions of section 19, every employer shall -

(a) formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace intended to promote gender sensitive safe spaces and remove underlying factors that contribute towards a hostile work environment against women;

(b) carry out orientation programmes and seminars for the Members of the Internal Committee;

(c) carry out employees awareness programmes and create forum for dialogues which may involve Panchayati Raj Institutions, Gram Sabha, women's groups, mothers' committee, adolescent groups, urban local bodies and any other body as may be considered necessary;

(d) conduct capacity building and skill building programmes for the Members of the Internal Committee;

(e) declare the names and contact details of all the Members of the Internal Committee;

(f) use modules developed by the State Governments to conduct workshops and awareness programmes for sensitising the employees with the provisions of the Act.

**14. Preparation of annual report. –** The annual which the Complaints Committee shall prepare under section 21, shall have the following details:-

(a) number of complaints of sexual harassment received in the year;

(b) number of complaints disposed off during the year;

(c) number of case pending for more than ninety days;

(d) number of workshops or awareness programme against sexual harassment carried out;

(e) nature of action taken by the employer or District Officer.

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