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

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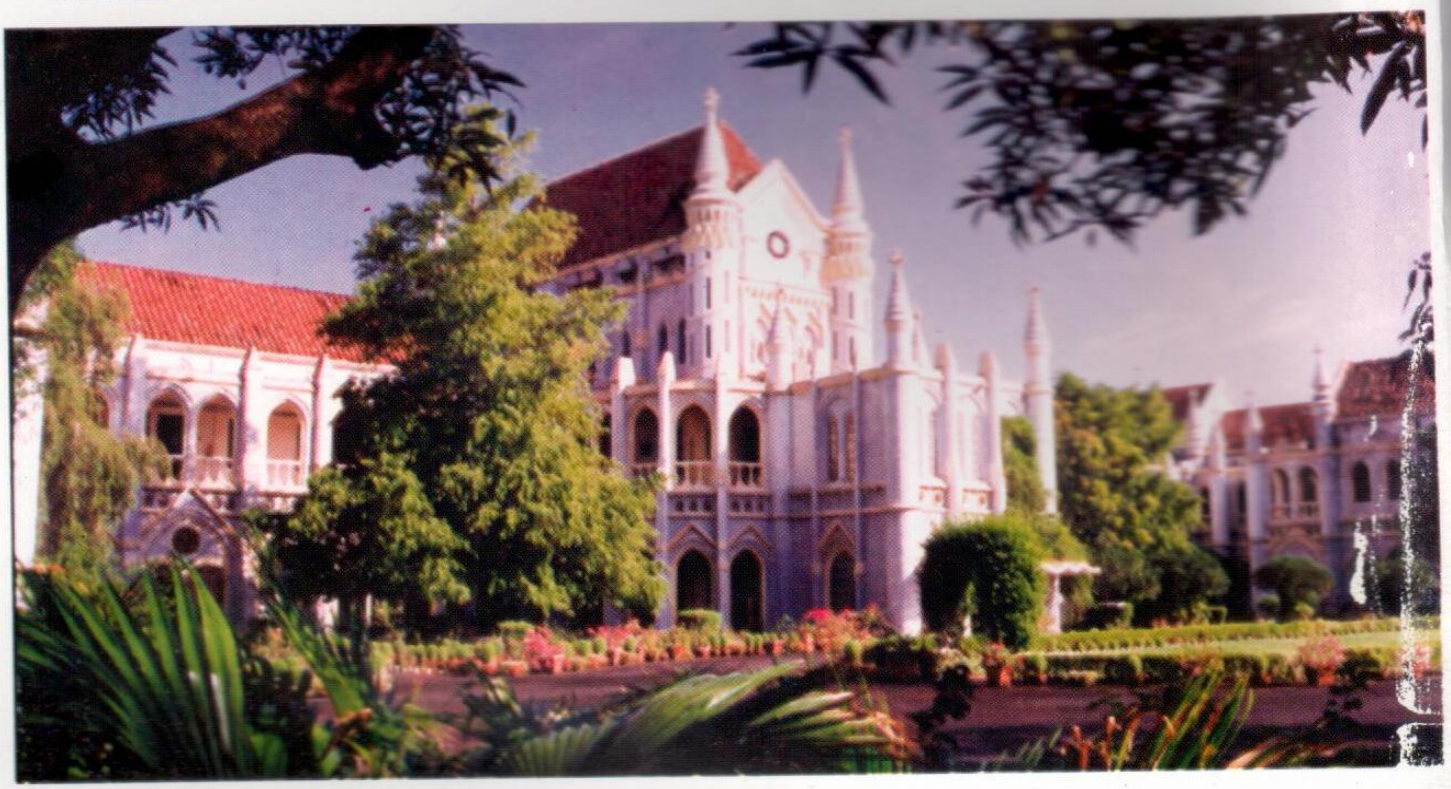

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Former Chief Justice,
High Court of M.P., Jabalpur

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Sanjeev Kalgaonkar
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FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director Incharge

Respected Judges

Nelson Mandela said *"Our children are our greatest treasure. They are our future. Those who abuse them tear at the fabric of our society and weaken our nation."*

Recently, in case of ***Sampurna Behura v. Union of India and Others,*** the Supreme Court in judgment dated 09.02.2018 observed that *"our policy and decision makers need to heed this advice and warning and appreciate that they are not doing any favour to the children of our country by caring for them – it is their constitutional obligation and the social justice laws enacted by Parliament need to be effectively and meaningfully enforced."*

Responding to the social pressure, the Central as well as State Government were swift to legislate on the stricter punishment for sexual offences against children providing even for death penalty. Still, a lot is desired to be done. The Government and the society need to consider the root causes for such violent and distorted psyche of offenders and respond accordingly.

We are concerned with the part of the Judiciary in dealing with children – both, in need of care and protection as well as in conflict with law. The children in conflict with law have right to be treated fairly and compassionately, in child-friendly manner. Instead of merely putting them in custody of child care institutions for their misdemeanor, the Juvenile Justice System must be proactive towards their social, economic and psychological rehabilitation so that we may not lose a good citizen who can contribute for betterment of our society and country. We are publishing an extensive article with regard to the jurisdiction, powers and limitations of the Children's Court.

The evergrowing pendency of the cases under Negotiable Instruments Act makes it imperative for the Courts to reconsider the procedure of trial. The Supreme Court in the cases of ***Indian Bank Association*** and ***M/s Meters and Instruments Pvt. Ltd.*** laid down certain guidelines with regard to procedure for

speedy trial of these cases. An attempt is being made by the Academy to clarify various aspects of the trial of cheque bounce cases.

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

The Supreme Court in case of ***Jaswant Singh*** laid down that an application for restoration of earlier application under Order 9 Rule 13 of CPC, which was dismissed in default, can be treated as an application under Order 9 Rule 9 read with Section 141 to restore a miscellaneous proceeding akin to suit and rejection of such application would entitle the applicant to file miscellaneous appeal under Order 43 Rule 1 (c) of CPC against that order.

In case of ***Suresh Kumar Wadhwa***, the Supreme Court held that forfeiture of earnest money can be ordered only when the contract contains stipulation of forfeiture.

Considering the scope of revisional jurisdiction, the High Court of Madhya Pradesh in the case of ***Malay Shrivastava*** laid down that the revisional court can only examine the correctness of the impugned order in the backdrop of *jus scriptum* and the *jus commune*. The impugned order cannot be set aside on the ground that it is motivated by malicious intent on the part of the complainant. Explaining the stage for consideration on sanction for prosecution, the High Court laid down that necessity for sanction has to be decided from stage to stage. If the alleged act unequivocally linked to discharge of public duty, the sanction is pre-requisite for cognizance and can be considered at the very inception.

In case of ***Shafhi Mohammad,*** the Apex Court considering the requirement of certification u/s 65B of the Evidence Act held that such a certificate would be mandatory only when the person producing electronic evidence has the custody or control over the devise generating the electronic evidence. It was further held that requirement of certificate can be relaxed where necessity of justice so justifies.

In case of ***Ranchhod,*** the High Court of Madhya Pradesh dealing with the rights of adoptee over coparcenary property of previous family, held that only the property "vested" in adopted child continues to vest in him. The fluctuating undivided interest in coparcenary property is not a vested right. Therefore, the adoptee has no vested right to seek partition of the property of the previous family after adoption.

In case of ***B.C. Jain,*** the High Court of Madhya Pradesh laid down guidelines for the police and Courts dealing with the cases of medical negligence implicating doctors working in Government Hospitals and Health Centres.

In case of ***Naveen Kumar,*** the Supreme Court considering the liability of transferee owner, held that Section 2 (30) of the Motor Vehicles Act provides that it is the registered owner, whom Parliament has regarded as owner of the vehicle and not the transferee owner. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority.

In case of ***Surya Prakash v. Smt. Rachna*** (unreported), the High Court of Madhya Pradesh held that non-payment of maintenance (interim or final) does constitute breach of protection order u/s 31 of the Protection of Women from Domestic Violence Act, 2005.

The Academy has been in the thick of educational activities in the past two months. The Academy conducted Workshops on Negotiable Instruments, Anti-Corruption Laws, Recent legal trends relating to crime against women & children and POCSO Act, 2012 for the Judges of the District Judiciary and also an Educational Programme for Prosecutors in the month of December.

The Academy commenced its academic activities in the year 2018 with the Colloquium of District Judges.

After the introduction of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, litigation will be made less cumbersome and expeditious. The Act mirrors and affirms similar

principles of law reflected in various statutes of developed countries which ensure a speedy legal recourse and essentially introduces setting up of a Commercial Court at District level and a Commercial Division in the High Court having ordinary original civil jurisdiction to deal with commercial disputes. As these Courts have been newly constituted, to sensitize the Presiding Officers of these Courts regarding the nuances of the new Act, in continuation with the colloquium, the Academy also conducted Workshop on working of Commercial Courts as most of the designated judges of the Commercial Courts are District Judges.

Madhya Pradesh State Judicial Academy and High Court of Madhya Pradesh in collaboration with National Judicial Academy, conducted NJA's West Zone Regional Conference on – Enhancing Excellence of the Judicial Institutions: Challenges & Opportunities on 13th & 14th January, 2018 in the Academy for the first time.

In addition to that, the Academy also conducted Final Phase Induction Course for the second batch of newly appointed Civil Judges of 2017 batch. A Specialized Regional Education Programme on – Domestic Violence and offences against women was conducted at Indore for the Judges of Indore region.

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

Keep blessing our pursuit for judicial excellence.

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"Iura Novit Curia" – It is the Judge's duty to find the legal norm fitting the case without waiting for the parties to present.

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

Colloquium for District Judges
(04.01.2018 & 05.01.2018)

Workshop on – Working of Commercial Courts
(06.01.18)

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

West Zone Regional Conference on Enhancing Excellence of the Judicial Institutions. Challenges and Opportunities
(13.01.2018 & 14.01.2018)

Induction Course (Final Phase) for Civil Judges Class-II of 2017 batch (second batch)
(16.01.2018 to 09.02.2018)

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

Workshop on – Negotiable Instruments Act, 1881
(03.12.2017)

Specialized Training Programme for Pubic Prosecutors
and Additional Pubilic Prosecutors
(05.12.2017 & 06.12.2017)

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

Two days Workshop on – Key issues under the Anti-Corruption Laws
(16.12.2017 & 17.12.2017)

Workshop on – Key issues of Recent Laws relating to Crime against Women & Children and POCSO Act, 2012
(22.12.2017)

HON'BLE SHRI JUSTICE VED PRAKASH SHARMA
DEMITS OFFICE

Hon'ble Shri Justice Ved Prakash Sharma demitted office on His Lordship's attaining superannuation.

Hon'ble Shri Justice Ved Prakash Sharma was born on January 2, 1956. Joined M.P. State Judicial Services as Civil Judge Class II on April 16, 1983 at Gwalior. Was promoted to Higher Judicial Sevices on June 3, 1996. Granted Selection Grade Scale on June 1, 2002 and thereafter, Super Time Scale on January 2, 2012.

Worked at Gwalior, Pichhore, Jora, Raipur (now Chhattisgarh) and Khandwa. Also served as Dy. Commissioner (Bhopal Gas Commission).

Held the post of Additional Director and thereafter, Director of the State Judicial Academy between May 2002 to June 2007. As Director of the JOTRI (now MPSJA), diversified its activities and conceptualized various Workshops/training programmes for Judicial officers as well as Officers of other Departments like Electricity, Police, Forest, Medical, Prosecution,

Co-operatives, District Consumer Forum etc. and was also Editor of

Bi-monthly Institutional Journal 'JOTI'. Following the pattern of National Judicial Academy, Bhopal, took initiative to prepare reading material on diverse specialized subjects of law. Acknowledged as a good orator and has delivered lectures and speeches in various training programmes on varied subjects in different Institutions including National Judicial Academy, Bhopal and National Law Institute University, Bhopal. From February, 2009 to March, 2010 served as Professor at the National Judicial Academy, Bhopal and thereafter, as District & Sessions Judge, Sehore. From March 2010 to March 2011, worked as Principal Registrar (Judl.) and thereafter, from April 2013 till 31.01.2016 as Registrar General of the High Court of M.P.

Authored book 'LEGAL ISSUES AN ANTHOLOGY' a compilation of articles on various legal issues, foreworded by Hon'ble Mr. Justice

R.V. Raveendran, Former Judge, Supreme Court of India. Also authored a book in Hindi on “Panchayat Raj in Madhya Pradesh”, published by M.P. State Legal Services Authority.

Attended International Conference on 'Judicial Governance' at Singapore in the capacity of Registrar General from 27th to 31st July, 2015.

Was Chairman, M.P. State Co-operative Tribunal, Bhopal from 01.02.2016 till elevation.

Took oath as Additional Judge, High Court of Madhya Pradesh on 07.04.2016 and as Permanent Judge on 17.03.2017.

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

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PART – I

परिवाद अन्तर्गत परक्राम्य लिखत अधिनियम - निर्देश एवं प्रक्रिया

सुदीप कुमार श्रीवास्तव
अतिरिक्त संचालक,
म.प्र. राज्य न्यायिक अकादमी

उद्देश्य

बैंकिंग, वित्तीय संस्थाएँ एवं परक्राम्य लिखत विधियाँ (संशोधन) अधिनियम, 1988 से परक्राम्य लिखत अधिनियम, 1881 में अध्याय 17 (धारा 138 से 142) के उपबंध समाविष्ट कर खाते में राशि की अपर्याप्तता इत्यादि आदि कारणों से चेक के अनादरण को दण्डनीय अपराध बनाये जाने में विधायिका का मूल उद्देश्य वित्तीय संस्थाओं और व्यवसायिक लेन-देन में चेक की स्वीकार्यता और विश्वसनीयता बढ़ाना रहा है।

इसी उद्देश्य को ध्यान में रखते हुये एक तरफ ईमानदार लेखीवाल (Drawee) को सुरक्षा प्रदान करते हुये धारा 138 में उपबंध किया गया कि यदि किन्हीं परिस्थितियों या आकस्मिकताओं के कारण चेक अनादरित हो गया है तो ऐसे अनादरण और मांग की सूचना प्राप्त होने पर लेखीवाल, भुगतान पाने वाले व्यक्ति (Payee) अथवा सम्यक अनुक्रम में चेक के धारक (Holder in due course) को 15 दिन के भीतर चेक की राशि और ब्याज एवं खर्च की राशि (यदि कोई हो) अदा कर सकता है और ऐसी दशा में लेखीवाल किसी अपराध के दायित्व से मुक्त होगा। दूसरी ओर गृहीता अथवा सम्यक् अनुक्रम में धारक को कठिनाईयों से बचाने के लिये धारा 139 से विधिक उपधारणा का सृजन कर उपधारणा के खण्डन का भार लेखीवाल अर्थात् अभियुक्त पर डाला गया है।

अपराध की प्रकृति

धारा 138 में वर्णित अपराध की प्रकृति एक सिविल दोष की है, इसे विनियात्मक अपराध (Regulatory offence) भी कहा गया है। इसका उद्देश्य न केवल अभियुक्त को दंडित करना है बल्कि उससे परक्राम्य लिखत का पालन कराना भी है। (देखें ***विनयदेवान्ना नायक विरूद्ध रैयत सेवा सहकारी बैंक लिमि., ए.आई.आर. 2008 एससी 716***)**दण्ड का स्वरूप**

आर. विजयन विरूद्ध बेबी, (2012) 1 एससीसी 260 वाले मामले में माननीय न्यायमूर्ति आर. व्ही. रविन्द्रन जे. ने धारा 138 में प्रावधानित दण्ड के स्वरूप को स्पष्ट करते हुए प्रतिपादित किया कि यह दण्डात्मक होने के साथ-साथ क्षतिपूरक है। मजिस्ट्रेट को इस परम्परागत सोच से ऊपर उठना होगा कि न्यायालय का कार्य दांडिक प्रकरणों में केवल दण्डादेश पारित करना है चाहे वह कारावास के रूप में हो या अर्थदण्ड के रूप में। इस अपराध में प्रावधानित अर्थदण्ड की मात्रा चेक की राशि से दुगनी तक होने का आशय परिवादी को न सिर्फ चेक की राशि बल्कि ब्याज और खर्च की उचित राशि क्षतिपूर्ति के रूप में दिलाना है।

इसी न्याय दृष्टांत में दण्ड प्रक्रिया संहिता की धारा 357 (1) (बी), 357, 29 (2) एवं परक्राम्य लिखत अधिनियम की धारा 143 में सन् 2002 में हुये संशोधन की स्थिति को स्पष्ट करते हुये स्पष्ट किया गया कि धारा 357 (3) के प्रावधान वहां आकर्षित होंगे जहां अर्थदण्ड, आदेशित दण्ड का भाग नहीं है अर्थात् जहां केवल कारावास का दण्ड दिया गया है वहां न्यायालय निर्देश दे सकते है कि अभियुक्त न्यायालय द्वारा निर्देशित राशि क्षति उठाने वाले व्यक्ति को क्षतिपूर्ति के रूप में अदा करे। जहां आदेशित मुख्य दण्ड में अर्थदण्ड शामिल है वहां धारा 357 (1) (बी) के प्रावधान आकर्षित होंगे और ऐसी दशा में क्षतिपूर्ति की राशि अर्थदण्ड में से ही दिलायी जायेगी। परक्राम्य लिखित अधिनियम में सन् 2002 में हुये संशोधन से धारा 143 (1) द्वारा दण्ड प्रक्रिया संहिता की धारा 29 (2) की सीमा को समाप्त करते हुये न्यायिक मजिस्ट्रेट प्रथम श्रेणी को विशेष शक्ति और अधिकारिता प्रदान की गई है कि वह 5000/- रूपये से अधिक का अर्थदण्ड आरोपित कर सकता है, जिसकी सीमा चेक राशि के दुगने तक है।

परक्राम्य लिखत अधिनियम की धारा 138 में प्रावधानित दण्ड के इस स्वरूप को देखते हुये इसे दण्ड प्रक्रिया की धारा 357 (1)(बी) एवं धारा 357 (3) के प्रावधानों को दण्ड आरोपित करते समय विचार में लिया जाना न सिर्फ उचित बल्कि आवश्यक होगा। यह ध्यान देने योग्य है कि धारा 357 (3) दं.प्र.सं. के अधीन आदेशित क्षतिपूर्ति की राशि को भारतीय दण्ड संहिता की धारा 64 एवं दण्ड प्रक्रिया संहिता की धारा 431 के अधीन प्रवृत्त कराया जा सकता है।

प्रक्रिया

धारा 138 से 142 के प्रभावशील होने के बाद प्रकरणों की बढ़ती संख्या और पक्षकारों को आने वाली कठिनाईयों को देखते हुये विधायिका द्वारा सन् 2002 में परक्राम्य लिखत (संशोधन एवं विविध उपबंध) अधिनियम, 2002 से धारा 143 से 147 तक के उपबंध जोड़कर प्रक्रिया को सरलीकृत किया गया है। सन् 2002 में किये गये संशोधनों से दर्शित है कि साक्ष्य को शपथ पत्र द्वारा दिये जाने का भी प्रावधान करते हुये अभियुक्त पर समंस की तामील डाक या कूरियर आदि द्वारा कराये जाने का उपबंध किया गया, साथ ही साथ प्रकरण का संक्षिप्त विचारण करने की अधिकारिता मजिस्ट्रेट को प्रदान की गई। धारा 147 के उपबंध द्वारा अपराध को शमनीय बनाने का उद्देश्य, पक्षकारों के बीच समझौते के अवसर उत्पन्न करना और पक्षकारों को यथासंभव शीघ्र उचित उपचार दिलाना है। इस संशोधन के उद्देष्य पर प्रकाश डालते हुये माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत ***माण्डवी को-आपरेटिव बैंक लिमिटेड विरूद्ध नीमेश बी. ठाकुर, ए.आई.आर. 2010 एससी 1402*** में प्रतिपादित किया कि धारा 143 से 147 के प्रावधान स्वयं में एक विशिष्ट संहिता है और इनका उद्देश्य विचारण की गति को बढ़ाना और नियमित दांडिक विचारण की कठिन प्रक्रियाओं को दूर करना है।

सन् 1988 के अधिनियम क्रमांक 66 के उद्देश्य को ध्यान में रखते हुये विभिन्न न्याय दृष्टांतों में माननीय सर्वोच्च न्यायालय ने समय-समय पर धारा 143 से 147 तक के प्रावधानों की व्याख्या करते हुये एक स्पष्ट प्रक्रिया निर्धारित की है। न्यायदृष्टांत ***इंडियन बैंक एसोसिएशन विरूद्ध यूनियन आफ इंडिया, ए.आई.आर 2014 एससी 2528*** के मामले में माननीय सर्वोच्च न्यायालय ने त्वरित विचारण हेतु अपनायी जाने वाली पद्धतियों संबंधी विस्तृत दिशा निर्देश दिये हैं और प्रतिपादित किया है कि सामान्यतः मामले के विचारण में संक्षिप्त प्रक्रिया अपनायी जानी चाहिये। ***जे.व्ही. बेहरूनी***

विरूद्ध स्टेट आफ गुजरात, (2014) 10 एससीसी 494 वाले मामले में माननीय सर्वोच्च न्यायालय ने यह भी प्रतिपादित किया कि धारा 138 के मामलों में अपनायी जाने वाली प्रक्रिया लचीली है और दण्ड प्रक्रिया संहिता की धारा 326 (3) के प्रावधान कठोर रूप से लागू नहीं होते हैं। अतः पूर्व मजिस्ट्रेट द्वारा जिस साक्षी की साक्ष्य को अंकित किया गया हो उस साक्षी को पुनः बुलाने का आदेश यांत्रिक रूप से नहीं किया जाना चाहिये। ***मेसर्स मीटर्स एण्ड इंस्ट्रूमेंट्स प्राईवेट लिमिटेड विरूद्ध कंचन मेहता, ए.आई.आर. 2017 एससी 4594*** के न्याय दृष्टांत में माननीय सर्वोच्च न्यायालय ने प्रतिपादित किया कि धारा 143 से 147 की योजना साक्ष्य अधिनियम और दण्ड प्रक्रिया संहिता के प्रावधानों से हटकर है। धारा 143 में प्रयुक्त ''जहां तक संभव है'' अभिव्यक्ति पर्याप्त लचीलापन दर्शित करती है। इस तरह मजिस्ट्रेट द्वारा अपनायी जाने वाली प्रक्रिया, दण्ड प्रक्रिया संहिता में वर्णित ''संक्षिप्त प्रक्रिया'' के समरूप नहीं है। आगे प्रतिपादित किया कि जब तक मजिस्ट्रेट का ऐसा अभिमत न हो कि एक वर्ष से अधिक अवधि का कारावास आदेशित किया जाना मामले की प्रकृति के अनुसार अपेक्षित है तब तक सामान्यतः संक्षिप्त प्रक्रिया का अनुसरण करना चाहिये। यह भी ध्यान दिया जाना चाहिये कि दण्ड प्रक्रिया संहिता की धारा 357 (3) व 431 एवं भारतीय दण्ड संहिता की धारा 64 के प्रावधानों को ध्यान में रखते हुये बहुत से ऐसे मामले हो सकते हैं जिसमें एक वर्ष से अधिक का कारावास दिया जाना आवश्यक न हो। इसी दृष्टिकोण के साथ विचार करते हुये प्रक्रिया अपनाई जानी चाहिये।

जैसा कि पूर्व में देखा जा चुका है कि धारा 147 का प्रावधान कर अपराध को शमनीय बनाने का उद्देश्य पक्षकारों के बीच समझौते के अवसर उत्पन्न कर पक्षकारों को शीघ्र उपचार उपलब्ध कराना रहा है। ***दामोदर एस. प्रभु विरूद्ध सैय्यद बाबालाल एच., ए.आई.आर. 2010 एससी 1907*** के न्याय दृष्टांत में माननीय सर्वोच्च न्यायालय ने विभिन्न निर्देश जारी करते हुये प्रारंभिक स्टेज पर ही मामले में समझौते के प्रयास की प्रवृत्ति अपनाने पर बल दिया है। ***सी.सी. अलावी हाजी विरूद्ध पाला पेटी मोहम्मद, ए.आई.आर. 2007 एससी (सप्लीमेंट) 1705*** के प्रकरण में माननीय सर्वोच्च न्यायालय ने यह भी प्रतिपादित किया है कि यदि धारा 138 (1) (बी) के अधीन अभियुक्त को नोटिस नहीं मिली है तो भी समंस मिलने के बाद वह न्यायालय में उपस्थित होकर चेक की राशि का भुगतान कर सकता है और ऐसा करने की अनुमति दी जा सकती है।

इंडियन बैंक एसोसिएशन (पूर्वोक्त) वाले मामले में आगे यह प्रतिपादित किया गया है कि समंस में यह निर्देश दिया जाना चाहिये कि अभियुक्त प्रथम सुनवाई में अपराध के शमन हेतु आवेदन कर सकता है और यदि आवेदन प्रस्तुत किया जाता है तो उस पर यथा उचित आदेश पारित किया जा सकता है। यहां भी समझौते द्वारा प्रकरण के निराकरण की संभावना तलाशने और उस पर बल देने का अभिमत माननीय सर्वोच्च न्यायालय का रहा है।

समझौते में दोनों पक्षों की सहमति आवश्यक है। समस्या तब उत्पन्न होती है जब अभियुक्त समझौता करने को तैयार हो और परिवादी पक्ष किन्हीं कारणों से समझौता करने को इच्छुक न हो। इस समस्या पर विचार करते हुये माननीय सर्वोच्च न्यायालय ने धारा 138 को परक्राम्य लिखत अधिनियम में अधिनियमित करने के उद्देश्यों को पुनः रेखांकित करते हुए ***मेसर्स मीटर्स एण्ड इंस्ट्रूमेंट्स*** (पूर्वोक्त) के न्यायदृष्टांत में प्रतिपादित किया है कि संविधि का मूल उद्देश्य संव्यवहारों में चेक की विश्वसनीयता को बढ़ाना और लेखीवाल को दंडित किये बिना चेक पाने वाले अर्थात् परिवादी को यथासंभव शीघ्र उपचार उपलब्ध कराना है। न्यायालय को परिवादी और अभियुक्त के

अधिकारों में संतुलन स्थापित करते हुये न्याय तक सबकी पहुंच सुनिश्चित करना होगा। ध्यान देना होगा कि दोषी को यथासंभव शीघ्रता से अवश्य दंडित करना है और जो विधि का पालन करने वाले हैं, उन्हें अनावश्यक रूप से लंबे समय तक कार्यवाहियों में उलझाकर नहीं रखना है।

इन्हीं उद्देश्यों के प्रकाश में माननीय सर्वोच्च न्यायालय ने आगे प्रतिपादित किया कि धारा 143 विवक्षित रूप से मजिस्ट्रेट को यह अधिकार प्रदान करती है कि इस बात से संतुष्ट होने पर कि न्यायालय द्वारा अभिनिर्धारित चेक की राशि, ब्याज और वाद व्यय की उचित राशि अभियुक्त द्वारा परिवादी को प्रदान कर दी गई है, तो मजिस्ट्रेट न्याय हित में अभियुक्त को उन्मोचित कर दे। इस प्रकार का निर्वचन विधायिका के आशय के अनुरूप होगा। इस तरह जब अभियुक्त का आचरण युक्तियुक्त हो तथा क्षतिपूर्ति द्वारा परिवादी को न्याय की पूर्ति होती हो, ऐसी दशा में धारा 143 परक्राम्य लिखत अधिनियम सहपठित धारा 258 दं.प्र.सं. का प्रयोग करते हुये कार्यवाही को समाप्त किया जा सकता है।

मेसर्स मीटर्स एण्ड इंस्ट्रूमेंट्स (पूर्वोक्त) वाले इसी मामले में ***इंडियन बैंक एसोसिएशन*** (पूर्वोक्त) के मामले में दिये गये निर्देशों को वर्णित करते हुये माननीय सर्वोच्च न्यायालय ने परिवाद के कुछ घटकों और संबंधित प्रक्रिया आदि के संबंध में निर्देश दिये है। इन दोनों प्रकरणों एवं आर विजयन (पूर्वोक्त) में दिये गये निर्देशों से धारा 138 परक्राम्य लिखत अधिनियम के मामलों की कार्यवाही एवं विचारण के संबंध में एक सुस्पष्ट और सारगर्भित प्रक्रिया प्रकट होती है जो इस प्रकार हैः-

1. धारा 138 के अधीन प्रस्तुत किये गये प्रत्येक परिवाद में यह वांछनीय है कि परिवादी अपने बैंक का एकाउंट नंबर और बैंक का विवरण दर्शित करे और यदि हो तो अपना ई-मेल आई.डी. दर्शित करे।
2. यदि संभव हो तो अभियुक्त का ई-मेल आई.डी. दर्शित किया जाये। यदि अभियुक्त के बैंक के पास अभियुक्त का ई-मेल आई.डी. उपलब्ध हो तो बैंक से वांछा किये जाने पर अभियुक्त का ई-मेल आई.डी. चेक धारक (Payee) को प्रदान करेगा।
3. सभी विवरण सहित परिवाद के साथ जब धारा 145 के अनुसार शपथ पत्र और आवश्यक दस्तावेज, अनादरित चेक, सूचना पत्र व बैंक स्लिप प्रस्तुत किये जाते हैं और इन सभी के परिशीलन से धारा 138 का अपराध गठित होता है तो मजिस्ट्रेट अपराध का संज्ञान लेकर अभियुक्त को समंस जारी करेगा।
4. धारा 145 के अधीन प्रस्तुत किया गया शपथ पत्र प्रकरण की सभी कार्यवाहियों और विचारण में साक्ष्य के रूप में पढ़ा जायेगा।
5. समंस का निर्वाह डाक, कुरियर अथवा ई-मेल के माध्यम से किया जायेगा और समंस के निर्वाह हेतु पुलिस सहायता भी ली जा सकती है।
6. अभियुक्त को भेजे जाने वाले समंस में यह दर्शित किया जायेगा कि अभियुक्त यदि समंस में दर्शाई गई चेक की राशि और न्यायालय द्वारा अभिनिश्चित ब्याज व वाद व्यय की राशि निश्चित दिनांक तक परिवादी द्वारा बताये गये खाते में जमा कर देता है और ई-मेल/डाक द्वारा परिवादी और न्यायालय को इस प्रकार राशि जमा करने की सूचना दे देता है तो अन्यथा आदेशित किये जाने के सिवाय अभियुक्त को न्यायालय के समक्ष उपस्थित होना आवश्यक न होगा।

7. जहां अभियुक्त द्वारा उपरोक्त प्रकार से समंस में अंकित राशि परिवादी द्वारा बताये गये खाते में जमाकर परिवादी और न्यायालय को सूचना दे दी जाती है वहां परिवादी द्वारा उठाई गई वैध आपत्तियों (यदि कोई हो) को सुनने और निराकृत करने के पश्चात् न्यायालय जब तक प्रकरण में आगे कार्यवाही करना उचित न समझे, प्रकरण की कार्यवाही समाप्त कर अभियुक्त को उन्मोचित कर देगा।
8. जहां परिवादी द्वारा उठाई गई आपत्ति के दृष्टिगत आगे सुनवाई आवश्यक हो वहां अभियुक्त की उपस्थिति की वांछा की जायेगी।
9. समुचित मामलों में न्यायालय धारा 205 दं.प्र.सं. की शक्तियों का प्रयोग करते हुये अभियुक्त को व्यक्तिशः उपस्थिति से अभिमुक्ति दे सकता है।
10. समंस में यह भी अपेक्षा की जायेगी कि यदि अभियुक्त उपरोक्त प्रकार से समंस में दर्शाई गई राशि जमा नहीं करता है तो वह सुनवाई हेतु नियत दिनांक को न्यायालय में उपस्थित हो एवं विचारण के दौरान अपनी उपस्थिति सुनिश्चित करने के प्रयोजन से न्यायालय द्वारा बताई गई राशि का प्रतिभू सहित/रहित बंध पत्र प्रस्तुत करे।
11. प्रकरण में सामान्यतः संक्षिप्त प्रक्रिया का अनुसरण किया जायेगा जब तक कि प्रकरण के विशिष्ट तथ्यों, परिस्थितियों और अभियुक्त के आचरण आदि के साथ दंड प्रक्रिया संहिता की धारा 357 (1) (बी) और 357 (3) पर विचार कर लेने के बाद मजिस्टेªट का यह अभिमत न हो कि एक वर्ष से अधिक कारावास किया जाना आवश्यक होगा।
12. अभियुक्त की उपस्थिति उपरांत प्रथम सुनवाई दिनांक को अपराध की विशिष्टियाँ बताई जायेंगी। जहां अभियुक्त परिवाद का प्रतिवाद करना चाहता है वहां अभिवाक् अंकित करते समय यह वांछा की जायेगी कि वह आवश्यक रूप से अपनी प्रतिरक्षा विशिष्टतः प्रकट करे। न्यायालय को यह अधिकार होगा कि वह उसी प्रक्रम पर अभियुक्त से उसकी अभिरक्षा के संबंध में विशिष्ट प्रश्न पूछ सके।
13. अभियुक्त जब अपराध अस्वीकार करता है तब यदि वह धारा 145 (2) के अधीन प्रतिपरीक्षण हेतु साक्षियों को बुलाने हेतु आवेदन नहीं करता है, प्रकरण प्रतिरक्षा साक्ष्य के लिये नियत किया जायेगा।
14. जहां अभियुक्त ने परिवादी साक्षियों के प्रतिपरीक्षण हेतु आवेदन किया है वहां परिवादी को निर्देशित किया जायेगा कि वह आगामी तिथि पर साक्षियों को आवश्यक रूप से प्रतिपरीक्षण हेतु उपस्थित रखे और उसके बाद प्रतिरक्षा साक्ष्य हेतु अभियुक्त से अपने साक्षियों को उपस्थित रखने हेतु स्पष्ट निर्देश दिये जायेंगे।
15. न्यायालय द्वारा, यदि शीघ्रगामी प्रक्रिया संभव हो तो दिन प्रतिदिन सुनवाई का अवलंबन लिया जायेगा ताकि विचारण 6 माह की अवधि में पूरा हो जाये।
16. विचारण कार्यवाही के दौरान न्यायालय द्वारा पक्षकारों के बीच समझौते की संभावना को तलाशने का भी प्रयास किया जाना अपेक्षित होगा।

17. अभिवाक् सौदा (Plea Bargaining) के उपबंधों का सहारा भी विचारण कार्यवाही के लिये लिया जा सकता है।

18. अभिवाक् सौदा (Plea Bargaining) या समझौते के प्रयास भी इस प्रकार किये जाने चाहिये कि प्रकरण के विचारण में विलंब कारित न हो और विचारण शीघ्रता पूर्वक किया जा सके।

विशिष्ट प्रक्रिया-सुझाव

उपरोक्त दिशानिर्देशों एवं प्रकरणों के त्वरित निराकरण हेतु विधायिका की मंशा को देखते हुये परिवाद की प्रस्तुति के समय से ही समग्र तथ्यों पर विशिष्ट ध्यान दिया जाना न्यायिक मजिस्ट्रेट के लिये अनिवार्य होगा।

(i) सर्वप्रथम न्यायालय शुल्क की पर्याप्तता पर ध्यान देना होगा और कम न्यायालय शुल्क अदा कर शेष न्यायालय शुल्क अदा करने हेतु लंबा समय लेकर मामले की प्रक्रिया को खींचने की प्रवृत्ति पर अंकुश लगाना होगा। ध्यान देना होगा कि न्यायालय शुल्क की अनुपलब्धता पहले की तरह शाश्वत् बचाव नहीं रह गया है। न्यायालय शुल्क का भुगतान आॅन-लाईन किया जा सकता है और उसे न्यायालय द्वारा प्रमाणित भी किया जा सकता है। अतः ऐसी प्रवृत्ति पर अंकुश लगाने के लिये पक्षकार को आन-लाईन न्यायालय शुल्क अदा करने के लिये निर्देश कर सकता है।

(ii) पार्टनरशिप फर्म या निगमित निकायों द्वारा अथवा उनके विरूद्ध प्रस्तुत मामलों की दशा में अधिनियम की धारा 141 एवं ***अनीता हाडा. विरूद्ध गाॅड फादर ट्रवेल्स एवं टूर्स प्रायवेट लि., ए.आई.आर. 2012 सु. को. 2795*** में प्रतिपादित सिद्धांतों की ओर ध्यान देकर सुनिश्चित कर लेना चाहिये कि परिवाद में प्रारूपिक त्रुटि तो नहीं है जो बाद में विवाद का कारण बने। यदि ऐसी कोई प्रारूपिक त्रुटि हो तो उसे प्रांरभिक स्तर पर ही ध्यान देकर ठीक कराया जाना चाहिये।

(iii) पूर्व में वर्णित दिशानिर्देशों के बिन्दु क्रमांक 6 से यह स्पष्ट है कि जब परिवाद प्रस्तुत होता है और अपराध का संज्ञान ले लिया जाता है तब समंस जारी करने के पहले मजिस्टेªट को विचार करना होगा कि चेक की राशि के संबंध में किस दर से कितना ब्याज और कितना वाद व्यय दिलाना होगा। तब ही समंस में अभियुक्त द्वारा जमा की जाने वाली राशि का उल्लेख संभव हो सकेगा। इसके लिये मेरे विनम्र मत में, उचित प्रक्रिया यह होगी कि परिवादी या उसके अधिवक्ता से इस संबंध में पंजीयन के समय ही पूछ लिया जाये कि न्यायालय शुल्क, अधिवक्ता शुल्क एवं परिवाद प्रस्तुत करने में टाईपिंग आदि का कितना व्यय हुआ है और वे ब्याज मद में कितनी राशि की अपेक्षा करते हैं। उनके प्रस्ताव पर न्यायिक रूप से विचार करते हुये परिवादी को स्वीकार होने वाली राशि तय कर ली जाये। आर. विजयन के न्याय दृष्टांत में बताई गई ब्याज दर को देखते हुये 9 प्रतिशत वार्षिक उचित ब्याज दर होगी। इस प्रकार तय की गई राशि का उल्लेख आदेश पत्रिका में कर लिया जाये जिससे बाद की तिथियों में ब्याज या खर्चे के बारे में आपत्तियाँ उत्पन्न न हों और अभियुक्त द्वारा समंस में लिखी प्रथम शर्त का पालन कर दिये जाने पर मामले को समाप्त करने की कार्यवाही की जा सके। इन निर्देशों के पालन में जारी किये जाने वाले समंस का एक प्रारूप प्रस्तावित किया जाता है जिसकी मदद यथा उचित फेरफार के साथ न्यायालयों द्वारा ली जा सकती है।

(iv) इसी तरह प्रकरण पंजीबद्ध होते समय ही अभियुक्त पर शीघ्रतापूर्वक समन निर्वाह के उपायों पर ध्यान दिया जाना आवश्यक होगा। वे उपाय इस प्रकार हो सकते हैं-

(1) परक्राम्य लिखत अधिनियम की धारा 138 का अपराध संज्ञेय अपराध नहीं हैं। अतः नियम एवं आदेश (आपराधिक) के नियम क्रमांक 546 एवं 548 के प्रकाश में समन हेतु आदेशिका शुल्क दिया जाना आवश्यक है। दिशा निर्देशों से प्रकट होने वाले समन के प्रारूप से स्पष्ट है कि प्रथम बार में अभियुक्त के विरूद्ध गिरफ्तारी वारंट जारी नहीं किया जाना चाहिये इसलिये उचित होगा कि पंजीयन के समय ही परिवादी से परिवाद पत्र, शपथ पत्र एवं दस्तावेजों की समुचित संख्या में प्रतियों के साथ आवश्यक आदेशिका शुल्क (तलवाना) एवं पावती सहित पंजीकृत डाक का डाक व्यय ले लिया जाये। इससे अभियुक्त के विरूद्ध समन जारी करने की प्रक्रिया में विलंब न होगा।

(2) दिशा निर्देश के बिन्दु क्रमांक 5 में वर्णित समन तामील की रीतियों को व्यवहारिक एवं प्रभावी रूप देने के लिये ऐसी प्रक्रिया अपनाई जा सकती है कि अभियुक्त यदि मजिस्ट्रेट की स्थानीय अधिकारिता से बाहर रहने वाला हो अथवा अभियुक्त कोई फर्म या निगमित इकाई हो तो समन तामील पंजीकृत डाक से अथवा यदि ई-मेल एड्रेस उपलब्ध हो तो ई-मेल द्वारा कराई जाये। अन्य परिस्थितियों में समन तामील के लिये पुलिस की सहायता के विकल्प का प्रयोग किया जाये।

(3) ई-मेल से समन भेजने की प्रक्रिया यह होगी कि जिला न्यायालय की कार्यालयीन ई-मेल आई.डी. के माध्यम से अभियुक्त के ई-मेल एड्रेस पर समन प्रेषित किया जायेगा। ई-मेल प्रेषित करते समय प्राप्ति सूचना (Receipt Information) के विकल्प को चुना जाना चाहिए और (On Read) (On Delivery) पर क्लिक करने से अभियुक्त को मेल प्राप्त हो जाने एवं पढ़े जाने पर न्यायालय के ई-मेल आई.डी. में स्वमेव सूचना प्राप्त होगी। ई-मेल आई.डी. सही रूप से प्रेषित हुई है या नहीं इस संबंध में हेडर (Header) की मदद ली जा सकती है। इस तरह सूचनाएँ प्राप्त होने पर साक्ष्य अधिनियम की धारा 88-क के अधीन न्यायालय द्वारा सम्यक् उपधारणा की जा सकती है।

(4) म.प्र. आपराधिक नियम के अंतर्गत हांलाकि असंज्ञेय अपराध से संबंधित प्रकरण में आदेशिका जारी किये जाने हेतु उल्लेखित शुल्क दिया जाना आवश्यक है परन्तु विशेष परिस्थितियों में न्यायालय अथवा उसके कर्मचारी के लोभ के कारण आदेशिका जारी न किये जाने, न्यायालय की निर्वहन संस्था पुलिस की उदासीनता, लोक अथवा उपेक्षा के कारण निष्पादन न होने अथवा आदेशिका को नियत दिनांक पर प्रस्तुत ही न किये जाने की दशा में सिविल न्यायालय नियम 420 (ख) में वर्णित उपबंधों से मार्गदर्शन प्राप्त पुनः तलवाना दिया जाना आवश्यक नहीं है। इस संबंध में न्यायालय सकारण आदेश पारित कर शुल्क से अभिमुक्ति प्रदान कर सकता है।

(5) समन तामील के उपरांत यदि अभियुक्त कोई राशि जमा नहीं करता है और उपस्थित भी नहीं होता है तब दण्ड प्रक्रिया संहिता की धारा 87 के अधीन जमानतीय / गैरजमानतीय वारंट की स्थिति उत्पन्न होगी। यहां तलवाने की आवश्यकता के संबंध में ***अयोध्या***

प्रिंटर्स लिमिटेड विरूद्ध स्टेट आफ केरल, (क्रिमिनल रिविजन क्रमांक 1003 /2015 निर्णय दिनांक 22.09.2015 = (2015) 4 केरला ला टाईम्स 251) के न्यायदृष्टांत से मार्गदर्शन प्राप्त होता है। इस न्यायदृष्टांत में प्रतिपादित किया गया है कि धारा 87 दण्ड प्रक्रिया संहिता के अधीन जारी आदेशिकाओं में आदेशिका शुल्क की आवश्यकता नहीं होती है। इसी तरह यदि अभियुक्त एक बार उपस्थित होने और प्रतिभू सहित/रहित बंधपत्र प्रस्तुत करने बाद यदि फरार हो गया है तब भी धारा 446 दण्ड प्रक्रिया संहिता के अधीन कार्यवाही करने और अभियुक्त के विरूद्ध गिरफ्तारी वारंट जारी करने हेतु आदेशिका शुल्क की आवश्यकता न होगी।

(v) इसी तरह उपरोक्त बिन्दु क्रमांक 12 के संदर्भ में ध्यान देने योग्य तथ्य यह है कि अपराध अस्वीकार करने की दशा में एक सामान्य सा अभिवाक् पर्याप्त न होगा। अभियुक्त पर दायित्व डाला गया है कि वह अपना अभिवाक् अपराध विवरण बताये जाने के समय ही विशिष्टतः अभिकथित करे और प्रकट करे। यदि अभियुक्त ऐसा नहीं करता है तब मजिस्ट्रेट पर दायित्व डाला गया है कि वह अभियुक्त से इस संबंध में प्रश्न पूछे और उसके द्वारा बताई गई बात को लिखे। मेरे विनम्र मत में अभियुक्त का अभिवाक् अंकित करते समय अभियुक्त से सामान्य प्रश्नोत्तर करते हुये उसके बचाव को स्पष्ट कर लेना चाहिये कि क्या प्रश्नगत चेक अभियुक्त के बैंक खाते का है, क्या उक्त चेक पर अभियुक्त के जारीकर्ता के रूप में हस्ताक्षर हैं, क्या अभियुक्त ने उक्त चेक परिवादी को प्रदत्त किया था, क्या अभियुक्त ने ऐसा, किसी ऋण अथवा अन्य दायित्व के उन्मोचन हेतु किया था, यदि नहीं तो उसके उत्तरों का आधार क्या है ? इसके लिय दं.प्र.सं. की धारा 313 (1)(क) के अधीन उपबंधित शक्तियों का प्रयोग भी किया जा सकता है।

(vi) अपराध की विशिष्टियाँ बताये जाने और विस्तृत विनिर्दिष्ट अभिवाक् अंकित करने के बाद प्रकरण सीधे परिवादी साक्षियों से प्रतिपरीक्षण के लिये नियत न होगा बल्कि अभियुक्त को आवेदन करना होगा कि वह परिवादी साक्षियों से प्रतिपरीक्षण चाहता है और ऐसा आवेदन करने पर ही परिवादी साक्षियों को प्रतिपरीक्षण के लिये आहूत करना होगा। यदि अभियुक्त साक्षियों को प्रतिपरीक्षण हेतु आहूत करने का आवेदन प्रस्तुत करता है तो न्यायालय परिवादी साक्षियों को आहूत कर प्रतिपरीक्षण करायेगा, तद्उपरांत अभियुक्त परीक्षण, बचाव साक्ष्य, अंतिम तर्क आदि की कार्यवाही निर्देशित अवधि के भीतर पूर्ण कर प्रकरण को निराकृत किया जाना अपेक्षित है।

उपसंहार

सर्वोच्च न्यायालय द्वारा परक्राम्य लिखित अधिनियम में उपबंधित अपराध से संदर्भित विनिर्दिष्ट प्रक्रिया प्रतिपादित करते हुए दिशा निर्देश जारी किये गये है जिनका अधिनियम के उद्देश्यों के उचित परिप्रेक्ष्यों में पूर्णतः से परिपालन किया जाना बाध्यकारी है। विचारण के विभिन्न स्तरों पर होने वाले प्रक्रियात्मक विलंब को हटाकर इन प्रकरणों का त्वरित निराकरण किया जा सकता है। आवश्यकता मात्र सार्थक प्रयास करने की है।

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(समन का प्रारूप)

न्यायालय ..... न्यायिक मजिस्ट्रेट प्रथम श्रेणी, ...

म.प्र.

प्रकरण क्रमांकः प्रोसेस क्रमांकः

समन अंतर्गत धारा 138 परक्राम्य लिखत अधिनियम, 1882

प्रति,

.....

.....

जो कि परिवादी ..... ने आपके द्वारा विधिक दायित्व/ऋण के भागिक/पूर्ण उन्मोचन में जारी चेक क्रमांक ..... दिनांक ..... राशि ..... के बावत् परक्राम्य लिखत अधिनियम, 1882 की धारा 138 के अधीन परिवाद (जिसकी प्रतिलिपि संलग्न है) प्रस्तुत किया है जिसका संज्ञान इस न्यायालय द्वारा लिया जा चुका है।

अतः आपसे अपेक्षा की जाती है कि आप स्वयं (या यथास्थिति प्लीडर द्वारा) दिनांक .....को ठीक 11:00 बजे दिन इस न्यायालय में उपस्थित हों और यह भी कि इसके बाद की सुनवाई तारीखों में अपनी उपस्थिति सुनिश्चित करने के प्रयोजन से ..... रूपये का प्रतिभू सहित/रहित बंधपत्र व जमानत प्रस्तुत करें। इसमें चूक न हो।

आपको यह भी सूचित किया जाता है कि यदि आप चेक की राशि और ब्याज तथा वाद व्यय की राशि के मद में कुल ..... रूपये की राशि परिवादी द्वारा बताये गये खाता क्रमांक ..... आई.एफ.एस.सी. कोड ..... बैंक का विवरण ..... में जमा कर देते हैं और ऐसे राशि जमा करने की सूचना उपरोक्त वर्णित दिनांक के पूर्व परिवादी को उसके द्वारा दिये गये पते पर और इस न्यायालय को दे देते हैं तो आपकी व्यक्तिशः उपस्थिति आवश्यक न होगी और परिवाद को समाप्त किया जायेगा। सूचित किया जाता है कि यदि आप प्रथम अथवा प्रारंभिक सुनवाई तिथियों में समझौता नहीं करते हैं तो विचारण के पश्चातवर्ती प्रक्रम पर समझौता करने पर चेक की राशि का 10 प्रतिशत शमन शुल्क आपसे वसूलनीय होगा।

यह आज दिनांक ..... को मेरे हस्ताक्षर और न्यायालय की मुद्रा से जारी किया गया।

मजिस्ट्रेट

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बालक न्यायालय - अधिकारिता, शक्ति और सीमाएं

अवधेश कुमार गुप्ता
वरिष्ठ संकाय सदस्य
म.प्र. राज्य न्यायिक अकादमी, जबलपुर

1. पृष्ठभूमि

16 दिसम्बर, 2012 की सर्द रात्रि को देश की राजधानी दिल्ली में एक युवती के साथ सामूहिक बलात्संग की लोमहर्षक घटना का स्मरण करें जिसने समूचे राष्ट्र को स्तब्ध, आक्रोशित और आंदोलित कर दिया था। इन आक्रोशजनित प्रदर्शनों ने भारत की संसद को न केवल यौन अपराधों संबंधी विद्यमान विधि को आपराधिक विधि (संशोधन) अधिनियम, 2013 के माध्यम से परिवर्तित करने के लिए विवश किया वरन् किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2000 के यथा विद्यमान प्रावधानों पर पुनर्विचार करने के लिए बाध्य किया। कारण यह था कि उक्त घटना में संलिप्त व्यक्तियों में से एक व्यक्ति 18 वर्ष से न्यून वय का (16 से 18 वर्ष के मध्य) अर्थात् किशोर था। उसे सामान्य आपराधिक न्यायालय में अभियोजित नहीं किया जा सकता था क्योंकि वह किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2000 के प्रावधानों से आवृत्त एवं संरक्षित था। भारतीय संसद के समक्ष जहां एक ओर किशोर न्याय से संबद्ध अंतरराष्ट्रीय प्रतिबद्धताएं थीं वहीं दूसरी ओर एक भारी जनमत की आकांक्षा जिसका यह आग्रह था कि 16 वर्ष से 18 वर्ष की वय के बालकों का विचारण सामान्य आपराधिक न्यायालयों द्वारा किया जाकर उन्हें दण्डित किया जाना चाहिए। अंतरराष्ट्रीय प्रतिबद्धता एवं जनमत परस्पर प्रतिकूल थे। इन प्रतिकूल परिस्थितियों में भारतीय संसद ने विद्यमान किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2000 को निरसित करते हुए नवीन किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2015 (जिसे अत्र पश्चात् 'अधिनियम' से संबोधित किया जाएगा) अधिनियमित किया। यह अधिनियम 15 जनवरी 2016 से प्रवृत्त हुआ। इस अधिनियम के अधीन 16 वर्ष से 18 वर्ष की वय के बालकों द्वारा कारित जघन्य अपराधों के कतिपय परिस्थितियों में विचारण हेतु एक नए न्यायालय जिसे अधिनियम में 'बालक न्यायालय' पद से अभिहित किया गया है, का गठन किया गया है। ऐसे बालक न्यायालय को अधिनियम में वर्णित बालकों के प्रति कतिपय अपराधों एवं किशोर न्याय बोर्ड एवं समिति के आदेशों के विरूद्ध अपील की अधिकारिता से युक्त किया गया है। अधिनियम की धारा 110 (1) के परंतुक द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए केन्द्र सरकार द्वारा किशोर न्याय (बालकों की देखरेख तथा सरंक्षण) आदर्श नियम, 2016 (जिसे अत्र पश्चात् 'नियम' से संबोधित किया जाएगा) निर्मित किए हैं।

2. बालक न्यायालय

अधिनियम की धारा 2 (20) के अनुसार -

> ''बालक न्यायालय' से बालक अधिकार संरक्षण आयोग अधिनियम, 2005 के अधीन स्थापित कोई न्यायालय या लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 के अधीन कोई विशेष न्यायालय, जहाँ कहीं विद्यमान हो, और जहाँ ऐसे न्यायालयों को अभिहित नहीं किया गया है, वहाँ इस अधिनियम के अधीन अपराधों का विचारण करने की अधिकारिता रखने वाला सेशन न्यायालय अभिप्रेत है।''

इस प्रकार 2015 के अधिनियम के अधीन अनुध्यात् बालक न्यायालय ऐसा न्यायालय है-

1. जो बालक अधिकार संरक्षण अधिनियम 2005 के अधीन स्थापित किया गया है अथवा
2. जो लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 की धारा 28 के अधीन स्थापित विशेष न्यायालय है अथवा
3. जहाँ ऐसे न्यायालय नहीं हैं वहाँ अपराधों को विचारण करने की अधिकारिता रखने वाला सेशन न्यायालय बालक अधिकार संरक्षण अधिनियम, 2005 की धारा-25 के अधीन बालक अधिकारों के उल्लंघन और बालकों के विरूद्ध अपराधों के त्वरित विचारण हेतु किसी सेशन न्यायालय को बालक न्यायालय के रूप में अधिसूचित करने के लिए राज्य सरकार सशक्त है।

मूल प्रावधान इस प्रकार है -

> ***"25. Childrens Courts .*** *For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a Court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:*
>
> *Provided that nothing in this section shall apply if*
>
> *(a) a Court of Session is already specified as a special Court; or*
>
> *(b) a special Court is already constituted, for such offences under any other law for the time being in force."*

इस प्रावधान के अधीन म.प्र. सरकार द्वारा प्रत्येक सेशन न्यायालय को 'बालक न्यायालय' के रूप में अधिसूचित किया गया है। सुसंगत अधिसूचना निम्नवत् है -

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

अधिसूचना

भोपाल, दिनांक07.01.2011 फा. क्र. 17(ई)./38/2010/21-ब (एक) - बाल अधिकार आयोग अधिनियम, 2005 (2006 का 4) की धारा 25 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए राज्य सरकार, म.प्र. उच्च न्यायालय के मुख्य न्यायाधिपति की सहमति से, एतद् द्वारा, बालकों के विरूद्ध अपराधों अथवा बाल अधिकारों के अतिक्रमण के अपराधों का त्वरित विचारण का उपबंध करने के प्रयोजन के लिए राज्य के प्रत्येक सेशन खण्ड में, सेशन न्यायालय को, बाल न्यायालय के रूप विनिर्दिष्ट करता है।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/-

यही न्यायालय लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 की धारा - 28 (1) के परंतुक के अधीन विशेष न्यायालय भी है।

इस प्रकार 2015 के अधिनियम की धारा 2 (20) के अधीन उपर्युक्त अधिसूचना के प्रकाश मेंम.प्र. राज्य में स्थित प्रत्येक सत्र न्यायालय 'बालक न्यायालय' है।

यह तथ्य ध्यातव्य है कि 2005 एवं 2012 के अधिनियमों के अधीन अनुध्यात बालक न्यायालय एवं विशेष न्यायालय बालकों के विरूद्ध अपराध कारित करने वाले व्यक्तियों के विचारण हेतु गठित हैं। ऐसे न्यायालयों में बालक साक्षियों की साक्ष्य अंकन आदि के संबंध में विचारण की विशेष प्रक्रिया उपबंधित करते हुए दोषियों को कठोर दण्ड दिए जाने का प्रावधान किया गया है। इसके विपर्यय 2015 के अधिनियम के अधीन गठित बालक न्यायालय से बालक हितैषी वातावरण में कार्य करते हुए दोषी बालक के सुधार को एवं उसके सामाजिक पुनःसमेकन को लक्षित किया गया है। इस प्रकार बालक न्यायालय से एक ही समय में सुभिन्न या लगभग विपरीत मनःस्थिति में कार्य करने की अपेक्षा की गई है और इस गंभीर दायित्व के निर्वहन का भार बालक न्यायालय पर है।

3. अधिनियम का अध्यारोही प्रभाव
(Overriding Effect of the Act)

बालक न्यायालय को 16 वर्ष और उससे अधिक वय के बालकों द्वारा कारित जघन्य अपराधों के विचारण की अधिकारिता किशोर न्याय (बालकों की देखरेख तथा संरक्षण) अधिनियम, 2015 से प्राप्त होती है। यह न्यायालय इस अधिनियम के प्रावधानों के अधीन विहित विशेष प्रक्रिया का अनुपालन एवं अनुसरण करने के लिए आबद्ध है। इस अधिनियम के प्रावधान दण्ड प्रक्रिया संहिता, 1973 सहित अन्य अधिनियमों के प्रावधानों पर अध्यारोही प्रभाव रखते हैं। इस संबंध में इस अधिनियम की धारा 1 (4) सुसंगत है। यह निम्नवत् है -

> ''1. संक्षिप्त नाम, विस्तार, प्रारंभ और लागू होना -
> (1) .....
> (2) .....
> (3) .....
> (4) तत्समय प्रवृत्त किसी अन्य विधि में अंतर्विष्ट किसी बात के होते हुए भी, इस अधिनियम के उपबंध देखरेख और संरक्षण के जरूरतमंद बालकों तथा विधि का उल्लंघन करने वाले बालकों से संबंधित सभी मामलों में लागू होंगे, जिनके अंतर्गत, -
>
> **(i) विधि का उल्लंघन करने वाले बालकों की गिरफ्तारी, निरोध, अभियोजन (Prosecution) शास्ति या कारावास (Penalty or imprisonment) पुनर्वास और समाज में पुनः मिलाना (Rehabilitation and social reintegration);**

(ii) देखरेख और संरक्षा के जरूरतमंद बालकों के पुनर्वासन, दत्तकग्रहण, समाज में पुनः मिलाने और वापसी की प्रक्रियाएं और विनिश्चय अथवा आदेश भी है।''

स्पष्ट है कि बालक न्यायालय द्वारा बालकों के संबंध में अनुसरित प्रक्रिया दण्ड प्रक्रिया संहिता, 1973 में वर्णित सुसंगत प्रक्रिया से उस सीमा तक भिन्न होगी जहां तक इस अधिनियम द्वारा ऐसी प्रक्रिया के संबंध में विशेष उपबंध किए हैं। पुनः यह भी कि बालक न्यायालय द्वारा बालकों द्वारा कारित जघन्य अपराधों के संबंध में दी जाने वाली शास्ति या कारावास के संबंध में इस अधिनियम में वर्णित प्रावधान ही प्रयोक्तव्य होंगे न कि अपराध का वर्णन करने वाले अधिनियम के। भारतीय दण्ड संहिता, 1860 सहित किसी अन्य अधिनियम में वर्णित अपराध के संबंध में विहित दण्ड केवल इस अधिनियम के अधीन विहित जघन्य अपराध के निर्धारण हेतु सुसंगत है, अन्य किसी प्रयोजन (यथा दंडाज्ञा) हेतु नहीं। उदाहरण स्वरूप किसी सोलह वर्ष अथवा उससे अधिक वय के बालक पर लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012के अधिनियम की धारा 6 के अधीन दण्डनीय गुरूत्तर प्रवेशन लैंगिक हमले का अपराध कारित करने का आरोप है । धारा 6 निम्नानुसार दण्ड विहित करती है-

''6. गुरूत्तर प्रवेशन लैंगिक हमले के लिये दण्ड - जो कोई गुरूत्तर प्रवेशन लैंगिक हमला कारित करेगा वह कठोर कारावास से जिसकी अवधि दस वर्ष से कम नहीं होगी किंतु जो आजीवन कारावास तक की हो सकेगी और जुर्माने से भी दण्डनीय होगा।''

उपर्युक्त धारा 6 में विहित दण्ड उक्त बालक द्वारा कारित अपराध अधिनियम की धारा 2 (33) में यथा विहित जघन्य अपराध था या नहीं इस हेतु तो निर्धारक होगा परंतु यदि बालक न्यायालय द्वारा उक्त बालक को ऐसे अपराध कारित करने का दोषी पाया जाता है तो उसकी शास्ति अथवा कारावास दिए जाने के संबंध में सुसंगत नहीं होगा। इस संबंध में केवल इस अधिनियम के प्रावधान ही लागू होंगे।

4. बालक न्यायालय द्वारा बोर्ड की शक्तियों का प्रयोग

अधिनियम के अधीन बोर्ड को विधि का उल्लंघन करने वाले बालक के संबंध में जो भी शक्तियां प्रदान की गई हैं उन सभी शक्तियों का प्रयोग बालक न्यायालय अधिनियम की धारा 8 (2) के अधीन अपीली अधिकारिता प्रयोग करते समय या धारा 19 के अधीन ऐसे बालक के विरूद्ध मामले का निराकरण करते समय या अन्यथा कर सकता है। धारा 8 (2) निम्नवत् है-

''(2) इस अधिनियम द्वारा उसके अधीन बोर्ड को प्रदत्त शक्तियों का प्रयोग उच्च न्यायालय और बालक न्यायालय द्वारा भी तब जब कार्यवाहियां अपील, पुनरीक्षण में या अन्यथा धारा 19 के अधीन उसके समक्ष आती हैं, किया जा सकेगा।''

यह उल्लेखनीय है कि अधिनियम की धारा 4 (2) एवं नियम 4 (1) के अधीन बोर्ड प्रधान मजिस्ट्रेट और दो सामाजिक कार्यकर्ताओं जिनमें से कम से कम एक महिला होगी द्वारा गठित एक

न्यायपीठ के रूप में होता है। चूंकि धारा 8 (2) के अधीन बालक न्यायालय को बोर्ड की सभी शक्तियों का प्रयोग करने के लिए सशक्त किया गया है न कि प्रधान मजिस्ट्रेट अथवा सामाजिक कार्यकर्ताओं की अतएव बालक न्यायालय के लिए बोर्ड की शक्तियों का प्रयोग करते समय सामाजिक कार्यकर्ताओं की उपस्थिति/उनके सहभाग की कोई आवश्यकता नहीं है। बालक न्यायालय प्रधान मजिस्ट्रेट एवं सामाजिक कार्यकर्ताओं समवेत गठित बोर्ड की शक्तियों का प्रयोग करने हेतु सशक्त है।

5. बालक न्यायालय की अधिकारिता

अधिनियम द्वारा बालक न्यायालय को दो प्रकार की अधिकारिता प्रदान की गई है - (1) अपीलीय अधिकारिता (2) आरंभिक अधिकारिता

(1) अपीलीय अधिकारिता-

धारा 101 बालक न्यायालय को अपीलीय अधिकारिता प्रदत्त करती है। साथ ही नियम 13 के कतिपय प्रावधान बालक न्यायालय द्वारा अपीली अधिकारिता के प्रयोग से संबंधित अन्य निर्देश विहित करते हैं।

धारा-101 इस प्रकार है -

"धारा 101 - अपीलें - (1) इस अधिनियम के उपबंधों के अधीन रहते हुए, इस अधिनियम के अधीन समिति या बोर्ड द्वारा किए गए किसी आदेश से व्यथित कोई व्यक्ति, ऐसा आदेश किए जाने की तारीख से तीस दिन के भीतर, पोषण, देखरेख और प्रवर्तकता पश्च देखरेख संबंध समिति के ऐसे विनिश्चयों के सिवाय, जिनके संबंध में अपील होगी, बालक न्यायालय में अपील कर सकेगाः

परन्तु, यथास्थिति, बालक न्यायालय या जिला मजिस्ट्रेट, उक्त तीस दिन की उक्त अवधि के अवसान के पश्चात् अपील ग्रहण कर सकेगा, यदि उसका यह समाधान हो जाता है कि अपीलार्थी को पर्याप्त कारणों से समय पर अपील करने से निवारित किया गया था कि उस अपील का विनिश्चिय तीस दिन की अवधि के भीतर किया जाएगा।

(2) अधिनियम की धारा 15 के अधीन किसी जघन्य अपराध में प्रारम्भिक निर्धारण करने के पश्चात् पारित बोर्ड के आदेश के विरूद्ध अपील सत्र - न्यायालय के समक्ष होगी तथा अपील को विनिश्चित करते समय न्यायालय अनुभवी मनोवैज्ञानिकों और चिकित्सीय विशेषज्ञों की सहायता ले सकेगा जो उनसे भिन्न हों जिनकी सहायता बोर्ड द्वारा उक्त धारा के अधीन आदेश पारित करने में ली गई हो।

(3) निम्नलिखित के विरूद्ध कोई अपील नहीं होगी, -

(क) किसी बालक के संबंध में, जिसके बारे में यह अभिकथन है कि उसने जघन्य अपराध के अलावा कोई अपराध किया है जिसने 16 वर्ष की

आयु पूरी कर ली है अथवा 16 वर्ष की आयु से अधिक है बोर्ड द्वारा किया गया दोषमुक्ति का कोई आदेश; या

(ख) इस निष्कर्ष के संबंध में कि वह देखरेख और संरक्षण का जरूरतमंद बालक नहीं है, समिति द्वारा किया गया कोई आदेश।

(4) इस धारा के अधीन किसी अपील में पारित बालक न्यायालय के किसी आदेश के विरूद्ध कोई द्वितीय अपील नहीं होगी।

(5) बालक न्यायालय के आदेश से व्यथित कोई व्यक्ति दंड प्रक्रिया संहिता, 1973 में विनिर्दिष्ट प्रक्रिया के अनुसार उच्च न्यायालय के समक्ष अपील फाइल कर सकेगा।''

इस प्रावधान के अधीन कोई भी ''व्यथित व्यक्ति'' इस अधिनियम के अधीन बोर्ड या समिति द्वारा पारित आदेश की अपील बालक न्यायालय के समक्ष प्रस्तुत कर सकता है। ऐसी अपील ऐसा आदेश पारित किए जाने की तिथि से 30 दिवस की अवधिपर्यंत की जा सकेगी। यद्यपि इस अवधि के अवसान उपरांत भी अपील ग्रहण की जा सकती है यदि न्यायालय का यह समाधान हो जाता है कि अपीलार्थी ''पर्याप्त कारणों'' से विहित समयावधि में अपील करने से निवारित रहा था। दूसरे शब्दों में आदेश पारित होने की तिथि से तीस दिवस की अवधि अवसान उपरांत अपील प्रस्तुति हेतु धारा 101 (1) के परंतुक के अधीन विलंब के उपमर्षण ;ब्वदकवदंजपवद व िकमंसलद्ध की अनुज्ञा हेतु आवेदन प्रस्तुत किया जाना चाहिए तथा न्यायालय का यह समाधान होने के पश्चात् ही अपील ग्रहण की जा सकेगी कि अपीलार्थी 'पर्याप्त कारण' से विहित अवधि में ऐसी अपील प्रस्तुत करने से निवारित रहा था।

कौन से आदेश अपीलनीय नहीं हैं -

बाल कल्याण समिति द्वारा पोषण देखरेख के संबंध में धारा 44 के अधीन पारित आदेश एवं प्रवर्तकता पश्च देखरेख के संबंध में धारा 45 के अधीन पारित आदेश बालक न्यायालय के समक्ष अपीलनीय नहीं है। ऐसे आदेशों के विरूद्ध अपील सुनने की अधिकारिता जिला मजिस्टेªट को है। इसके अतिरिक्त धारा-101(3) के अधीन निम्नलिखित आदेशों की कोई अपील नहीं होगी -

(i) सोलह वर्ष या अधिक वय के ऐसे बालक के संबंध में बोर्ड द्वारा किया गया दोषमुक्ति का आदेश जिस पर जघन्य अपराध कारित करने का आरोप नहीं था। (दूसरे शब्दों में 16 वर्ष या अधिक वय के बालक की जघन्य अपराध कारित करने के अभियोग से दोषमुक्ति का आदेश अपीलनीय है।)

(ii) समिति द्वारा इस संबंध में किया गया आदेश कि कोई बालक देखरेख और संरक्षण का जरूरतमंद है या नहीं ।

व्यथित व्यक्ति -

इस प्रावधान के अधीन कोई भी 'व्यथित व्यक्ति' अपील प्रस्तुत करने में सक्षम है। अधिनियम में 'व्यथित व्यक्ति' पद परिभाषित नहीं है। सामान्य भावबोध में 'व्यथित व्यक्ति' ऐसा व्यक्ति है जो बोर्ड

या समिति के आदेश से प्रभावित हुआ हो। ऐसे व्यक्ति में राज्य तथा बालक के अतिरिक्त तृतीय पक्ष (उदाहरणार्थ - पीड़ित पक्ष) भी सम्मिलित हो सकता है।

अपील के निराकरण की परिसीमा -

अपील का निराकरण तीस दिवस की अवधि के भीतर किया जाना चाहिए।

अपीलनीय आदेशों के संबंध में प्रक्रिया -

बालक न्यायालय के समक्ष विभिन्न आदेशों यथा बोर्ड द्वारा बालक को प्रतिभूति पर छोड़ने के आवेदन की अस्वीकृति, बोर्ड द्वारा बालक की आयु निर्धारित करने आदि आदेशों की अपील हो सकती है। ऐसे आदेशों के अतिरिक्त धारा - 15 (1) के अधीन बोर्ड द्वारा जघन्य अपराध के मामलों में प्रारंभिक निर्धारण के पश्चात् पारित आदेश, चाहे वह बोर्ड द्वारा ही निराकरण किए जाने से संबंधित हो अथवा बालक न्यायालय द्वारा वयस्क की भांति निराकरण किए जाने से संबंधित हो, अपीलीय हैं। ऐसे आदेश के विरूद्ध अपील का निराकरण करते समय धारा - 101 (2) में वर्णित विशेष प्रक्रिया का अनुसरण किया जा सकता है। यह प्रावधान विहित करता है कि ऐसी अपील विनिश्चित करते समय न्यायालय अनुभवी मनोवैज्ञानिकों एवं चिकित्सा विशेषज्ञों की सहायता यह निर्धारण करने में ले सकता है कि बालक की मानसिक तथा शारीरिक क्षमता ऐसा अपराध कारित करने की थी तथा वह आक्षेपित परिस्थितियों में अपराध के परिणामों को समझने की योग्यता रखता था। शर्त यह है कि ऐसे मनोवैज्ञानिक एवं चिकित्सा विशेषज्ञ उन व्यक्तियों से भिन्न हों जिसकी सहायता बोर्ड ने अपीलीय आदेश (आक्षेपित आदेश) पारित करने में ली हो।

यह ध्यातव्य है कि बालक की आयु घोषित करने वाले बोर्ड के आदेश अथवा बोर्ड द्वारा प्रारंभिक निर्धारण के निष्कर्षों के विरूद्ध अपील किए जाने की दशा में, यदि बालक न्यायालय को बोर्ड द्वारा मामला धारा 18 (3) के आदेश के साथ प्राप्त हो गया है, तो वह उस मामले में कार्यवाही तब तक अग्रसर नहीं करेगा जब तक कि ऐसी अपील का निराकरण नहीं हो जाता। दूसरे शब्दों में अपील का निराकरण पहले किया जाएगा। ऐसा किया जाना किशोर न्याय (बालकों की देखरेख तथा संरक्षण) आदर्श नियम, 2016 के नियम 13 (2) एवं 13 (3) के अधीन अपेक्षित है। अतएव सत्र न्यायाधीश से यह अपेक्षित है कि वह प्रारंभिक निर्धारण पश्चात् बोर्ड के आदेश अथवा बोर्ड द्वारा प्रारंभिक निर्धारण के निष्कर्षों के विरूद्ध प्रस्तुत अपील एक ही न्यायालय के समक्ष प्रस्तुत होना सुनिश्चित करे।

बोर्ड द्वारा किए गए प्रारंभिक निर्धारण के संबंध में निम्नलिखित स्थितियाँ हो सकती हैं -

(1) बोर्ड द्वारा प्रारंभिक निर्धारण में यह निष्कर्ष दिया गया हो कि मामले का निराकरण बोर्ड द्वारा किया जाना चाहिए न कि वयस्क के रूप में बालक न्यायालय द्वारा। यह आदेश धारा 15 (2) के परंतुक के अधीन अपीलीय है। ऐसे आदेश के विरूद्ध राज्य सहित अन्य व्यथित व्यक्ति द्वारा अपील प्रस्तुत की जा सकती है।

(2) बोर्ड द्वारा प्रारंभिक निर्धारण में यह निष्कर्ष दिया हो कि बालक का वयस्क के रूप में विचारण करने की आवश्यकता है और वह धारा 18(3) के अधीन

मामले के विचारण को विचारण की अधिकारिता रखने वाले बालक न्यायालय को अंतरित करने का आदेश देता है। ऐसे आदेश के निष्कर्षों के विरूद्ध बालक की ओर से अन्य आधारों सहित निम्नलिखित आधारों पर अपील में चुनौती दी जा सकती है -

(अ) बालक घटना दिनांक को 16 वर्ष अथवा अधिक वय का नहीं था। बालक न्यायालय द्वारा किया गया आयु निर्धारण त्रुटिपूर्ण है अतएव बालक न्यायालय द्वारा प्रारंभिक निर्धारण के संबंध में गलत अधिकारिता का प्रयोग किया गया है। बालक के घटना दिनांक को सोलह वर्ष से न्यून वय का होने से बालक न्यायालय को कोई अधिकारिता नहीं है।

(ब) बालक के विरूद्ध अभिकथित अपराध अधिनियम मे यथा परिभाषित जघन्य अपराध की श्रेणी में नहीं आता है।

(स) बालक द्वारा अपराध करने की शारीरिक एवं मानसिक क्षमता, उसके द्वारा अपराध के परिणामों को समझने की योग्यता तथा उन परिस्थितियों जिनमें अपराध किया गया था, के संबंध में बोर्ड द्वारा त्रुटिपूर्ण निष्कर्ष अंकित किए गए हैं। बालक का वयस्क के रूप में विचारण किए जाने की कोई आवश्यकता नहीं है

यह भी उल्लेखनीय है कि उपर्युक्त (स) में आने वाले मामलों में प्रारंभिक निर्धारण के निष्कर्षों के विरूद्ध अपील प्रस्तुत होने की दशा में बालक न्यायालय बोर्ड को मामले का अभिलेख वापस नहीं करेगा भले ही उसका निष्कर्ष यह रहा हो कि मामले का निराकरण वयस्कों की भांति किया जाना अपेक्षित नहीं है। ऐसी स्थिति में यदि बालक न्यायालय के पास अभिलेख नहीं हो तो वह अभिलेख बोर्ड से बुलाएगा। (देखें नियम 13 (5), 13 (6), 13 (7))

(2) आरंभिक अधिकारिता - अधिनियम के अधीन गठित बालक न्यायालय की आरंभिक अधिकारिता को दो वर्गों में रखा जा सकता है-

1. अधिनियम के अधीन बालकों के विरूद्ध ऐसे अपराध जो सात वर्ष से अधिक अवधि के कारावास से दण्डनीय हैं, का विचारण करने की अधिकारिता (देखें अधिनियम की धारा - 86)

इस वर्ग में आने वाले अपराधों को कारित करने वाला व्यक्ति बालक अथवा वयस्क हो सकता है। यदि इस वर्ग में आने वाले अपराध को किसी वयस्क व्यक्ति द्वारा कारित किया गया है तो उसके संबंध में दण्ड प्रक्रिया संहिता के सामान्य प्रावधान प्रयोज्य होंगे तथा संबद्ध मामला अधिकारिता रखने वाले न्यायिक मजिस्ट्रेट के न्यायालय में प्रस्तुति उपरांत बालक न्यायालय को उपार्पित किया जाना चाहिए। तत्पश्चात् ही बालक न्यायालय ऐसे मामले में अपनी आरंभिक अधिकारिता का प्रयोग कर

सकता है। इस संबंध में दण्ड प्रक्रिया संहिता, 1973 की धाराओं 190, 209 एवं 193 के सामान्य प्रावधान अनुकरणीय हैं।

2. 16 से 18 वर्ष की वय के बालकों द्वारा कारित जघन्य अपराधों का विचारण करने की अधिकारिता।

(अ) इस वर्ग में आने वाले मामलों में बालक न्यायालय अधिकारिता की प्राप्ति - अधिनियम की धारा 2 (33) में यथा परिभाषित कोई जघन्य अपराध किसी ऐसे बालक ने कारित किया है, जिसने ऐसे अपराध को कारित करते समय सोलह वर्ष की आयु पूर्ण कर ली है या जो सोलह वर्ष से अधिक आयु का है उसके संबंध में बालक न्यायालय को अधिकारिता दो माध्यमों से प्राप्त हो सकती है -

1. जब किशोर न्याय बोर्ड द्वारा ऐसे बालक के संबंध में अधिनियम की धारा-15 के अधीन उसके द्वारा कारित जघन्य अपराध के संबंध में प्रारंभिक निर्धारण करते हुए धारा - 18 (3) के अधीन यह आदेश पारित किया जाता है कि उक्त बालक का वयस्क के रूप में विचारण करने की आवश्यकता है और ऐसे आदेश के साथ मामले को बोर्ड द्वारा बालक न्यायालय को अंतरित कर दिया जाता है।

2. जब बालक न्यायालय के समक्ष अधिनियम की धारा 101 के अधीन किशोर न्याय बोर्ड द्वारा ऐसे बालक द्वारा कारित जघन्य अपराध के संबंध में धारा 15 के अधीन प्रारंभिक निर्धारण के पश्चात् बोर्ड द्वारा पारित आदेश की अपील की जाती है। अपीली न्यायालय के रूप में बालक न्यायालय चाहे यह अवधारित करे कि उस बालक के वयस्क के रूप में विचारण की आवश्यकता है अथवा ऐसी अवश्यकता नहीं है, दोनों ही स्थितियों में बालक न्यायालय द्वारा किशोर न्याय बोर्ड से उस मामले की फाइल बुलाने और बालक न्यायालय द्वारा ही उस मामले का निराकरण करने का आदेश दिया जाएगा। ऐसा अपीली आदेश बालक न्यायालय को मामले का निराकरण करने की अधिकारिता प्रदान करता है। देखें नियम - 13 (4) एवं 13 (5)

सार रूप में बालक न्यायालय को जघन्य अपराध कारित करने वाले 16 वर्ष या उससे अधिक वय के बालकों के मामलों का विचारण करने की अधिकारिता निम्नलिखित दो माध्यमों से प्राप्त होती है -

(अ) बोर्ड द्वारा धारा 15 के अधीन प्रारंभिक निर्धारण के पश्चात् धारा 18 (3) के अधीन ऐसे मामले के अंतरण के आदेश से।

(ब) बालक न्यायालय को धारा 15 के अधीन बोर्ड द्वारा पारित प्रारंभिक निर्धारण के विरूद्ध अपील किए जाने पर ऐसी अपील के आदेश के अधीन बोर्ड से मामले के विचारण हेतु फाइल आहूत करने के आदेश से ।

इस प्रकार बालक न्यायालय को बोर्ड द्वारा किए गए प्रारंभिक निर्धारण की अपील प्राप्त हो जाने पर वह अपील में बालक के वयस्क के रूप में विचारण किए जाने की आवश्यकता होने अथवा न होने संबंधी कोई भी अवधारण करे, उस मामले का निराकरण बालक न्यायालय द्वारा ही किया जाना चाहिए न कि बोर्ड द्वारा ।

बालक न्यायालय द्वारा बोर्ड को मामले की वापसी -

प्रश्न यह है कि क्या प्रारंभिक निर्धारण के पश्चात् बोर्ड द्वारा बालक के वयस्क के रूप में विचारण हेतु बालक न्यायालय को मामले के अंतरण अथवा ऐसे प्रारंभिक निर्धारण की अपील बालक न्यायालय को प्राप्त हो जाने के उपरांत बालक न्यायालय मामले को किसी भी परिस्थिति में निराकरण हेतु बोर्ड को भेजने के लिए सशक्त नहीं है ? इस प्रश्न का उत्तर बालक न्यायालय की अधिकारिता में ही निहित है। बालक न्यायालय की अधिकारिता आकर्षित होने के लिए निम्नलिखित अनिवार्य अपेक्षाएं हैं -

1. कारित अपराध अधिनियम की धारा - 2 (33) में यथा परिभाषित जघन्य अपराध हो। धारा - 2 (33) में जघन्य अपराध को निम्नवत् परिभाषित किया गया है -

   "जघन्य अपराध के अंतर्गत ऐसे अपराध आते हैं, जिसके लिए भारतीय दण्ड संहिता (1860 का 45) या तत्समय प्रवृष्त किसी अन्य विधि के अधीन न्यूनतम दण्ड सात वर्श्ष या उससे अधिक के कारावास का है।"

2. अपराध कारित करने वाला बालक अपराध कारित करते समय सोलह वर्ष या सोलह वर्ष से अधिक आयु का था।

   यह दोनों अपेक्षाएं एक साथ पूर्ण होनी चाहिए। यदि दोनों मे से कोई भी एक अपेक्षा पूर्ण नहीं होती है अर्थात कारित अपराध धारा 2 (33) में यथा परिभाषित जघन्य अपराध की कोटि में नहीं आता है अथवा अपील में बालक न्यायालय का यह अभिमत है कि घटना, दिनांक को बालक की आयु सोलह वर्ष से न्यून थी तो ऐसे मामले में बालक न्यायालय को विचारण की कोई अंतर्निहित अधिकारिता नहीं होगी। ऐसे मामले को निराकरण हेतु बालक न्यायालय द्वारा बोर्ड को वापस भेज देना चाहिए।

यदि उक्त दोनों अपेक्षाएं पूर्ण होने के पश्चात् बालक न्यायालय का चाहे अपील में या अन्यथा यह अभिमत है कि बालक के वयस्क के रूप में विचारण किए जाने की कोई आवश्यकता नहीं है तो

भी ऐसे मामले का विचारण करने की अधिकारिता बालक न्यायालय को ही रहेगी। ऐसे मामले को बालक न्यायालय द्वारा किसी भी स्थिति में बोर्ड को वापस नहीं किया जाएगा।

6. बोर्ड से मामला प्राप्त होने पर बालक न्यायालय द्वारा अनुसरित की जाने वाली प्रक्रिया एवं शक्तियां

(i) संयुक्त कार्यवाही का प्रतिषेध प्रारंभिक सावधानी - बालक न्यायालय द्वारा सर्वप्रथम यह सुनिश्चित किया जाना चाहिए कि बालक के संबंध में न्यायालय द्वारा कोई भी कार्यवाही ऐसे व्यक्ति के साथ संयुक्त रूप से तो नहीं की जा रही है जो बालक नहीं है। यदि बालक न्यायालय द्वारा विधि का उल्लंघन करने वाले बालक का विचारण किसी ऐसे व्यक्ति के साथ संयुक्त रूप से किया जाता है जो बालक नहीं है तो उस बालक के संबंध में की गई ऐसी सम्पूर्ण कार्यवाही दूषित एवं अवैध होगी। अधिनियम की धारा 23 के अधीन बालक न्यायालय ऐसा करने से प्रतिषिद्ध है। धारा 23 निम्नवत् है -

> **"धारा 23 - विधि का उल्लंघन करने वाले किसी बालक और ऐसे व्यक्ति की जो बालक नहीं है, संयुक्त कार्यवाही का न होना -** (1) दंड प्रक्रिया संहिता, 1973 की धारा 223 में या तत्समय प्रवृत्त किसी अन्य विधि में किसी बात के होते हुए भी विधि का उल्लंघन करने वाले अभिकथित किसी बालक के साथ किसी ऐसे व्यक्ति की जो बालक नहीं है, संयुक्त कार्यवाही नहीं की जाएगी।
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> (2) यदि बोर्ड द्वारा या बालक न्यायालय द्वारा जांच के दौरान विधि का उल्लंघन करने वाले अभिकथित व्यक्ति के बारे में यह पाया जाता है कि वह बालक नहीं है तो ऐसे व्यक्ति का किसी बालक के साथ विचारण नहीं किया जाएगा।"

यदि कोई मामला संयुक्त रूप से विचारित हो तो उसे अन्य वयस्क अभियुक्तों के मामले से पृथक किया जाना चाहिए और उसका पृथक पंजीयन किया जाकर अधिनियम में यथाविहित विशेष प्रक्रिया का अनुसरण कर मामले का निराकरण किया जाना चाहिए।

(ii) बोर्ड से प्रारंभिक निर्धारण प्राप्त होने पर प्रक्रिया -

बोर्ड से प्रारंभिक निर्धारण प्राप्त होने पर मामले में सीधे वयस्क के रूप में बालक का विचारण प्रारंभ नहीं किया जाना चाहिए। अधिनियम की धारा 19 (1) और नियम 13 (1) के अधीन बालक न्यायालय से यह अपेक्षित है कि वह इस संबंध में विनिश्चय करे कि क्या वयस्क के रूप में बालक के विचारण की अवश्यकता है अथवा नहीं। अधिनियम की धारा 19 (1) तथा आदर्श नियम, 2016 का नियम 13 (1) क्रमशः निम्नवत् है -

> ***"धारा 19 - बालक न्यायालय की शक्तियाँ - (1) अधिनियम की धारा 15 के अधीन बोर्ड से प्रारंभिक निर्धारण प्राप्त होने के पश्चात् बालक न्यायालय यह विनिश्चय कर सकेगा कि -***

(i) दंड प्रक्रिया संहिता, 1973 के उपबंधों के अनुसार वयस्क के रूप में बालक के विचारण और इस धारा तथा धारा 21 के उपबंधों के अधीन रहते हुए बालक की विशेष जरूरतों, ऋजु विचारण के सिद्धान्तों तथा बालक अनुकूल वातावरण बनाए रखने पर विचार करते हुए, विचारण के पश्चात् समुचित आदेश पारित करने की आवश्यकता है; या

(ii) वयस्क के रूप में बालक के विचारण की कोई आवश्यकता नहीं है और बोर्ड के रूप में जांच की जा सकती है तथा धारा 18 के उपबंधों के अनुसार समुचित आदेश पारित किए जा सकते हैं।'

''नियम 13 - बालक न्यायालय और निगरानी प्राधिकरणों के संबंध में प्रक्रिया - (1) बोर्ड से प्रारंभिक निर्धारण प्राप्त हो जाने पर, बाल न्यायालय यह निर्णय ले सकेगा कि क्या वयस्क अथवा बालक के रूप में बालक के विचारण की आवश्यकता है और उपयुक्त आदेश पारित कर सकेगा।'

यद्यपि धारा 19 (1) एवं नियम 13 (1) में प्रयुक्त श्ठंलश् से ऐसा प्रतीत होता है कि ऐसा विनिश्चय किया जाना वैवेकिक है न कि आज्ञापक, परंतु यदि अधिनियम की धारा 19 एवं नियम 13 की शेष योजना के आलोक में इन प्रावधानों को देखा जाए तो स्पष्ट होता है कि ऐसा विनिश्चय किया जाना आज्ञापक है न कि वैवेकिक। यदि बालक न्यायालय प्रारंभिक निर्धारण प्राप्त होने पर सीधे वयस्क के रूप में विचारण प्रारंभ कर देगा तो अधिनियम की धारा 19 (1) (पप) तथा नियम 13 (7) के प्रावधान निरर्थक हो जाएंगे और यह अधिनियम की भावना के प्रतिकूल होगा।

ऐसा विनिश्चय प्रारंभिक निर्धारण प्राप्त होते ही सर्वप्रथम किया जाना चाहिए, जब तक कि ऐसे निर्धारण को धारा 101 (2) के अधीन अपील में चुनौती न दी गई हो। ऐसा विनिश्चय किए बिना मामले को आरोप हेतु अग्रसर किया जाना अथवा आरोप के प्रक्रम पर आरोप के आदेश के साथ ऐसा विनिश्चय किया जाना विधिसंगत नहीं है। मामले को आरोप हेतु अग्रसर किए जाने का तात्पर्य है कि बालक न्यायालय ने विधि का उल्लंघन करने वाले बालक का विचारण वयस्क के रूप में (सत्र विचारण की प्रक्रिया द्वारा) करने का निर्णय ले लिया है और सुसंगत विनिश्चय औपचारिकता मात्र है।

ऐसा विनिश्चय मात्र औपचारिकता नहीं होना चाहिए। नियम 13 (6) के अधीन ऐसे विनिश्चय में बालक न्यायालय द्वारा विनिश्चय के कारण अभिलिखित किया जाना आज्ञापक है। नियम 13 (6) निम्नवत् है -

''13(6) बालक न्यायालय किसी निष्कर्ष पर पहुंचने के समय इस बात के कारण अभिलिखित करेगा कि बालक का विचारण वयस्क के रूप में या बालक के रूप में किया जाना है।''

यह विनिश्चय धारा 102 के अधीन उच्च न्यायालय द्वारा पुनरीक्षणीय है। अतएव बालक न्यायालय से अपेक्षित है कि वह ऐसे विनिश्चय में बोर्ड द्वारा प्रारंभिक निर्धारण के संबंध में प्रेषित सामग्री एवं मामले के शेष अभिलेख के अधीन अपराध की परिस्थितियों पर विचार करते हुए स्वतंत्र निर्णय ले कि क्या मामले में विधि का उल्लंघन करने वाले बालक का वयस्क के रूप में विचारण किए जाने की आवश्यकता है अथवा नहीं। इस संबंध में बालक द्वारा अपराध करने की मानसिक और शारीरिक क्षमता, अपराध के परिणामों को समझने की योग्यता तथा अपराध किए जाने की परिस्थितियों के बारे में बोर्ड द्वारा लिए गए निष्कर्षों से बालक न्यायालय को प्रभावित नहीं होना चाहिए। बालक न्यायालय प्रधान मजिस्टेªट एवं सामाजिक सदस्यों से भिन्न अधिक अनुभवी एवं वरिष्ठ, सत्र न्यायाधीश पदमान के न्यायाधीश द्वारा अधिष्ठायित किया जाता है अतएव उसके द्वारा धारा 19 (1) एवं नियम 13 (1) के अधीन स्वतंत्र, अधिक तर्कसंगत व सकारण विनिश्चय किया जाना अपेक्षित है।

यह भी उल्लेखनीय है कि यह विनिश्चय धारा 101 (2) के अधीन प्रारंभिक निर्धारण के आदेश के विरूद्ध अपील में किए जाने वाले विनिश्चय से भिन्न है। धारा 101 (2) के अधीन अपील न्यायालय के रूप में बालक न्यायालय अनुभवी मनोवैज्ञानिकों और चिकित्सीय विशेषज्ञों की सहायता ले सकता है। यह सुविधा धारा 19 (1) एवं नियम 13 (1) के अधीन विनिश्चय के लिए उपलब्ध नहीं है। एतद् हेतु बोर्ड द्वारा प्रेषित अभिलेख पर उपलब्ध सामग्री ही निर्धार्य होगी।

उपर्युक्त विनिश्चय किए जाने का प्रक्रम विधि का उल्लंघन करने वाले बालक के संबंध में की जाने वाली कार्यवाहियों का अत्यंत महत्वपूर्ण चरण है। इस स्तर पर गंभीरतापूर्वक विचार किया जाना चाहिए कि बालक का विचारण वयस्क की भांति किया जाए अथवा नहीं। इस संबंध में अधिनियम अथवा नियमों में कोई मार्गदर्शी सिद्धांत विहित नहीं किए गए हैं परंतु यह स्पष्ट है कि बालक का विचारण वयस्क की भांति किया जाना बालक न्यायिक व्यवस्था के सुस्थापित मानदण्डों से विचलन एवं अत्यंत आपवादिक एवं चरम उपाय है। इस आपवादिक चरम उपाय का उपयोग 16 दिसम्बर 2012 को दिल्ली में घटित मामले जैसे मामलों की परिस्थितियों में ही किया जाना युक्तिसंगत होगा। अन्य मामलों में यह विनिश्चय किया जाना चाहिए कि बालक का विचारण वयस्कों की भांति किए जाने की कोई आवश्यकता नहीं है। इस हेतु हमें बालक न्यायालय के गठन की पृष्ठभूमि जो इस आलेख के प्रारंभ में लेख की गई है, का स्मरण रखना चाहिए। यांत्रिक रूप से प्रारंभिक निर्धारण द्वारा प्राप्त प्रत्येक बालक का यांत्रिक रूप से वयस्क की भांति विचारण किया जाना अधिनियम की बालक संरक्षण की संकल्पना के प्रतिकूल होगा।

(iii) बालक हितैषी वातावरण (Child friendly atomosphere) बालक न्यायालय से विधि का उल्लंघन करने वाले बालक के संबंध में सभी प्रक्रियाओं का बालक हितैषी वातावरण में संपादित किया जाना आवश्यक है। अधिनियम की धारा 2 (15) में ''बालक हितैषी'' पद निम्नानुसार परिभाषित किया गया है -

''बालक हितैशषी'' से ऐसा कोई व्यवहार, आचरण, पद्धति, प्रक्रिया, रूख, पर्यावरण या बर्ताव अभिप्रेत है, जो मानवीय, विचारशील और बालक के सर्वोत्तम हित में हो;''

इस परिभाषा द्वारा बालक न्यायालय की कार्यप्रणाली, जिसका बालक हितैषी होना चाहिए के परिक्षेत्र को अत्यंत विस्तार दे दिया गया है। इसमें न केवल व्यवहार, आचरण व पद्धति सम्मिलित है वरन् रूख, पर्यावरण एवं बर्ताव भी है जिसके मानवीय, विचारशील तथा बालक के सर्वोत्तम हित में होना भी आवश्यक है।

'बालक के सर्वोत्तम हित' पद को अधिनियम की धारा 2 (9) में इस प्रकार परिभाषित किया गया है-

"बालक का सर्वोत्तम हित" से बालक के बारे में, उसके मूलभूत अधिकारों और जरूरतों, पहचान, सामाजिक कल्याण और भौतिक, भावनात्मक और बौद्धिक विकास के पूरा किए जाने को सुनिश्चित करने के लिए किए गए किसी विनिश्चय का आधार अभिप्रेत है;"

इस परिभाषा का मार्गदर्शन लिया जा सकता है ।

(iv) साधारण सिद्धांत - बालक न्यायालय द्वारा अधिनियम की धारा 3 में वर्णित निम्नलिखित साधारण सिद्धांतों का मार्गदर्शन लिया जाना भी अपेक्षित है -

"3. अधिनियम के प्रशासन में अनुसरित किए जाने वाले साधारण सिद्धांत-यथास्थिति, केन्द्रीय सरकार, राज्य सरकारें, बोर्ड और अन्य अभिकरण, इस अधिनियम के उपबंधों को क्रियान्वित करते समय निम्नलिखित मूलभूत सिद्धांतों द्वारा मार्गदर्शित होंगे, अर्थात्:-

(i) **निर्दोषिता की उपधारणा का सिद्धांतः** किसी बालक के बारे में, अठारह वर्ष की आयु तक, यह उपधारणा की जाएगी कि वह किसी असद्भावपूर्ण या आपराधिक आशय का दोषी नहीं है।

(ii) **गरिमा और योग्यता का सिद्धांतः** सभी मनुष्यों के साथ गरिमा और अधिकारों में समान बर्ताव किया जाना चाहिए।

(iii) **भाग लेने का सिद्धांतः** प्रत्येक बालक को सुने जाने का और उसके हितों को प्रभावित करने वाली सभी आदेशिकाओं और विनिश्चयों में भाग लेने का अधिकार प्राप्त है और बालक के दृष्टिकोण को बालक की आयु और परिपक्वता को सम्यक् ध्यान में रखते हुए विचार किया जाएगा।

(iv) **सर्वोत्तम हित का सिद्धांतः** बालक के संबंध में सभी विनिश्चय मुख्यतया इस प्रारम्भिक विचारणा पर आधारित होंगे कि वे बालक के सर्वोत्तम हित में हैं और बालक के लिए अपनी पूर्ण शक्तता को विकसित करने में सहायक हैं।

(v) **कौटुंबिक जिम्मेदारी का सिद्धांतः** बालक की देखरेख, उसका पोषण और उसकी संरक्षा करने की प्राथमिक जिम्मेदारी जैविक कुटुम्ब या, यथास्थिति दत्तक अथवा पालक माता-पिता की है।

(vi) **सुरक्षा का सिद्धांतः** यह सुनिश्चित करने के लिये कि बालक सुरक्षित है और देखरेख तथा संरक्षा पद्धति के संपर्क में रहते हुए और उसके पश्चात् उसकी कोई अपहानि, उससे दुर्व्यहार या बुरा बर्ताव नहीं किया जाता है, सभी उपाय किए जाने चाहिए।

(vii) **सकारात्मक उपायः** सभीस्त्रोतोंको, इसके अंतर्गत वे भी हैं जो कुटुम्ब और समुदाय के हैं, कल्याण को प्रोन्नति, पहचान के विकास को सुकर बनाने और बालकों की असुरक्षा को कम करने के लिए समावेशित और समर्थकारी वातावरण उपलब्ध कराने के लिए गतिमान किया जाना चाहिए।

(viii) **गैर-कंलकीय शब्दार्थों का सिद्धांतः** किसी बालक से तात्पर्यित आदेशिकाओं में प्रतिकूल या अभियोगात्मक शब्दों का प्रयोग नहीं किया जाना चाहिए।

(xi) **अधिकारों का अधित्यजन न किए जाने का सिद्धांतः** बालक के किसी अधिकार का किसी भी प्रकार का अधित्यजन अनुज्ञेय या विधिमान्य नहीं है चाहे उसकी ईप्सा बालक द्वारा की गई हो या बालक की ओर से कार्य करने वाले व्यक्ति या किसी बोर्ड या समिति द्वारा की गई हो और किसी मूलभूत अधिकार का प्रयोग न किया जाना अधित्यजन की कोटि में नहीं आएगा।

(x) **समानता और विभेद न किए जाने का सिद्धांतः** किसी बालक के विरूद्ध किसी भी आधार पर, जिसके अंतर्गत लिंग, जाति, नस्ल, जन्म-स्थान, निःशक्तता या कारित अपराध भी है, किसी प्रकार का विभेद नहीं किया जाएगा और पहुंच, अवसर और बर्ताव में समानता प्रत्येक बालक को दी जानी चाहिए।

(xi) **एकांतता और गोपनीयता के अधिकार का सिद्धांतः** प्रत्येक बालक को सभी साधनों द्वारा और सम्पूर्ण न्यायिक प्रक्रिया में अपनी एकांतता और गोपनीयता की संरक्षा करने का अधिकार प्राप्त होगा।

(xii) **अंतिम अवलंब के उपाय के रूप में संस्थात्मक बनाने का सिद्धांतः** बालक को युक्तियुक्त जांच करने के पश्चात् अंतिम अवलंब के उपाय के रूप में संस्थागत देखरेख में रखा जाएगा।

(xiii) **संप्रत्यावर्तन और प्रत्यावर्तन का सिद्धांतः** किशोर न्यायिक पद्धति में प्रत्येक बालक को शीघ्रातिशीघ्र अपने कुटुम्ब से पुनः मिलाने का और उसी सामाजिक-आर्थिक और सांस्कृतिक प्रास्थिति में, जिसमें वह इस अधिनियम के क्षेत्राधीन आने के पूर्व रहता था, प्रत्यावर्तित होने का, जब तक कि ऐसा प्रत्यावर्तन और संप्रत्यावर्तन उसके सर्वोत्तम हित में न हो, अधिकार प्राप्त होगा।

(xiv) **नए सिरे से शुरूआत करने का सिद्धांतः** किशोर न्याय पद्धति के अधीन किसी बालक के पिछले सभी अभिलेख को, विशेष परिस्थितियों के सिवाय, समाप्त कर दिया जाना चाहिए।

(xv) **अपयोजन का सिद्धांतः** विधि का उल्लंघन करने वाले बालकों से न्यायिक कार्यवाहियों का अवलंब लिए बिना, जब तक कि वह बालक या सूपंर्ण समाज के सर्वोत्तम हित में न हो, निपटाने के उपायों को बढ़ावा दिया जाएगा।

(xvi) **नैसर्गिक न्याय के सिद्धांतः** इस अधिनियम के अधीन न्यायिक हैसियत में कार्य करते हुए सभी व्यक्तियों या निकायों द्वारा ऋजुता के बुनियादी प्रक्रियात्मक मानकों का, जिनके अतंर्गत उचित सुनवाई का अधिकार, पक्षपात के विरूद्ध नियम और पुनर्विलोकन का अधिकार भी है, पालन किया जाना चाहिए ।''

(v) परिवीक्षा अधिकारी की बालक न्यायालय की कार्यवाही में उपस्थिति - अधिनियम की धारा 2 (48) में यथापरिभाषित परिवीक्षा अधिकारी पर नियम 64 (3) (पप) के अधीन यह कर्त्तव्य एवं उत्तरदायित्व अधिरोपित किया गया है कि वह बालक न्यायालय की कार्यवाहियों में उपस्थित रहेगा तथा जब भी अपेक्षित हो प्रतिवेदन प्रस्तुत करेगा। परिवीक्षा अधिकारी विधि का उल्लंघन करने वाले बालक के संबंध में कोई भी विनिश्चय करने में बालक न्यायालय को सहयोग प्रदान करता है। बालक न्यायालय द्वारा विधि का उल्लंघन करने वाले बालक के संबंध में की जा रही सभी कार्यवाहियों में उसकी उपस्थिति की अपेक्षा की जानी चाहिए। कार्यवाहियों में उसकी उपस्थिति आदेश पत्र में अंकित की जानी चाहिए। बालक न्यायालय द्वारा उसे दिए गए निर्देश एवं उसके द्वारा प्रस्तुत प्रतिवेदनों का ब्यौरा आदेश पत्र में अंकित किया जाना चाहिये।

(vi) समुचित आदेश (Appropriate Order) - बालक न्यायालय द्वारा बालक का वयस्क की भांति विचारण किए जाने में सेशन न्यायालयों द्वारा विचारण हेतु दण्ड प्रक्रिया संहिता, 1973 के अध्याय-18 में विहित प्रक्रिया का अनुसरण किया जाएगा (देखें नियम 13 (8) (i))

जब बालक न्यायालय का यह विनिश्चय है कि बालक का वयस्क के रूप में विचारण करने की कोई आवश्यकता नहीं है तो वह बोर्ड की भांति कार्य करते हुए दण्ड प्रक्रिया संहिता, 1973 के अध्याय-20 में समन मामले में विचारण की प्रक्रिया का अनुसरण करते हुए जांच करेगा। (देखें नियम 13 (8) (ii)) इन दोनों ही मामलों में अधिनियम की धारा 19 (1) एवं नियम 13 (7) एवं 13 (8) में

यथाविहित समुचित आदेश अंतिम आदेश पारित किया जाएगा। अंतिम आदेश में अनिवार्य रूप से बालक के पुनर्वासन के लिए व्यक्तिगत देखरेख योजना को सम्मिलित किया जाना चाहिए। इस संबंध में अधिनियम की धारा 19 (2) में निम्नलिखित निर्देश हैं -

> ''(2) बालक न्यायालय यह सुनिश्चित करेगा कि विधि का उल्लंघन करने वाले बालक से संबंधित अंतिम आदेश में बालक के पुनर्वास के लिए व्यक्तिगत देखभाल योजना को सम्मिलित किया जाएगा जिसके अंतर्गत परिवीक्षा अधिकारी या जिला बाल संरक्षण एकक या किसी समाजिक कार्यकर्ता द्वारा की गई अनुवर्ती कार्रवाई भी है।''

व्यक्तिगत देखरेख योजना नियम 2 (ix) में निम्नानुसार परिभाषित है -

> ''व्यक्तिगत देखरेख योजना''' किसी बालक के लिए ऐसी व्यापक विकास योजना है, जो उस बालक की आयु और लिंग-विशिष्ट आवश्यकताओं तथा उस बालक के मामले के पूर्ववृत्त पर आधारित हो, जिसे बालक का खोया आत्मसम्मान, गरिमा और स्वाभिमान लौटाने और उसे जिम्मेदार नागरिक बनाने के उद्देश्य से बालक के साथ परामर्श करके तैयार किया गया हो और तद्नुसार इस योजना में बालक की निम्नलिखित आवश्कताओं की पूर्ति की जाएगी जिसकी कोई सीमा नहीं होगी अर्थात् -
>
> (क) स्वास्थ्य और पोषण संबंधी आवश्यकताएं, जिसके अंतर्गत कोई विशेष आवश्यकताएं भी हैं;
>
> (ख) भावनात्मक और मनोवैज्ञानिक आवश्यकताएं;
>
> (ग) शैक्षणिक और प्रशिक्षण संबंधी आवश्यकताएं;
>
> (घ) अवकाश, सर्जनात्मकता और खेलकूद;
>
> (ड.) सभी प्रकार के शोषण, उपेक्षा और दुर्व्यवहार से सरंक्षण;
>
> (च) उद्धार और अनुवर्तन;
>
> (छ) समाज की मुख्यधारा में सम्मिलित करना;
>
> (ज) जीवन कौशल प्रशिक्षण ।''

यह नियम के प्रारूप क्रमांक 7 में तैयार की जाती है।

इस प्रकार बालक न्यायालय की कार्यवाही के अंत में निर्णय के स्थान पर अधिनियम एवं नियमों द्वारा यथाविहित अंतिम आदेश पारित किया जाएगा ।

(vii) प्रक्रिया जब बालक न्यायालय का यह विनिश्चय है कि वयस्क के रूप में बालक का विचारण किए जाने की कोई आवश्यकता नहीं है -

जब बालक न्यायालय धारा 19 (1) एवं नियम 13 (1) के अधीन यह विनिश्चित करता है कि बालक की वयस्क के रूप में विचारण करने की कोई आवश्यकता नहीं है तो वह धारा 19 (1) (ii) एवं नियम 13 (7) सहपठित धारा 18 के अधीन विहित प्रक्रिया का अनुसारण करेगा। इसके अधीन वह-

(i) मामले को बोर्ड को प्रतिप्रेषित नहीं करेगा वरन् स्वयं बोर्ड की शक्तियों एवं प्रक्रिया का अनुसरण करते हुए बोर्ड की ही भांति कार्यवाही करते हुए मामले में जांच (न कि विचारण) इस समाधान हेतु करेगा कि क्या बालक ने कोई जघन्य अपराध किया है अथवा नहीं। इस हेतु अत्यंत तकनीकी जटिलताओं से भिन्न मात्र समाधानपरक साक्ष्य पर्याप्त है । धारा 18 में प्रयुक्त 'समाधान' पद सामान्य आपराधिक मामलों में अपेक्षित 'युक्तियुक्त संदेह के परे' के मानक से भिन्न है। (देखें धारा -19 (1) (ii), धारा-18, नियम 11 एवं नियम 13 (7) (i))

(ii) इस जांच में समन विचारण की प्रक्रिया का अनुसरण किया जाना चाहिए तथा समस्त कार्यवाही बंद कमरे में एवं बाल अनुकूल वातावरण में की जानी चाहिए। (देखें नियम 13 (7) (ii))

(ii) बालक न्यायालय से यह अपेक्षित है कि वह साक्ष्य अधिनियम की धारा 165 की शक्तियों का उपयोग साक्षियों से बालक के घर, सामाजिक परिवेश, पृष्ठभूमि तथा घटना की परिस्थितियों को जानने के लिए भी करे। बालक की परीक्षा करते समय भी इन तथ्यों के संबंध में प्रश्न किए जाने चाहिए। (देखें नियम 13 (7) (iv) एवं (अ))

(iv) यदि इस जांच के उपरांत बालक न्यायालय का यह समाधान हो जाता है कि बालक ने कोई अपराध किया है तो बालक न्यायालय ऐसे बालक के संबंध में पुनर्वास आदेश पारित करने के लिए अग्रसर होगा। दण्डादेश पारित किए जाने की कोई भी अधिकारिता बालक न्यायालय को ऐसे बालक के संबंध में नहीं है। पुनर्वास आदेश मात्र औपचारिकता नहीं है। बालक न्यायालय को इस स्तर पर यह भी तय करना होगा कि संबद्ध बालक के पुनर्वास के लिए अधिनियम की धारा 18 (1) के खंड (क) से (छ) तक वर्णित पुनर्वास की विभिन्न प्रविधियों में से कौन सी प्रविधि उपयुक्त होगी। इन प्रविधियों में से चयन करने की प्रक्रिया में बालक के पूर्व आचरण एवं सामाजिक जांच प्रतिवेदन में वर्णित तथ्यों के अतिरिक्त नियमों के प्रारूप 7 में यथाविहित व्यक्तिगत देखरेख योजना को सम्मिलित किया जाना आज्ञापक है। अतएव बालक न्यायालय द्वारा परिवीक्षा अधिकारी या बाल कल्याण अधिकारी या मामला कार्यकर्ता को विहित प्रारूप में संबद्ध बालक की व्यक्तिगत देखरेख योजना की प्रस्तुति सुनिश्चित करने का आदेश दिया जाना चाहिए। (देखें धारा 1 (4) 18 एवं नियम 13 (7) (vi))

(v) बालक न्यायालय द्वारा पुनर्वास के संबंध में पारित किए जा सकने वाले आदेश - नियम 13 (7) (vii) के अधीन बालक न्यायालय अधिनियम की धारा 18 (1) एवं 18 (2) के उपबंधों के अनुसार कोई भी आदेश पारित करने के लिये सशक्त है। धारा-18 के अधीन पारित किए जा सकने वाले पुनर्वास आदेशों को दो वर्गों में रखा जा सकता है -

(क) संस्थागत पुनर्वास आदेश- बालक को संस्थागत पर्यवेक्षण में पुनर्वास हेतु रखा जाना संस्थागत पुनर्वास कहलाता है। इस प्रविधि में बालक को धारा 48 में यथा विहित विशेष गृह अथवा धारा-49 में यथाविहित सुरक्षित स्थान में पुर्नवास हेतु प्रेषित किया जाता है। मध्यप्रदेश शासन द्वारा सिवनी एवं इंदौर में विशेष गृह एवं सुरक्षित स्थान स्थापित किए गए हैं।

सुसंगत प्रावधान धारा 18(1) (छ) में निम्नवत् हैं -

> "(छ) बालक को तीन वर्ष से अनाधिक की ऐसी अवधि के लिए, जो वह ठीक समझे, सुधारात्मक सेवाएं, जिसके अंतर्गत शिक्षा, कौशल विकास, परामर्श देने, आचरण उपांतरण चिकित्सा के लिए और विशेष गृह में ठहरने की कालावधि के दौरान मनश्चिकित्सीय समर्थन देना भी है, विशेष गृह में भेजने का निदेश दे सकेगाः
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> परन्तु यदि बालक का आचरण और व्यवहार ऐसा हो गया है जो बालक के हित में या विशेष गृह में रहने वाले अन्य बालकों के हित में नहीं होगा तो बोर्ड, ऐसे बालक को सुरक्षित स्थान पर भेज सकेगा।"

यह ध्यातव्य है कि अधिनियम की धारा 3 (xii) के अधीन संस्थागत पुनर्वास का आदेश अंतिम विकल्प होना चाहिए। दूसरे शब्दों में बालक को संस्थागत पुनर्वास में भेजने का आदेश दिए जाने के पूर्व बालक न्यायालय द्वारा यह समाधान अभिलिखित किया जाना आवश्यक है कि संबद्ध बालक के संबंध में (धारा 18 (1) खंड (क) से (च) में वर्णित) पुनर्वास की अन्य कोई प्रविधि उपयुक्त/प्रभावी नहीं है। संस्थागत पुनर्वास अंत्य उपाय है तथा ऐसे विरलतम मामलों में ही आदेशित किया जाना चाहिए जिनमें अन्य प्रविधियों से बालक का पुनर्वास संभव ही नहीं है।

(ख) असंस्थागत पुनर्वास आदेश- अधिनियम की धारा 18 (1) (क) से (च) तक वर्णित पुनर्वास की प्रविधियों को इस वर्ग में रखा जा सकता है। इन प्रविधियों में निम्नलिखित आदेश आते हैं -

1. बालक एवं उसके माता पिता का परामर्श उपदेश या भर्त्सना उपरांत घर जाने हेतु अनुज्ञात करना।
2. बालक को सामूहिक परामर्श (Group counseling) देना।
3. बालक को किसी संगठन/संस्था/व्यक्ति या व्यक्तियों के समूह में पर्यवेक्षणाधीन सामुदायिक सेवा (Community services) में भाग लेने का आदेश।
4. बालक/उसके माता-पिता या संरक्षक द्वारा अर्थदण्ड संदाय का आदेश।
5. सदाचरण की परिवीक्षा पर छोड़ने तथा बालक को उसके माता-पिता या योग्य व्यक्ति (fit Person) या उपयुक्त तंत्र (fit facility) की देखरेख में रखने का निर्देश। (देखें धारा - 18 (1))

अतिरिक्त आदेश - धारा - 18 (2) के अधीन बालक न्यायालय उपर्युक्त संस्थागत अथवा असंस्थागत पुनर्वास आदेश के साथ साथ बालक के हित को दृष्टिगत रखते हुए निम्नलिखित अतिरिक्त आदेश भी पारित कर सकता है -

(i) विद्यालय में उपस्थित होने;

(ii) किसी व्यवसायिक प्रशिक्षण केन्द्र में उपस्थित होने;

(iii) किसी चिकित्सा केन्द्र में हाजिर होने;

(iv) किसी विनिर्दिष्ट स्थान पर बारंबार जाने या उपस्थित होने से बालक को प्रतिषिद्ध करने; या

(v) व्यसनमुक्ति कार्यक्रम में भाग लेने (देखें धारा-18 (2))

(viii) प्रक्रिया जब बालक न्यायालय का यह विनिश्चय है कि बालक का वयस्क के रूप में विचारण किया जाना चाहिए-

इस संबंध में अधिनियम की धारा 19(3), 19(4), 19(5), 20 एवं 21 तथा नियम 13(8) में विस्तार से प्रक्रिया विहित की गई है। इन प्रावधानों के अधीन अनुध्यात् प्रक्रिया सरल रूप में निम्नानुसार है -

1. बालक न्यायालय द्वारा ऐसे मामलों में दण्ड प्रक्रिया संहिता, 1973 के अध्याय-18 में सेशन न्यायालय के समक्ष विचारण हेतु वर्णित प्रक्रिया का अधिनियम की अपेक्षा के अनुरूप यथा परिवर्तनोंके साथ अनुसरण किया जाना चाहिए। दूसरे शब्दों में संहिता के अधीन विहित प्रक्रिया बाल अनुकूल वातावरण में अग्रसरित की जाएगी तथा विचारण का अंत निर्णय के स्थान पर अंतिम आदेश से होगा। अंतिम आदेश में सर्वप्रथम बालक की अपराध में संलिप्तता का निर्धारण अभिलेख पर उपलब्ध साक्ष्य के आधार पर सामान्य आपराधिक मामलों की भांति किया जाएगा। यदि बालक अपराध में संलिप्त पाया जाता है तो दण्डादेश के स्थान पर धारा-19, 20 एवं नियम 13(8) में विहित रीति से बालक के संस्थागत पुनर्वास एवं उसके सुधार के मूल्यांकन हेतु आदेश किए जाने चाहिए। बालक न्यायालय बालक के इक्कीस वर्ष की आयु का होने तक ऐसे संस्थागत पुनर्वास में उसके सुधार का अनिवार्य पर्यवेक्षण भी करेगा। यदि बालक ने 21 वर्ष की आयु का होने तक अपने संस्थागत पुनर्वास में कोई भी प्रगति दर्शित नहीं की हो तभी बालक न्यायालय ऐसी आपवादिक स्थिति में 'शेष अवधि' कारागार में व्यतीत करने के लिये आदेश दे सकता है।
2. बालक के अपराध में संलिप्त पाए जाने की दशा में प्राथमिक आदेश यह होगा कि बालक को इक्कीस वर्ष की आयु का होने तक के लिए ''सुरक्षित स्थान'' (Place of safety) पर भेज दिया जाए। यहां उस बालक का व्यक्तिगत देखरेख योजना के अनुसार संस्था के पर्यवेक्षण में पुनर्वास किया जाएगा। (देखें धारा 19 (3) एवं नियम 13 (8) (iii))
3. उक्त आदेश के भाग के रूप में नियम के प्रारूप-7 में प्रस्तुत ''व्यक्तिगत देखरेख योजना'' के अनुसरण में बालक के संस्थागत पुनर्वास में उसकी प्रगति के मूल्यांकन का निर्देश परिवीक्षा अधिकारी/जिला बाल संरक्षण इकाई या सामाजिक कार्यकर्ता को दिया जाना चाहिए एवं उनसे प्रारूप-13 में समीक्षा प्रतिवेदन के प्रस्तुत किए जाने की अपेक्षा की जानी चाहिए। (देखें नियम 13 (8) (iv))
4. स्पष्ट है कि अंतिम आदेश के साथ ही बालक न्यायालय के समक्ष लंबित मामला समाप्त नहीं हो जाता है जैसे कि अन्य आपराधिक मामले निर्णय के साथ ही समाप्त हो जाते हैं और अभिलेख अभिलेखागार प्रेषित कर दिया जाता है। प्रस्तुत मामलों में अंतिम आदेश के उपरांत बालक के

21 वर्ष की आयु का होने तक उसके पुनर्वास/सुधार की प्रगति के मूल्यांकन के दायित्व के निर्वहन का भार बालक न्यायालय पर है। अतएव मामले का अभिलेख अंतिम आदेश के उपरांत भी जहां बालक को दोषी पाया गया है, बालक के इक्कीस वर्ष की आयु प्राप्त करने तक बालक के पुनर्वास/सुधार की प्रगति के मूल्यांकन हेतु बालक न्यायालय के पास ही रहना चाहिए। अभिलेख अंतिम आदेश के तत्काल पश्चात् अभिलेखागार नहीं भेजा जाना चाहिए। अंतिम आदेश के उपरांत ऐसे मामलों में बालक की प्रगति के मूल्यांकन हेतु आवधिक रूप से समीक्षा प्रतिवेदन प्रस्तुति या बालक की स्वीय प्रस्तुति हेतु तिथि नियत की जानी चाहिए।

5. बालक न्यायालय यह भी सुनिश्चित करेगा कि संस्थागत पुनर्वास के अनुक्रम में बालक से कोई दुर्व्यवहार न किया जाए। इस हेतु एवं प्रगति के मूल्यांकन हेतु अनिवार्य वार्षिक समीक्षा प्रतिवेदन के अतिरिक्त बालक न्यायालय प्रत्येक तीन मास में एक बार बालक को अपने समक्ष प्रस्तुत किए जाने का निर्देश भी दे सकता है। (देखें धारा 19 (4), 19 (5) एवं नियम 13 (8) (अ))

6. बालक द्वारा इक्कीस वर्ष की आयु पूर्ण कर लिए जाने पर बालक न्यायालय बालक के संबंध में प्रस्तुत समीक्षा प्रतिवेदनों एवं अभिलेख पर उपलब्ध सामग्री पर विचार सहित बालक से अपेक्षित संवाद उपरांत यह तय करेगा कि क्या बालक में संस्थागत पुनर्वास के अनुक्रम में सुधारात्मक परिवर्तन हुए हैं या नहीं तथा क्या अब वह समाज का योगदान करने वाला सदस्य हो सकता है या नहीं। इस संबंध में बालक न्यायालय द्वारा अपना सकारण अभिमत लेखबद्ध किया जाना चाहिए। यदि बालक न्यायालय का अभिमत सकारात्मक है तो वह बालक की निर्मुक्ति का आदेश कर सकता है। इस संबंध में धारा-20 (1), 20 (2) (i) एवं नियम 13(8) (vi) का अनुपालन किया जाना चाहिए। नियम 13 (8) (vi) एवं 13 (8) (vii) में निम्नलिखित निर्देश हैं-

"(vi) जब बालक की आयु इक्कीस वर्ष हो जाए और उसे संस्था में रहने कीअवधि पूरी करनी हो तब बालक न्यायालय:-

(क) यह मूल्यांकन करने के लिए बालक से विचार-विमर्श करेगा कि उसमें सुधारात्मक बदलाव आए हैं या नहीं और क्या वह बालक समाज का योगदानकारी सदस्य बन सकता है।

(ख) यदि आवश्यक हुआ तो परिवीक्षा अधिकारी या जिला बाल संरक्षण इकाई या सामाजिक कार्यकर्ता द्वारा तैयार की गई बालक की प्रगति की आवधिक रिपोर्टों पर विचार करेगा और यदि संस्थागत व्यवस्था अपर्याप्त हो तो आगे सुधार के निर्देश देगा।

(ग) मूल्यांकन करने के बाद बालक न्यायालय ;

(गक) बालक को तुरंत छोड़ने ;

(गख) अच्छे व्यवहार के लिए बालक को प्रतिभूति के साथ या बिना प्रतिभूति के मुचलका निष्पादित करने पर छोड़ने;

(गग) बालक को छोड़ने और परिवर्तनकारी एवं सकारात्मक व्यवहार को बढ़ावा देने के उद्देश्य से शिक्षा, व्यावसायिक प्रशिक्षण, प्रशिक्षुता, रोजगार, परामर्श और अन्य उपचारात्मक कार्यों के विषय में निर्देश जारी करने;

(गघ) बालक को छोड़ने और उसके संस्था में रहने की शेष विनिर्दिष्ट अवधि के लिए निगरानी प्राधिकारी नियुक्त करने का निर्णय कर सकेगा। जिस मामले में निगरानी प्राधिकारी नियुक्त किया जाए, उस मामले में वह प्राधिकारी बालक के लिए पुनर्वास कार्ड प्रारूप 14 में रखेगा।

(अपप) इस नियम के उप-नियम (अप) (ग) (गघ)के प्रयोजन के लिए;

(क) परिवीक्षा अधिकारी या मामला कार्यकर्ता या बालक कल्याण अधिकारी या किसी उपयुक्त व्यक्ति को निगरानी प्राधिकारी नियुक्त किया जा सकता है।

(ख) जिला बाल संरक्षण इकाई ऐसे व्यक्तियों की सूची रखेगी, जिन्हें निगरानी प्राधिकारी नियुक्त किया जा सकता है और यह सूची द्विवार्षिक अद्यतनीकरण के साथ बालक न्यायालय को भेजी जाएगी।

(ग) छोड़े जाने के बाद पहली तिमाही में बालपाक्षिक आधार पर या बालक न्यायालय के निर्देशानुसार अंतरालों पर निगरानी प्राधिकारी से मिलेगा। निगरानी प्राधिकारी बालक से परामर्श करके ऐसी बैठकों का समय और स्थान निर्धारित करेगा। निगरानी प्राधिकारी बालक की प्रगति के विषय में अपनी टिप्पणियां मासिक आधार पर बाल न्यायालय को भेजेगा।

(घ) पहली तिमाही समाप्त होने पर निगरानी प्राधिकारी बालक के लिए आगे अपेक्षित अनुवर्ती प्रक्रिया के विषय में सिफारिशें करेगा।

(ड.) जहाँ छोड़े जाने के बाद, बालक को आपराधिक कार्यकलाप में प्रवृत्त होते या आपराधिक पूर्ववृत्त वाले लोगों से मेलजोल रखते हुए पाया जाए, वहाँ बालक को अगले आदेशों के लिए बालक न्यायालय के समक्ष लाया जाएगा।

(च) यदि यह पाया जाए कि अब बालक की और निगरानी किए जाने की आवश्यकता नहीं है तो निगरानी प्राधिकारी सिफारिशों के साथ विस्तृत रिपोर्ट बालक न्यायालय के समक्ष प्रस्तुत करेगा और बालक न्यायालय निगरानी को समाप्त किए जाने या आगे जारी रखे जाने के लिए निर्देश जारी करेगा।

(छ) पहली तिमाही के बाद बाल निगरानी प्राधिकारी द्वारा पहली तिमाही के अंत में की गई सिफारिशों के आधार पर बालक न्यायालय द्वारा किए गए निर्देशों के अनुसार अंतरालों पर निगरानी प्राधिकारी से मिलेगा और निगरानी

प्राधिकारी अपनी रिपोर्ट बालक न्यायालय को भेजगा, जो कि हर तिमाही में उसकी समीक्षा करेगा।''

7. यदि वार्षिक समीक्षा प्रतिवेदनों, अभिलेख पर उपलब्ध सामग्री पर विचार एवं बालक से परिसंवाद के उपरांत बालक न्यायालय का यह अभिमत है कि बालक द्वारा अपनी संस्थागत पुनर्वास की अवधि में कोई भी सुधारात्मक परिवर्तन स्वीकार नहीं किया गया है और वह समाज का योगदान करने वाला सदस्य होने के अयोग्य है, तो वह बालक को छोड़े जाने के स्थान पर शेष अवधि कारागार में पूरी करने का आदेश कर सकता है और बालक को ''शेष अवधि'' के लिए कारागार प्रेषित कर दिया जाएगा। (देखें धारा 20 (2) (ii))

8. ''शेष अवधि'' पद को न तो अधिनियम और न ही नियम में परिभाषित किया गया है। अतएव शेष अवधि क्या होगी यह न्यायालय के विवेक का विषय है। यह अवधि संबद्ध अपराध हेतु अधिनियम में विहित दण्ड भी हो सकती है परंतु निश्चित रूप से यह अवधि बालक के 21 वर्ष के होने तक निरोध में व्यतीत कुल अवधि को छोड़कर एवं धारा 21 के निम्नलिखित प्रतिबंध के अधीन होनी चाहिए -

''धारा 21 आदेश, जो विधि का उल्लंघन करने वाले बालक के विरूद्ध पारित न किया जा सकेगा - विधि का उल्लंघन करने वाले किसी बालक को इस अधिनियम के उपबंधों के अधीन या भारतीय दंड संहिता, 1860 या तत्सयम प्रवृत्त किसी अन्य विधि के उपबंधों के अधीन ऐसे किसी अपराध के लिए छोड़े जाने की संभावना के बगैर मृत्यु या आजीवन कारावास का दंडादेश नहीं दिया जाएगा।''

9. बालक न्यायालय द्वारा बालक को कारागार में प्रेषित किए जाने के आदेश के साथ उसके द्वारा सम्पूर्ण कार्यवाही के अनुक्रम में निरोध में व्यतीत कुल अवधि के समायोजन का प्रमाण पत्र भी नियम 90 (3) अनुपालन में निर्मित कर प्रेषित करना चाहिए। नियम 90 (3) इस प्रकार है -

''90 (3) - कानून का उल्लंघन करने वाले बालक के कारावास या आवास या सजा की अवधि की संगणन करते समय, ऐसी स्थिति अवधियों की जो बालक अभिरक्षा, निरोध, आवास या कारावास की सजा से पहले ही बिता चुका है, न्यायालय या बोर्ड के अंतिम आदेश में समाविष्ट की गई आवास या निरोध या कारावास की सजा की अवधि के रूप में गणना की जाएगी ''

इस प्रकार दण्ड प्रक्रिया संहिता, 1973 की धारा 428 की भावना का अनुपालन बालकों के संबंध में भी किया जाना चाहिए। (देखें -***सुनील ओझा वि. स्टेट आफ एन.सी.टी. आफ देलही 2007 (4) क्राइम्स 596 (देलही)*** एवं ***प्रदीप कश्यप वि. छत्तीसगढ़ राज्य, 2013 (1) एम.पी.एच.टी. (छत्तीसगढ़) 60***)

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A Note on Admissibility of Electronic Evidence in light of Shafhi Mohammad v. State of Himachal Pradesh, AIR 2018 SC 714

– **Vidhan Maheshwari**
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The law relating to admissibility of electronic evidence is in the stage of evolution like any new law. It is trying to keep pace with the advancement of the Information Technology. A new dimension of law is laid down by the Supreme Court in the case of ***Shafhi Mohammad v. State of Himachal Pradesh, AIR 2018 SC 714.*** It has created anxiety in the minds of legal professionals as to the requirement of certificate under Section 65B of the Evidence Act. The order of the Supreme Court forwards the concept of advancement of justice without restricting oneself to formal procedural bottlenecks. It ensures the basic theme that law of evidence recognises the new techniques and tools, provided their accuracy can be proved.

Before the discussion on order of the Supreme Court in ***Shafhi's*** case, it will be beneficial to have an overview of the law before it.

The law relating to electronic evidence before Sections 65A and 65B came into force was somewhat similar to law relating to admissibility of scientific evidence in developed countries where the Courts were given the responsibility of *"gatekeepers"* and were expected to ensure the reliability and authenticity of scientific evidence before admitting it. This role was also recognised by the Supreme Court in the case of ***Ram Singh v. Col. Ram Singh, AIR 1986 SC 3,*** where it was held that tape recorded conversation is admissible only after its originality and authenticity is established.

After the coming of Sections 65A and 65B, the role of the Court so as to permit the admission of electronic record was formalised and requirement of production of "Certificate" was mandated. Through this the legislature tried to replace the prima facie reliability and authenticity test at the stage of admission with a formal certificate so as to simplify the admissibility procedure. The object was to obviate the difficulty attached to the production of primary evidence, which can lead to a denial of justice in many cases and bring secondary evidence to the level of primary evidence in order to make it admissible in accordance with law.

After the insertion of special law under Sections 65A and 65B there were different opinions as to the pre-condition of certification for admissibility of electronic evidence. The main point of contention was whether other existing general provisions of Evidence Act relating to documentary evidence would apply to electronic evidence or whether the newly inserted provisions are complete code of electronic evidence so as to override other provision of general law.

One of the first judgment on this point which held the field for almost ten years was the case of ***State of NCT Delhi v. Navjot Sandhu @ Afsan Guru, AIR 2005 SC 3820***.In this the Supreme Court held that there is no bar to adducing secondary electronic record under other general provisions of the Evidence Act, namely Sections 63 & 65. It meant that although special law relating to electronic evidence has been made in Sections65A and 65B of Evidence Act, it does not exclude the application of other provisions relating to documentary evidence inclusive of electronic evidence. Thus, an electronic record may be admitted in absence of certificate if the other general conditions in Section 63 and 65 are fulfilled.

A three judge bench of the Supreme Court in the case of ***Anvar P.V. v. P.K. Basheer and ors., AIR 2015 SC 180*** considered above mentioned dictum of law. Expressly overruling the ratio of the ***Navjot Sandhu*** case, it was held that a third type of category of evidence other than oral and documentary has been created and that is electronic evidence. The legislature has inserted a special law relating to electronic evidence in the form of Sections 65A and 65B which starts with a non-obstante clause. Therefore, the special law relating to electronic evidence shall prevail over the other existing general law and certificate as mandated by Section 65B is essential for admissibility of electronic evidence. The Court also clarified that this law was only for the production and admissibility of electronic evidence in secondary form and does not apply to original electronic evidence, which does not require any certificate for admissibility.

Keeping in mind the object of Section 65B to facilitate the production of secondary electronic evidence, the law relating to admissibility of secondary electronic evidence was settled by the Supreme Court in ***Anvar case,*** but the situation where the party is not in position to produce the certificate because of any justifiable reason was not addressed.

In the latest case of ***Shafhi Mohammad v. State of Himachal Pradesh, AIR 2018 SC 714,*** a two judge bench of the Supreme Court was considering as to whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected. A question arose as to admissibility of electronic evidence in a situation where the person producing the electronic evidence was not in control of the device producing it. Whether in such a situation the Court will not admit the electronic evidence as the certificate required cannot be accompanied to it. The Court held as follows:

> *"The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory."*

The Court has held that it cannot be universal law that certificate will always be mandatory for admissibility of electronic evidence. The certificate is required where situation is covered by the special law of Section 65B i.e. where the party presenting the evidence is in control of the device producing it and is in position to present the certificate. In a situation where the party is not in a position to produce certificate because he is not in control of the device or is the opposite party, the certificate is not mandatory. The Court may admit the electronic evidence on being satisfied as to the authenticity and relevancy.

The Supreme Court has again underlined that it will be fallacious to deny to the law of evidence, advantages gained by new techniques and new devices. Also, the Court will not turn its eyes from any material evidence just because any procedural formality could not be complied with.

The law has come full circle with ***Shafhi's*** dictum again recognising the *gatekeepers'* role of the Court recognised by foreign and Indian Courts previous to the insertion of Sections 65A and 65B. The special law contained in Section 65B will apply to electronic evidence only where the provision could be applied and in all other circumstances, not covered by it, the general provision relating to admissibility will apply to electronic evidence as well.

It is also important to remember that electronic record are not inherently inadmissible in evidence and Section 65B requires a certificate for admission in given circumstances. The condition facilitating admissibility under Section 65B comes within the purview of mode or method of proof. Since any objection relating to the mode or method of proof must be raised at the time of marking of

the document as an exhibit and not later, the objection as to the requirement of certificate or in relation to it, must also be raised at the stage of admissibility. As held by the Supreme Court in the case of ***Sonu @ Amar v. State of Haryana, AIR 2017 SC 3441*** such objections, if not taken at the trial, cannot be permitted at the later stage.

Having regard to the afore-mentioned discussion, it can be concluded that:

1. Electronic evidence is a special category of evidence different from documentary evidence.
2. No Certificate is required for the production of original electronic evidence where the content has been generated without any human intervention.
3. Certificate is required for admissibility of electronic record if the party producing the electronic record is in a position to produce the certificate as required by Section 65B. In such a situation the requirement of the certificate is mandatory.
4. Where the party producing the electronic record is not in position to produce the certificate for any justifiable reason, the Court may admit it on satisfaction firstly, as to the reason of non-production of certificate and secondly, as to the authenticity and relevancy of electronic evidence.
5. All objections as to the admissibility of electronic record must be raised at the stage of admitting it and any such objection shall not be permitted at any later stage.

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He who seeks justice must believe in justice, who like all divinities, show her face only to the faithful.

PART – II

NOTES ON IMPORTANT JUDGMENTS

1. CIVIL PROCEDURE CODE, 1908 –Sections 141, 104 and Order 43 Rule 1

(i) Order 43 Rule1(c) – Scope and ambit – Term "order rejecting an application" explained – Miscellaneous appeal from Order – Right to appeal is provided on rejection of an application – Cannot be limited to rejection on merit – It also covers dismissal on default. ***(Judgment in case of Nathu Prasad v. Singhai Kapurchand, AIR 1976 MP 136 (FB)*** **approved on this point).**

(ii) Section 141 – Scope explained – Appeal from an Order – Application under Order 9 Rule 13 dismissed on default – Application for its restoration dismissed on merit – Whether an order dismissing application for restoration is appealable under Order 43 Rule (1)(c)? Held, Yes – Application for restoration can be treated as application under Order 9 Rule 9 read with Section 141 to restore a miscellaneous proceeding akin to suit – Appeal under Order 43 Rule 1(c) is permissible against order rejecting such application. (Judgment in case of ***Nathu Prasad, AIR 1976 MP 136 (FB)*** **partly overruled on this point).**

सिविल प्रक्रिया संहिता, 1908 - धाराएं 141, 104 एवं आदेश 43 नियम 1

(i) आदेश 43 नियम 1(ग) - कार्य क्षेत्र व विस्तार - अभिव्यक्ति ''आवेदन अस्वीकृत करने का आदेश'' की व्याख्या - आदेश के विरूद्ध विविध अपील - आवेदन अस्वीकृत् होने पर अपील करने का अधिकार प्रदान किया गया है - इसे केवल गुणागुण पर अस्वीकृति तक सीमित नहीं किया जा सकता है - इसके अन्तर्गत व्यतिक्रम पर खारिज किया जाना भी आता है। (इस बिन्दु पर ***नाथू प्रसाद, विरूद्ध सिंघई कपूरचंद ए.आई.आर. 1976 एम.पी. 136 (एफ.बी.)*** में दिया गया निर्णय अनुमोदित)

(ii) धारा 141 - कार्यक्षेत्र विवेचित - आदेश की अपील - आदेश 9 नियम 13 के अधीन आवेदन व्यतिक्रम पर खारिज - इसके पुर्नस्थापन हेतु आवेदन गुणागुण पर खारिज - क्या आदेश 43 नियम 1(ग) के अधीन पुर्नस्थापन आवेदन खारिज किये जाने का आदेश अपील योग्य है? - अभिनिर्धारित, हाँ - पुर्नस्थापन आवेदन को आदेश 9 नियम 9 सहपठित धारा 141 के अधीन वाद की भांति विविध कार्यवाही के पुर्नस्थापन की तरह व्यवहृत किया जायेगा - ऐसे आवेदन की अस्वीकृति के आदेश के विरुद्ध आदेश 43 नियम 1(ग) के आधीन अपील अनुमत है। (इस बिन्दु पर ***नाथू प्रसाद, ए.आई.आर. 1976 एम.पी. 136***में दिये गये निर्णय को आंशिक रूप से नामंजूर किया गया)

Jaswant Singh and ors.v. Parkash Kaur and anr.
Judgment dated 21.07.2017 passed by the Supreme Court in Civil Appeal No. 9409 of 2017, reported in AIR 2017 SC 5275

Relevant extracts from the judgment:

We may first examine, as to whether, the order dated 19.10.2001 by which application filed by Ranjit Singh, defendant was dismissed in default, was appealable or not? Order XLIII Rule 1(d) permits appeal from "an order under Rule 13 of Order IX rejecting an application". There cannot be any dispute that ex parte decree passed by the Civil Judge dated 06.12.1997 was appealable and Ranjit Singh, the defendant chose to file an application under Order IX, Rule 13 praying for setting aside the ex parte decree dated 06.12.1997, with the further prayer that suit be decided on merits after giving opportunity to the appellant Ranjit Singh.

The statutory provision of Order XLIII, Rule 1(c) and 1(d), C.P.C. uses the words "rejecting an application". When the appeal is provided on rejection of an application, we need not read any further precondition in the word rejecting. When the right of appeal has been given on "rejecting" an application the said right cannot be read to limit the right of appeal only when application is rejected on merit. Taking any such interpretation will be nothing but adding words to statute which is clearly impermissible.

Full Bench of Madhya Pradesh High Court in ***Nathu Prasad v. Singhai Kapurchand, AIR 1976 MP 136 (FB)*** case had occasion to consider the words "rejecting an application" as contained in Order XLIII Rule 1(c) C.P.C. After considering the earlier judgments of the different High Courts the Full Bench opined as follows:

> ".....In our opinion, there is nothing in the wording of Order 43 Rule 1(c), Civil P. C. to restrict it to rejection on merits. The words "rejecting an application" are comprehensive enough to include dismissal for default on rejection, in any other situation whatever."

Thus, there cannot be any dispute that when the application was rejected in default under Order IX Rule 13, C.P.C., the right of appeal could have been exercised under Order XLIII Rule 1(d), C.P.C.

In the present case against the order dated 19.10.2001, rejecting the application under Order IX Rule 13, C.P.C. in default, no appeal was filed. Rather after the death of Ranjit singh on 20.11.2001 his legal heirs, who are appellants before us filed an application on 21.08.2002, praying for restoration of the application under Order IX Rule 13, C.P.C. Further, they prayed that they may be allowed to contest the suit. The application dated 21.08.2002 was dismissed on merit by Trial Court holding that there was no sufficient cause for restoration. The appeal was filed against the order dated 23.12.2005 before the Appellate Court.

The application filed by appellant dated 21.08.2002 for restoration of the application under Order IX Rule 13, C.P.C., which was dismissed in default, is not expressly covered by the provisions of Order IX C.P.C. The application dated 21.08.2002 was miscellaneous proceeding on which Civil Miscellaneous Case No. 30 of 2002 was registered. What are the provisions and procedure for miscellaneous proceeding have to be looked into for deciding the issue. Section 141 of C.P.C. is relevant in this context. Section 141, C.P.C. deals with miscellaneous proceeding. An Explanation has been inserted under Section 141 by Act 104 of 1976. Section 141, C.P.C. after amendment w.e.f. 01.02.1977 is as follows:

> ***"141. Miscellaneous proceedings.-*** The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
> [***Explanation.*** In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.]"

As per Section 141, the procedure provided in Civil Procedure Code in regard to suit shall be followed, as far as, it can be made applicable in all proceedings in any Court of civil jurisdiction. By insertion of explanation, it has now been expressly provided that expression "proceedings" includes proceedings under Order IX, C.P.C.

When Section 141 expressly refers to proceedings under Order IX, as miscellaneous proceedings and appeals from such orders are expressly provided by Order XLIII Rule 1(c) and (d), it is clear that right of appeal has been given, from the orders arising out of the miscellaneous proceeding.

It is relevant to note that expression "proceedings" as referred to in explanation contains only an inclusive definition. What is explained in explanation is not exhaustive rather inclusive. Dismissal of an application under Order IX Rule 13, C.P.C. in default, is an order passed in miscellaneous proceedings, which is expressly included in Section 141, C.P.C. explanation. But whether the application dated 21.08.2002 to recall the order dated 19.10.2001 is also a miscellaneous proceeding, covered by miscellaneous 'proceedings' under Section 141, C.P.C. The answer has to be 'yes' thus, application dated 21.08.2002 is also a miscellaneous proceeding in which proceeding, the procedure prescribed in the Code for suits is to be followed.

Order IX Rule 9, C.P.C. refers to application filed by plaintiff for restoration of a suit which had been dismissed in default. Application dated 21.08.2002 prays for recalling of the order dated 19.10.2001, dismissing the application under Order IX Rule 13, C.P.C. in default.

Before we proceed further, it is necessary to consider the Full Bench judgment of High Court of M.P. in ***Nathu Prasad case, AIR 1976 MP 136 (FB)***

(supra). Before the Full Bench following three questions were referred to be answered:

> "(i) When an application under Order 9, Rule 9, Civil P.C., is dismissed for default, whether an application lies for its restoration under Order 9, Rule 9, Civil P.C.?
>
> (ii) Whether an order dismissing an application under Order 9, Rule 9, Civil P.C. is appealable under Order 43, Rule 1 (c), Civil P.C.?
>
> (iii) If both the questions are answered in the affirmative, whether both the remedies are concurrent or either of them excludes the other?"

We have already noticed that while considering the words "rejecting an application" Full Bench held that the words "rejecting an application" are comprehensive enough to include the dismissal for default or rejection on any other ground. The Full Bench has held that appeal will lie under Order XLIII, Rule 1(c), C.P.C., even when, application under Order IX, Rule 9, C.P.C. is dismissed in default. It is useful to extract the following observations of Full Bench:

> "We have not come across any argument to demonstrate that the provisions of Order 43, Rule 1(c) led to any absurdity or hardship, if the plain meaning of the clause is accepted. Consequently, it is not permissible to add the words "on merits," or any other words, in the said Clause (c). It is the first principle of interpretation of statutes that effect must be given to the intention of the legislature. And, it is equally fundamental that the language of the law itself is the depository of the intention of the legislature. Therefore, where the language is clear, and the meaning plain, effect must be given to it. The Court cannot read a law as if its language is different from what it actually is. Otherwise, it will amount to amending the law, which is not permissible for the Court. See, for instance, ***Thakur Amarsinghji v. State of Rajasthan, (1955) 2 SCR 303 : (AIR 1955 SC 504) and Firm Hansraj Nathuram v. Firm Lalji Raja and Sons (1963) 2 SCR 619 : (AIR 1963 SC 1180).*** The primary duty of the Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention [See: ***New Piece Goods Bazar Co. Ltd., Bombay v. Commissioner of Income-tax, Bombay, (1950) 1 SCR 553 : (AIR 1950 SC 165)***].

> The result of this discussion is that in our view, an appeal lies from an order dismissing for default or on merits an application under Order 9, Rule 9, Civil P. C."

The Full Bench, however, took the view that when an application under Order IX, Rule 9 C.P.C. for restoration of the suit is rejected and an application is made for restoration of the application although, such application also falls within the purview of Order IX, Rule 9, C.P.C., read with Section 141, Civil P.C., yet, the order rejecting the application does not fall within the Order 43, Rule 1(c), C.P.C. inasmuch as the subsequent application is not "for an order to set aside the dismissal of a suit"; it is for an order to set aside dismissal of the application. The Full Bench summed up its conclusion in following words:-

> "Let it be mentioned for removal of doubt, and for making the picture complete, that when an application ('A') under Order 9, Rule 9, Civil P. C., for restoration of the suit is rejected and an application ('B') is made for restoration of the application ('A') although such application ('B') also falls within the purview of Order 9, Rule 9, read with Section 141, Civil P. C., yet, the order rejecting the application ('B') does not fall within Order 43, Rule 1 (c) inasmuch as the application ('B') is not "for an order to set aside the dismissal of a suit"; it is for an order to set aside dismissal of the application ('A').

We may now sum up the conclusions we have reached on the above discussion :

(i) When application ('A') under Order 9, Rule 9, Civil P. C, is itself dismissed for default of the plaintiff/petitioner's appearance, an application ('B') lies under Order 9, Rule 9, read with Section 141 of the same Code, for restoration of the application ('A'). In order to succeed in this proceeding ('B'), the petitioner has to satisfy the Court that he was prevented by sufficient cause from appearing on the date when the application ('A') was called on for hearing.

(ii) The order of dismissal for default of the application ('A') is appealable under Clause(c)of Rule1,Order 43,CivilP.C.

(iii) Both the above remedies, i. e., application under Order 9, Rule 9, and appeal under Order 43, Rule 1 (c) are concurrent. They can be resorted to simultaneously. Neither excludes the other. The scope of each of the above proceedings is, however, different.

(iv) When an appeal (second remedy) is decided, one way or the other, the order of dismissal for default appealed from gets merged in the order of the appellate Court, so that

thereafter the application ('B') under Order 9, Rule 9, becomes infructuous. When it comes to the notice of the appellate Court that an application has also been made under Order 9, Rule 9, for restoration, the appellate Court may do well to postpone the hearing of the appeal until the decision of the application under Order 9, Rule 9, Civil P.C.

(v) No appeal lies from an order rejecting an application ('B') for restoration of application ('A'), which latter application was for restoration of the suit.

(vi) As observed by their Lordships of the Supreme Court in ***Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936 and Jaisri v. Rajdewan, AIR 1962 SC 83,*** if a Division Bench does not agree with another Division Bench in a decision rendered earlier, the Second Division Bench must either follow the earlier decision or place the matter before the Chief Justice for being referred to a larger Bench. But, the second Division Bench cannot take upon itself the task of holding that the decision of the first Division Bench was wrong. We answer this reference accordingly."

The reasoning given by the Full Bench as extracted above, is that, since the subsequent application is not for an order to set aside the dismissal of the suit and it is only for an order to set aside the dismissal of the application in default, it does not fall under Order XLIII, Rule 1 (c), C.P.C.

The High Court lost sight to the essence of the prayer in the second application. The prayer in the second application is to restore the earlier application which was dismissed in default and decide the said application. Thus, the ultimate prayer is to set aside the dismissal of the application under Order IX, Rule 13, C.P.C. which is a miscellaneous proceeding initiated by predecessor-in-interest of the appellants. The restoration application filed by appellants is referable to Order IX, Rule 9, C.P.C. since it prays for restoration of miscellaneous proceedings dismissed in default.

No one doubts that when first application, which sought to set aside the dismissal of the suit, was dismissed in default and appeal would lie under Order XLIII, Rule 1(c) C.P.C. which has also been held by the Full Bench of High Court of ***M.P. (AIR 1976 MP 136 (FB))*** (supra). Because, the applicant or his legal heirs immediately, did not file an appeal and sought to get the order recalled to revive the application, the right of appeal cannot be held to be lost.

It is true that Section 141 only provides for procedure to be followed in a miscellaneous proceeding and that question of right of appeal has to be looked into from other provisions of the statute and not from Section 141. In the miscellaneous proceedings right of appeal has to be read as has already been laid down by this Court in ***Ram Chandra Aggarwal and another v. The State of Uttar Pradesh and another, AIR 1966 SC 1888 (V 53 C 382).***

When the application under Order IX, Rule 13, C.P.C., which was filed by deceased, Ranjit Singh was dismissed for nonappearance, an application to recall the said order and to restore the application can very well be treated as an application under Order IX, Rule 9, C.P.C. to restore a miscellaneous proceeding akin to suit and against the order rejecting such application an appeal is permissible under Order XLIII, Rule 1(c), C.P.C.

There is thus no reason for holding that appeal filed by the appellants before the District Judge against the order dated 23.12.2005, was not maintainable.

Further, when the appellants could have filed appeal against order dated 19.10.2001 under Order XLIII, Rule 1(c), C.P.C., said right shall not be lost on the ground that they tried to get that order recalled by filing an application.

The application filed by Ranjit Singh, predecessor-in-interest of the appellants under Order IX, Rule 13, C.P.C. was dismissed on 19.10.2001 in default. When the appellants filed application dated 21.08.2002 to recall the order dated 19.10.2001, their application in the nature of proceeding seeking recall of an order dismissing the application, the miscellaneous proceedings dated 21.08.2002 were akin to application under Order IX, Rule 9, C.P.C. seeking recall of order dismissing their application under Order IX, Rule 13, C.P.C.. The order dated 23.12.2005 rejecting their application dated 21.08.2002 on merit by the Trial Court was thus clearly referable to order passed rejecting their application under Order IX, Rule 9. Hence, against such order the appeal was clearly maintainable under Order XLIII, Rule 1(c), C.P.C.

There cannot be any dispute to the view taken by the different High Courts in various judgments as noticed above that an appeal is a substantive right and not a mere matter of procedure and unless the right to appeal is specifically conferred it cannot be inferred under Section 141 of the C.P.C. The present is not a case where we are reading the right of appeal from Section 141, CPC. Section 141 now expressly provides that Order IX is applicable to all proceedings in civil jurisdiction. When Order IX is made applicable to the proceedings in the nature of application seeking recall of the order dismissing the application under Order IX, Rule 13, C.P.C., the order passed by the civil court rejecting such application is clearly referable to Order IX, Rule 9, C.P.C. and an order which is clearly referable to Order IX, Rule 9 C.P.C. shall also be appealable by virtue of Order XLIII, Rule 1(c), C.P.C. Rejection of application for restoration which is referable to Order IX, we cannot refuse to treat an order rejecting application under Order IX, Rule 9, C.P.C. for the purposes of Order XLIII, Rule 1(c), C.P.C. The Full Bench judgment of Madhya Pradesh High Court insofar as it answered question No.1 as framed in paragraph 1 of the judgment lays down the correct law. However, the view of the Full Bench that when application under Order IX, Rule 9, C.P.C. for restoration of suit is rejected, the second application for restoration of the original application although falls under the purview of the Order IX, Rule 9, C.P.C. read with Section 141, rejection of the application does

not fall under Order XLIII, Rule 1(c), C.P.C., to the above extent, the view of the Full Bench cannot be approved. When the second application as held by Full Bench falls under Order IX, Rule 9, C.P.C., hence the right of appeal shall also accrue when such application is rejected.

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***2. CIVIL PROCEDURE CODE, 1908 – Order 2 Rule 2 and Order 6 Rule 17**

Amendment of plaint – Suit for declaration and injunction – Plaintiff merely pleaded reservation of right to file suit for specific performance – Later, amendment application filed for incorporating relief in respect of specific performance – Held, non-seeking permission of court at time of filing of suit amounts to omission or relinquishment of right in respect of suit for specific performance under Order 2 Rule 2 – Amendment in respect of relief of specific performance is not permissible.

सिविल प्रक्रिया संहिता, 1908 - आदेश 2 नियम 2 एवं आदेश 6 नियम 17

वादपत्र में संशोधन - घोषणा तथा व्यादेश हेतु वाद - वादी ने विनिर्दिष्ट अनुपालन के लिए वाद संस्थित हेतु अधिकार संरक्षित रखने का अभिवचन मात्र किया - तत्पश्चात्, विनिर्दिष्ट अनुपालन के संबंध में अनुतोष समाविष्ट करने हेतु संशोधन आवेदन पत्र प्रस्तुत - अभिनिर्धारित, वाद संस्थित किये जाते समय न्यायालय की अनुज्ञा न लेना, आदेश 2 नियम 2 के अंतर्गत, विनिर्दिष्ट अनुपालन हेतु वाद के संबंध में अधिकार का लोप या त्याग माना जायेगा - विनिर्दिष्ट अनुपालन के अनुतोष के संबंध में संशोधन अनुज्ञेय नहीं है।

Rakesh v. Anurag and others
Order dated 23.08.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No. 2102 of 2017, reported in 2018 (1) MPLJ 502

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***3. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 20 (1A) and Order 9 Rule 13**

(i) Conditions precedent for passing an order of substituted service – Before passing an order for substituted service of summons, application of judicial mind as to the requirements of Rule 20 of Order 5 and reflection of due consideration of provision are necessary.

(ii) Remedies against *exparte* decree – Right of appeal is not taken away by filing an application under Order 9 Rule 13 – But, if the appeal is dismissed on merits, application under Order 9 Rule 13 is not maintainable.

(iii) Dismissal of an application under Order 9 Rule 13 – Remedy of

appeal under Order 43 Rule 1 is available – Once such an appeal is dismissed, same contention cannot be raised in appeal under Section 96 CPC.

सिविल प्रक्रिया संहिता, 1908 - आदेश 5 नियम 20 (1-क) और आदेश 9 नियम 13

(i) प्रतिस्थापित तामीली के लिये आदेश पारित करने के लिये पुरोभाव्य शर्तें - समन की प्रतिस्थापित तामील हेतु आदेश पारित किये जाने के पूर्व, आदेश 5 नियम 20 की अनिवार्यताओं पर साम्यक् विचार किये जाने के संबंध में न्यायिक मस्तिष्क का प्रयोग परिलक्षित होना चाहिए।

(ii) एक पक्षीय आज्ञप्ति के विरूद्ध उपचार - आदेश 9 नियम 13 के अंतर्गत आवेदन प्रस्तुति से अपील का अधिकार नहीं छिन जाता - किन्तु, यदि अपील गुणागुण पर निरस्त की गई तो आदेश 9 नियम 13 के अंतर्गत आवेदन पोषणीय नहीं है।

(iii) आदेश 9 नियम 13 के अधीन आवेदन निरस्त - आदेश 43 नियम 1 के अंतर्गत अपील का उपचार उपलब्ध है - एक बार ऐसी अपील निरस्त होने पर धारा 96 के अंतर्गत अपील में वही प्रतिवाद नहीं लिया जा सकता।

Neerja Realtors Private Limited v. Janglu (dead) Through Legal Representative
Judgment dated 29.01.2018 passed by the Supreme Court in Civil Appeal No. 71 of 2018, reported in (2018) 2 SCC 649

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***4. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Sections 307 and 393
Application under Order 7 Rule 11 CPC in proceeding filed under Section 307 (5) of Municipal Corporation Act, whether maintainable? Held, in view of Section 393 of the Act, 1956 provisions of Order 7 Rule 11 CPC are applicable to proceedings under Section 307(5). (Relied on *Hari Singh v. Sushila Devi and another, 1996 JLJ 624*).

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11

नगर पालिक निगम अधिनियम, 1956 (म.प्र.) - धाराएं 307 एवं 393

नगर पालिक निगम अधिनियम की धारा 307 (5) के अंतर्गत संस्थित कार्यवाही में, क्या सिविल प्रक्रिया संहिता के आदेश 7 नियम 11 के अंतर्गत आवेदन पत्र पोषणीय है? अभिनिर्धारित, 1956 के अधिनियम की धारा 393 के परिप्रेक्ष्य में सिविल प्रक्रिया संहिता के आदेश 7 नियम 11 के प्रावधान धारा 307 (5) के तहत कार्यवाहियों में लागू होते हैं। (***हरि सिंह विरूद्ध सुशीला देवी और अन्य, 1996 जे.एल.जे. 624,*** अवलंबित)

Renu Bhatnagar v. Municipal Corporation, Gwalior

Order dated 13.07.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Civil Revision No. 86 of 2016, reported in 2018 (1) MPLJ 506

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***5. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
LIMITATION ACT, 1963 – Article 109

(i) Non-joinder of necessary party, whether a ground for dismissal of suit? Suit can be dismissed for non-joinder of necessary party only where an opportunity for impleading necessary party was granted to the party and necessary party was not impleaded.

(ii) Suit for setting aside the alienation of ancestral property – Commencement of limitation – According to Article 109 of Limitation Act, period of limitation for such suit is 12 years and commences from date of alienation of the property.

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11

परिसीमा अधिनियम, 1963 - अनुच्छेद 109

(i) आवश्यक पक्षकार का असंयोजन क्या वाद की निरस्ती का आधार हो सकता है? आवश्यक पक्षकार के असंयोजन से वादपत्र केवल वहां निरस्त हो सकता है जहां पक्षकार को, आवश्यक पक्षकार जोड़ने का अवसर प्रदान किया गया और आवश्यक पक्षकार को नहीं जोड़ा गया।

(ii) पैतृक सम्पत्ति के हस्तांतरण को अपास्त करने के लिये वाद - परिसीमा का प्रारंभ - परिसीमा अधिनियम के अनुच्छेद 109 के अनुसार इस प्रकार के वादों में परिसीमा अवधि 12 वर्ष है और परिसीमा सम्पत्ति के हस्तांतरण दिनांक से प्रारंभ होती है।

Reva Associates (M/s) & anr. v. Sarjubai & ors.
Order dated 26.07.2016 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Revision No. 194 of 2014, reported in ILR (2016) MP 3367

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6. CIVIL PROCEDURE CODE, 1908 – Order 32
HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 4

(i) Appointment of guardian as specified under Section 4 (b) of Hindu Guardianship Act as 'next friend' in a civil suit for minor plaintiff, whether necessary? Concept of 'guardian' under Hindu Guardianship Act is different from concept of 'next friend' or 'guardian *ad litem*' in a civil proceeding – Representation by 'next friend' or 'guardian *ad litem*' in a suit is limited for the purpose of suit – Principles arising out of the Guardians and Wards Act, 1890 and the Hindu Guardianship Act not apposite to 'next friend' appointed under Order 32 – 'Next friend' need

not necessarily be a duly appointed guardian as specified under Section 4 (b) of Hindu Guardianship Act.

(ii) Distinction between 'next friend' and 'guardian *ad litem*' under Order 32 CPC – Explained.

सिविल प्रक्रिया संहिता, 1908 - आदेश 32

हिन्दू अवयस्कता एवं संरक्षकता अधिनियम, 1956 - धारा 4

(i) क्या अवयस्क वादी द्वारा व्यवहार वाद में हिन्दू संरक्षकता अधिनियम की धारा 4(ख) में यथा विनिर्दिष्ट संरक्षक को 'वाद मित्र' के रूप में नियुक्त किया जाना आवश्यक है? हिन्दू संरक्षकता अधिनियम में 'संरक्षक' की अवधारणा सिविल कार्यवाही में की 'वाद मित्र' या 'वादार्थ संरक्षक' की अवधारणा से भिन्न है - वाद में 'वाद मित्र' या 'वादार्थ सरंक्षक' द्वारा प्रतिनिधित्व केवल वाद के उद्देश्य तक ही सीमित है - संरक्षक एवं प्रतिपाल्य अधिनियम, 1890 एवं हिन्दू संरक्षकता अधिनियम से उत्पन्न सिद्धांत आदेश 32 के अधीन नियुक्त 'वाद मित्र' के संबंध में विरोधी नहीं है - 'वाद मित्र' का हिन्दू संरक्षकता अधिनियम की धारा 4(ख) के अधीन यथा विनिर्दिष्ट सम्यक् रूप में नियुक्त संरक्षक होना आवश्यक नहीं है।

(ii) सिविल प्रक्रिया संहिता के आदेश 32 के अंतर्गत 'वाद मित्र' तथा 'वादार्थ संरक्षक' में विभेद, व्याख्या की गई।

Nagaiah and another v. Chowdamma (Dead) by Legal Representatives and another

Judgment dated 08.01.2018 passed by the Supreme Court in Civil Appeal No. 22969 of 2017, reported in (2018) 2 SCC 504

Relevant extracts from the judgment:

A bare reading of Order XXXII, Rule 1 of the Code makes it amply clear that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the "next friend" of the minor. The next friend need not necessarily be a duly appointed guardian as specified under Sub-Section (b) of Section 4 of Hindu Guardianship Act. "Next friend" acts for the benefit of the "minor" or other person who is unable to look after his or her own interests or manage his or her own law suit (***person not sui juris***) without being a regularly appointed guardian as per Hindu Guardianship Act. He acts as an officer of the Court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The aforesaid provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order XXXII of the Code.

Order XXXII Rules 1 and 3 of the Code together make a distinction between a next friend and a guardian ***ad litem***; i.e.,

(a) where the suit is filed on behalf of a minor and

(b) where the suit is filed against a minor.

In case, where the suit is filed on behalf of the minor, no permission or leave of the Court is necessary for the next friend to institute the suit, whereas if the suit is filed against a minor, it is obligatory for the plaintiff to get the appropriate guardian ***ad litem*** appointed by the Court for such minor. A "guardian ***ad litem***" is a special guardian appointed by a court in which a particular litigation is pending to represent a minor/infant, etc. in that particular litigation and the status of guardian ***ad litem*** exists in that specific litigation in which appointment occurs.

X X X X X X

"Guardian" as defined under the Hindu Guardianship Act is a different concept from the concept of "next friend" or the "Guardian ***ad litem***". Representation by "next friend" of minor plaintiff or by "guardian ***ad litem***" of minor defendant is purely temporary, that too for the purposes of that particular law suit.

There is no hurdle for a natural guardian or duly constituted guardian as defined under Hindu Guardianship Act to represent minor plaintiff or defendant in a law suit. But such guardian should not have adverse interest against minor. If the natural guardian or the duly constituted guardian has adverse interest against the minor in the law suit, then a next friend or guardian ***ad litem***, as the case may be, would represent the minor in the civil litigation.

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Order XXXII Rules 12, 13 and 14 of the Code empower the minor plaintiff to take a decision either to proceed with the suit or to abandon the suit, after attaining majority. Thus, after attaining majority, if the plaintiff elects to proceed with the suit, he may do so by making an application, consequent upon which the next friend ceases to represent the minor plaintiff from the date of attaining majority by the minor. Order XXXII Rule 12 of the Code requires the minor plaintiff to have the option either to proceed with the suit or to abandon the suit and does not at all provide that if no such election is made by the minor plaintiff on attaining majority, the suit is to be dismissed on that ground. In case, if the Court discovers during the pendency of the suit that the minor plaintiff has attained majority, such plaintiff needs to be called upon by the Court to elect whether he intends to proceed with the suit or not. In other words the minor who attained majority during the pendency of the matter must be informed of the pendency of the suit and in the absence of such a notice the minor cannot be imputed with the knowledge of the pendency of the suit. So, before any adverse orders are to be made against the minor who has attained majority, the Court has to give notice to such person. Of course, in the present matter, under the facts and circumstances, such occasion did not arise, since plaintiff no. 2 on attaining majority has continued with the suit, which means he has elected to proceed with the suit.

The principles arising out of the Guardians and Wards Act, 1890 and the

Hindu Guardianship Act may not be apposite to the next friend appointed under Order XXXII of the Code. The appointment of a guardian ad litem to represent the defendant or a next friend to represent the plaintiff in a suit is limited only for the suit and after the discharge of that guardian ***ad litem***/next friend, the right/ duty of guardian as defined under sub-section (b) of Section 4 of the Hindu Guardianship Act (if he has no adverse interest) automatically continues as guardian. In other words, a next friend representing the minor in the suit under Order XXXII Rule 1 of the Code, will not take away the right of the duly appointed guardian under the Hindu Guardianship Act as long as such guardian does not have an adverse interest or such duly appointed guardian is not removed as per that Act.

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To sum up, instituting a suit on behalf of minor by a next friend or to represent a minor defendant in the suit by a guardian ***ad litem*** is a timetested procedure which is in place to protect the interests of the minor in civil litigation. The only practical difference between a "next friend" and a "guardian ***ad litem***" is that the next friend is a person who represents a minor who commences a lawsuit; guardian ***ad litem*** is a person appointed by the Court to represent a minor who has been a defendant in the suit. Before a minor commences suit, a conscious decision is made concerning the deserving adult (next friend) through whom the suit will be instituted. The guardian ***ad litem*** is appointed by Court and whereas the next friend is not. The next friend and the guardian ***ad litem*** possess similar powers and responsibilities. Both are subject to control by the Court and may be removed by the Court if the best interest of the minor so requires.

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7. CONTEMPT OF COURTS ACT, 1971 – Sections 2 (c) and 12 Interference in administration of justice – Scandalous statements as to corruption of judges on failure to obtain favourable orders – No remorse or regret shown during proceedings as well – Conduct amounts to contempt of Court.

न्यायालय अवमान अधिनियम, 1971 - धाराएं 2 (ग) एवं 12

न्याय प्रशासन में हस्तक्षेप - अनुकूल आदेश प्राप्त न कर पाने पर न्यायाधीशगण के भ्रष्टाचार के संबंध में कलंकात्मक कथन - कार्यवाही के दौरान कोई पश्चाताप अथवा खेद भी व्यक्त नहीं - आचरण न्यायालय का अवमान गठित करता है।

In Reference v. Lavit Rawtani
Order dated 06.04.2017 passed by the High Court of Madhya Pradesh in Contempt Petition (Civil) No. 350 of 2016 (unreported)

Relevant extracts from the order:

In the circumstances, as the contemner stands by his statement and still asserts that certain Judges of this Court are possibly corrupt without justifying or submitting any proof of the same, we have no option but to punish him for the

contempt committed by him.

Apparently, the contemner is a person who, on failing to obtain a favourable order in his writ petition, has made the aforesaid remarks in respect of certain Judges by specifically naming them and accusing them of being possibly corrupt. To our mind making such an unjustified statement and casting scurrilous aspersions against thoroughly honest and hard-working Judges who have discharged their judicial functions with utmost devotion results in casting a deep shadow on their integrity, honesty and judicial impartiality which if unpunished or ignored would seriously erode the dignity, authority and status of the highest Court of the State and, therefore, deserves to be punished severely because, if ignored, it would encourage litigants who have lost in the Court to impute unsubstantiated and unjustified motives to the Judges of the institution in the name of fair criticism.

The statement of the contemner appears to have been made as a calculated attempt to obstruct and to interfere with the course of justice and the due administration of law, more so as this Court and the Judges perform their duties herein enjoying the highest confidence and respect of the people which cannot be allowed to be tarnished, diminished or wiped out by such scurrilous abusive unsubstantiated statements of the contemner.

The dignity and authority of this Court has to be respected and protected at all costs so that the judiciary can perform its duties and functions effectively without fear and in the true spirit. If we ignore and permit such statements as made by the contemner to go unnoticed, we would be failing in our pious duty to uphold the trust and confidence of the people that they have reposed in the ability of the institution to deliver fearless and impartial justice and would result in disrespect and distrust in the working of this Court resulting in erosion of the judicial system and the administration of justice more so as the statement made by the contemner, oral and written to the effect that certain Judges of this Court are possibly corrupt has been made without submitting any oral or documentary proof to substantiate the same.

While a fair criticism of a judgment by a person who knows the law and is an expert in the field may, in certain cases and to a limited extent, be justified however, making statements to the extent of calling certain Judges possibly corrupt by a litigant who has lost his case in the Court with the ulterior motive of trying to force this Court to reopen his case has to be taken seriously and no person can be permitted to make such a statement and expect to go scot free as that would not just lower down the dignity and authority of the judiciary but would also result in loss of faith of the public in the highest judicial institution of the State. Such a statement is not just contemptuous but it also tends to interfere with the proper administration of justice and is calculated to obstruct the course of justice and the due administration of law.

Looking to the facts and circumstances of the present case, specifically

the fact that the condemner has stuck to his statement and re-asserts his statement that certain Judges of this Court are possibly corrupt, the quantum of punishment to be imposed on him has to be considered.

We may take note of the fact that in the instant case, there is no iota of any remorse or regret in the stand of the contemner before this Court nor has he tendered any kind of apology or explanation for his conduct. In view of the aforesaid facts that are admitted and undisputed, while normally we would have imposed the maximum punishment upon him, however, looking to the fact that the contemner is not a young man and is a Professor of MANIT, we think it appropriate and hereby impose a punishment of three months of Simple Imprisonment upon him as anything less would be a gross travesty of justice looking to the heinous and monumentally obnoxious statement of the contemner. The contemner is, accordingly, sentenced to three months Simple Imprisonment.

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8. CONTRACT ACT, 1872 – Section 74

(i) Forfeiture of earnest money – Only when contract contains stipulation of forfeiture – In absence of any stipulation, right to forfeit sum deposited is not available to party.

(ii) Notice inviting tender – At the time of inviting bids publication of all necessary/ material/ special terms and conditions is mandatory – Bidders are entitled to know these material terms at the time of submitting the bid.

संविदा अधिनियम, 1872 - धारा 74

(i) अग्रिम राशि का समपहरण - केवल तब होगा जब संविदा में समपहरण की शर्त हो - ऐसी शर्त के अभाव में अग्रिम धन को समपहरत करने का अधिकार पक्षकार को नहीं है।

(ii) निविदा आमंत्रण की सूचना - बोली आमंत्रण की सूचना में सभी आवश्यक/ सारवान/विशेष शर्तों एवं दशाओं का प्रकाशन आवश्यक है - बोली लगाते समय बोली लगाने वाले व्यक्ति सभी सारवान शर्तों को जानने के हकदार हैं।

Suresh Kumar Wadhwa v. State of M. P and ors.
Judgment dated 25.10.2017 passed by the Supreme Court in Civil Appeal No. 7665 of 2009, reported in AIR 2017 SC 5435

Relevant extracts from the judgment:

Reading of Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as “earnest money” or “security” for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. ***A fortiori***, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.

The learned author Sir Kim Lewison in his book "The Interpretation of Contracts" (6th edition) while dealing with subject "Penalties, Termination and Forfeiture clauses in the Contract" explained the meaning of the expression "forfeiture" in these words:

> "A forfeiture clause is a clause which brings an interest to a premature end by reason of a breach of covenant or condition, and the Court will penetrate the disguise of a forfeiture clause dressed up to look like something else. A forfeiture clause is not to be construed strictly, but is to receive a fair construction." (See page 838)

The author then quoted the apt observations of *Lord Tenterden from an old case* reported in ***(1828) Moo. and M.189 Doe d Davis v. Elsam*** where in the learned Lord while dealing with the case of forfeiture held as under:

> "I do not think provisos of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts" (See pages 840).

Equally well-settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally "alter" the terms and conditions of the contract and nor they have a right to "add" any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, who adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply such additional terms/conditions.

Keeping in view the aforementioned principle of law, when we examine the facts of the case at hand then we find that the public notice (advertisement), extracted above, only stipulated a term for deposit of the security amount of '.3 lakhs by the bidder (appellant) but it did not publish any stipulation that the security amount deposited by the bidder (appellant herein) is liable for forfeiture by the State and, if so, in what contingencies.

In our opinion, a stipulation for deposit of security amount ought to have been qualified by a specific stipulation providing therein a right of forfeiture to the State. Similarly, it should have also provided the contingencies in which such right of forfeiture could be exercised by the State against the bidder. It is only then the State would have got a right to forfeit. It was, however, not so in this case.

In our considered opinion, it was mandatory on the part of the respondents (State) to have published the four special conditions at the time of inviting the bids itself because how much money/rent the bidder would be required to pay to the State on allotment of plot to him was a material term and, therefore, the bidders were entitled to know these material terms at the time of submitting the bid itself. It was, however, not done in this case.

Since these four conditions were added unilaterally and communicated to the appellant by respondent No. 3 while accepting his bid, the appellant had every right to refuse to accept such conditions and wriggle out of the auction proceedings and demand refund of his security amount. The State, in such circumstances, had no right to insist upon the appellant to accept such conditions much less to comply and nor it had a right to cancel the bid on the ground of non-compliance of these conditions by the appellant.

Learned counsel for the respondents (State), however, argued that it was not necessary for the State to specify the condition relating to forfeiture and four additional terms/conditions in the public notice because they were already part of RBC, which is applicable to the *nazul* lands in question.

We find no merit in this submission for more than one reason. First, the public notice inviting bids did not even contain a term that all the provisions of RBC will be applicable to the auction proceedings and second, the relevant clauses of RBC which, according to the State, were to govern the auction proceedings ought to have been quoted in verbatim in the public notice itself. It was, however, not done.

In our considered opinion, the object behind publishing all material term(s) is/are three fold. First, such term(s) is/are made known to the contracting parties/bidders; second, parties/bidders become aware of their rights, obligations, liabilities qua each other and also of the consequences in the event of their non-compliances; and third, it empowers the State to enforce any such term against the bidder in the event of any breach committed by the bidder and lastly, when there are express terms in the contract/public notice then parties are bound by the terms and their rights are, accordingly, determined in the light of such terms in accordance with law.

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***9. CRIMINAL LAW (AMENDMENT) ORDINANCE, 1944 – Sections 12, 13 and 4**

Scope of Sections 12, 13 and 4 –

(i) Attachment of property – Death of accused – Cannot be under taken after death of accused – Further, prosecution cannot be continued after death.

(ii) Attachment of property – Property inherited as legal representative liable to be attached – Not only the property acquired by ill-gotten money but, to secure the property

appropriated, any property of accused can be attached – Even property of other persons can also be attached.

(iii) Recording of finding as to money or value of property procured by means of offence – Obligatory on Court on representation as to attachment order.

(iv) Effect of non-recording of finding under Section 12 (1), will not terminate the attachment – Section 13 gives ample power to deal with attached property after termination of criminal proceedings.

आपराधिक विधि (संशोधन) अध्यादेश, 1944 - धाराएं 12, 13 एवं 4

धारा 12, 13 एवं 4 का कार्यक्षेत्र -

(i) सम्पत्ति की कुर्की - अभियुक्त की मृत्यु - अभियुक्त की मृत्यु के बाद नहीं की जा सकती है - अभियुक्त की मृत्यु के बाद अभियोजन कार्यवाही आगे जारी नहीं रख सकती है।

(ii) सम्पत्ति की कुर्की - विधिक प्रतिनिधि के रूप में उत्तराधिकार में प्राप्त सम्पत्ति कुर्की योग्य है - न केवल भ्रष्टाचार की राशि से प्राप्त सम्पत्ति बल्कि दुर्विनियोग की राशि की सुरक्षा के लिये अभियुक्त की कोई भी सम्पत्ति कुर्क की जा सकती है - अन्य व्यक्ति की सम्पत्ति भी कुर्क की जा सकती है।

(iii) अभियुक्त द्वारा अपराध से उपाप्त राशि या सम्पत्तियों के मूल्य विषयक निष्कर्ष को अभिलिखित करना - कुर्की आदेश के संबंध में अभ्यावेदन किये जाने पर न्यायालय पर आबद्धकर है।

(iv) धारा 12 (1) के अधीन निष्कर्ष अंकित न करने का प्रभाव - कुर्की समाप्त नहीं होगी - दाण्डिक कार्यवाही समाप्त होने पर कुर्क सम्पत्ति के संबंध में धारा 13 पर्याप्त शक्ति प्रदान करती है।

Ravi Sinha and ors.v. State of Jharkhand
Judgment dated 05.10.2017 passed by the Supreme Court in Criminal Appeal No. 1561 of 2008, reported in AIR 2017 SC 5443

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10. CRIMINAL PROCEDURE CODE, 1973 – Section 91
Whether availability of documents under Right to Information Act can be a ground to reject application under section 91? Held, No.

दण्ड प्रक्रिया संहिता, 1973 - धारा 91

क्या सूचना का अधिकार अधिनियम के अंतर्गत दस्तावेज की उपलब्धता धारा 91 के अंतर्गत आवेदन खारिज करने का आधार हो सकता है ? अभिनिर्धारित, नहीं।

Vimlesh and others v. State of Madhya Pradesh
Order dated 15.03.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 3883/2017 (unreported)

Relevant extracts from the judgment:

The reasoning given by the trial Court for having dismissed the application under Section 91 is unsustainable in the eye of law. The provisions under Section 91 of Cr.P.C. is not a substitute or an alternative remedy to a right under the provisions of Right to Information Act, which may or may not be available to the accused. If the trial Court is satisfied on the basis of the application that the documents so sought to be produced by exercising jurisdiction under Section 91 of Cr.P.C is essential for the conduct of the defence of the accused persons then under such circumstances, it must necessarily allow the application under Section 91 of Cr.P.C. and not decline the same only because a remedy was also available under the provision of Right to Information Act.

In fact, asking the accused to exercise his right under the Right to Information Act would, in fact delay the proceedings or defeat the cause of justice as far as the accused is concerned, as police could delay in delivering the information to the accused or not deliver the information at all, as sought for. When an application under Section 91 of Cr.P.C is filed before the trial Court at the stage of defence evidence, the only thing that the trial Court has to see is whether the documents so called for are relevant for conducting the defence of the accused persons, however, remote it may be. In this case, the trial Court did not even consider the relevance of the said documents called for by the accused persons. The revisional Court also erred in wrongly holding that the said application was filed only to delay the proceedings before the trial Court. The documents so sought by the petitioners, is an effort by them to show that they were first in point of time in making the complaint to the police with regard to the incident itself, and that they were not the aggressors. Under the circumstances, the relevance of the said documents in defence of the accused persons cannot be questioned.

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11. CRIMINAL PROCEDURE CODE, 1973 – Section 102

Power of the police to freeze bank accounts – Registration of offence relating to cheating – Discrepancies in bank accounts of accused persons – Word "property" under Section 102 includes "bank accounts" – Suspicious accounts of person other than accused may also be seized – Also, no requirement of giving prior notice to the person holding the property – Further, Court mayde-freeze on completion of investigation, if circumstances justifies the same.

दण्ड प्रक्रिया संहिता, 1973 - धारा 102

बैंक खातों पर रोक लगाने की पुलिस की शक्ति - छल से संबंधित अपराध का पंजीयन - अभियुक्तगण के बैंक खातों में विसंगतियां - धारा 102 के अंतर्गत शब्द 'संपत्ति' में ''बैंक खाता'' सम्मिलित हैं - अभियुक्त के अलावा अन्य व्यक्ति के संदिग्ध खाते भी अधिगृहित किये जा सकते हैं - साथ ही, संपत्ति धारित करने वाले व्यक्ति

को पूर्व सूचना दिया जाना आवश्यक नहीं है - आगे और, यदि परिस्थितियोंसे न्यायोचित लगे तो न्यायालय अन्वेषण पूरा होने पर रोक हटा सकता है।

Teesta Atul Setalvad v. State of Gujarat
Judgment dated 15.12.2017 passed by the Supreme Court of India in Criminal Appeal No. 1099 of 2017 reported in AIR 2018 SC 27

Relevant extracts from the judgment:

The sweep and applicability of Section 102 of the Code is no more ***res integra***. That question has been directly considered and answered in the case of ***State of Maharashtra v. Tapas D. Neogy, 1999 7 SCC 685.*** The Court examined the question whether the police officer investigating any offence can issue prohibitory orders in respect of bank accounts in exercise of power under Section 102 of the Code. The High Court, in that case, after analysing the provisions of Section 102 of the Code had opined that bank account of the accused or of any relation of the accused cannot be held to be "property" within the meaning of Section 102 of the Code. Therefore, the Investigating Officer will have no power to seize bank accounts or to issue any prohibitory order prohibiting the operation of the bank account. This Court noted that there were conflicting decisions of different High Courts on this aspect and as the question was seminal, it chose to answer the same. In paragraph 6, this Court noted thus:

> "A plain reading of sub-section (1) of Section 102 indicates that the Police Officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression "any property" and "any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two preconditions for applicability of Section 102(1) are that it must be "property" and secondly, in respect of the said property there must have been suspicion of commission of any offence. In this view of the matter the two further questions that arise for consideration are whether the bank account of an accused or of his relation can be said to be "property" within the meaning of sub-section (1) of Section 102 of the Cr.P.C. and secondly, whether circumstances exist, creating suspicion of commission of any offence in relation to the same .."

After analysing the decisions of different High Courts, this Court in paragraph 12, expounded the legal position thus:

> "Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be "property" within the

meaning of the said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the Courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into.

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In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting the account of the accused from being operated upon."

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As regards the procedure for issuing instructions to freeze the bank accounts, it is noticed that the same has been followed by giving intimation to the concerned Magistrate on 21st November, 2014 as required in terms of Section 102 of the Code. There is nothing in Section 102 which mandates giving of prior notice to the account holder before the seizure of his bank account. The Magistrate after noticing that the principle stated by the Division Bench of the Bombay High Court in the case of ***Dr. Shashikant D. Karnik v. State of Maharashtra, 2008 Cr.L.J. 148 (Bom.)*** has been overruled in terms of the Full Bench Judgment of the Bombay High Court in the case of ***Vinos kumar Ramachandran Valluvar v. State of Maharashtra, 2011 Cri.L.J. 2522 (Bom.),*** rightly negatived that contention. The Full Bench of the Bombay High Court has expounded that Section 102 does not require issuance of notice to a person before or simultaneously with

the action attaching his bank account. In the case of ***Adarsh Co-operative Housing Society Limited v. Union of India & ors., 2012 CrLJ 520 (Bom.)*** the Division Bench of the Bombay High Court once again considered the issue and rejected the argument that prior notice to the account holder was required to be given before seizure of his bank account. It also noted that the bank account need not be only of the accused but it can be any account creating suspicion about the commission of an offence. The view so taken commends us.

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Suffice it to observe that as the Investigating Officer was in possession of materials pointing out circumstances which create suspicion of the commission of an offence, in particular, the one under investigation and he having exercised powers under Section 102 of the Code, which he could, in law, therefore, could legitimately seize the bank accounts of the appellants after following the procedure prescribed in sub-Section (2) and sub-Section (3) of the same provision. As aforementioned, the Investigating Officer after issuing instructions to seize the stated bank accounts of the appellants submitted report to the Magistrate concerned and thus complied with the requirement of sub-Section (3).

Although both sides have adverted to statement of accounts and vouchers to buttress their respective submissions, we do not deem it necessary nor think it appropriate to analyse the same while considering the matter on hand which emanates from an application preferred by the appellants to de-freeze the stated bank accounts pending investigation of the case. Indisputably, the investigation is still in progress. The appellants will have to explain their position to the investigating agency and after investigation is complete, the matter can proceed further depending on the material gathered during the investigation. The suspicion entertained by the investigating agency as to how the appellants appropriated huge funds, which in fact were meant to be disbursed to the unfortunate victims of 2002 riots will have to be explained by the appellants. Further, once the investigation is complete and police report is submitted to the concerned Court, it would be open to the appellants to apply for de-freezing of the bank accounts and persuade the concerned Court that the said bank accounts are no more necessary for the purpose of investigation, as provided in sub-Section (3) of Section 102 of the Code. It will be open to the concerned Court to consider that request in accordance with law after hearing the investigating agency, including to impose conditions as may be warranted in the fact situation of the case.

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12. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 190, 197, 200, 204, 397, 399 and 482

(i) Referral for investigation u/s 156 (3) – Signifies – (a) that the JMFC is not satisfied that the complaint discloses the commission of a cognizable offence or any offence for that matter; (b) where the JMFC is satisfied that the allegations in

the complaint though constitute a *prima facie* case against the accused persons but *abundans cautela* wants to ascertain the veracity of allegations leveled in the complaint; and (c) the JMFC is of the opinion that an investigation into the same by a qualified and neutral investigating agency viz. police is desirable to assess the truth in allegation.

(ii) Cognizance – Post investigation – Final report to the effect that no offence is made out – Allegations reveal a civil liability – Magistrate must assign reasons, howsoever brief, as to compelling circumstances for taking cognizance contrary to the police report.

(iii) Order directing issuance of process – Challenge – Options available – Accused can challenge impugned order either (a) by way of a revision petition before the Court of Sessions or the High Court; or (b) by invoking inherent jurisdiction of High Court u/s 482 Cr.P.C.

(iv) Criminal Revision – The revisional court can only examine the correctness of impugned order in the backdrop of *jus scriptum* and the *jus commune* – Cannot set aside impugned order on the ground that it is motivated by malicious intent on the part of the complainant.

(v) Sanction for prosecution – Stage for consideration – Necessity for sanction has to be decided from stage to stage – If the alleged act unequivocally linked to discharge of public duty – Sanction is pre-requisite for cognizance in such case – Can be considered at very inception – Cannot be deferred till charges are framed.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 156 (3), 190, 197, 200, 204, 397, 399 एवं 482

(i) धारा 156 (3) के अंतर्गत अनुसंधान हेतु भेजना - अभिप्राय है - (अ) कि प्रथम वर्ग न्यायिक मजिस्ट्रेट संतुष्ट नहीं था कि परिवाद उस मामले में किसी संज्ञेय अपराध या अन्य अपराध कारित किया जाना प्रकट करता है; (ब) जहां प्रथम वर्ग न्यायिक मजिस्ट्रेट संतुष्ट था कि परिवाद के अभिकथन यद्यपि अभियुक्त व्यक्तियों के विरूद्ध प्रथम दृष्टया मामला गठित करते हैं परंतु 'अधिक सावधानी' परिवाद में आरोपित अभिकथनों की सत्यता सुनिश्चित करने की अपेक्षा करती है; और (स) प्रथम वर्ग न्यायिक मजिस्ट्रेट का यह मत है कि अभिकथनों की सत्यता के आकलन हेतु उस मामले में दक्ष एवं निष्पक्ष अनुसंधान अभिकरण यथा पुलिस द्वारा अनुसंधान वांछनीय है।

(ii) संज्ञान - पश्च अनुसंधान - इस प्रभाव का अंतिम प्रतिवेदन कि कोई अपराध गठित नहीं होता है - अभिकथन सिविल दायित्व प्रकट करते हैं - मजिस्ट्रेट

द्वारा पुलिस प्रतिवेदन के विरूद्ध संज्ञान लेने हेतु आबद्धकर परिस्थितियों के संबंध में कारण, भले ही संक्षिप्त हों, दिये जाने चाहिए ।

(iii) आदेशिका निर्गत करने के निर्देश का आदेश - चुनौती - उपलब्ध विकल्प - अभियुक्त आक्षेपित आदेश को या तो (अ) सत्र न्यायालय या उच्च न्यायालय के समक्ष पुनरीक्षण याचिका द्वारा; या (ब) दण्ड प्रक्रिया संहिता की धारा 482 के अतंर्गत उच्च न्यायालय की अंतर्निहित क्षेत्राधिकारिता का अवलम्ब लेकर चुनौती दे सकता है।

(iv) दाण्डिक पुनरीक्षण - पुनरीक्षण न्यायालय केवल 'कामन लॉ' और 'लिखित विधि' की पृष्ठभूमि में आक्षेपित आदेश की सत्यता की जांच कर सकते हैं - इस आधार पर आक्षेपित आदेश अपास्त नहीं कर सकते कि यह परिवादी के दूषित आशय से प्रेरित था।

(v) अभियोजन के लिये स्वीकृति - विचार हेतु प्रक्रम - स्वीकृति की आवश्यकता प्रक्रम दर प्रक्रम विनिश्चित की जानी चाहिए - यदि अभिकथित कृत्य स्पष्ट रूप से लोक कर्तव्य के निर्वहन से संसक्त है - ऐसे मामलों में स्वीकृति संज्ञान लेने की पूर्व शर्त है - इसे बिल्कुल आरम्भ में ही विचार में लिया जा सकता है - आरोप विरचित होने तक आस्थगित नहीं किया जा सकता।

Malay Shrivastava & ors.v. Shankar Pratap Singh Bundela & anr.
Order dated 14.09.2016 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 1052/2008, reported in ILR (2017) MP 199

Relevant extracts from the order:

The Ld. Counsel for the Petitioners has laid a strong emphasis on the point that the order taking cognizance and the summons issued to the Petitioners to stand trial for offences are bad in law as no prior sanction u/s. 197 Cr.P.C has been placed before the JMFC by the Respondents. In support of his contention, the Ld. Counsel has placed reliance on the judgment of the Supreme Court passed in ***P.K.Choudhury v. Commander, 48 BRTF (GREF), (2008) 13 SCC 229,*** wherein the Supreme Court while dealing with a case arising from a complaint u/s. 200 Cr.P.C before the Judicial Magistrate where two points arose for consideration (i) whether an offence, the cognizance of which had been hit by limitation on account of the operation of Section 468 Cr.P.C, cognizance could have been taken by the Judicial Magistrate without condoning the delay? And (ii) whether the Magistrate could have taken cognizance of offences u/ss. 166 and 167 without sanction u/s. 197 Cr.P.C? As regards the instant case, it is only the second question that has been answered by the Hon'ble Supreme Court which is of relevance. In paragraph 12 of the said judgment, the Supreme Court held "Far more important however, is the question of non-grant of sanction. The appellant admittedly is a public servant. He is said to have misused his position as a public servant. Section 197 of the Code of Criminal Procedure lays down requirements for obtaining an order of sanction from the competent authority, if

in committing the offence, a public servant acted or purported to act in discharge of his official duty. As the offences under Sections 166 and 167 of the Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction was prerequisite before the learned Judicial Magistrate could issue summons upon". In the instant case also, undisputedly the Petitioners are all Public Servants and therefore, it was contended that the offences which have been taken cognizance of by the Ld. Trial Court by their very nature were such that (a) the same could only have been committed by a Public Servant and (b) the same could only have been committed by such Public Servant in the discharge of his official duties. It was therefore contended that the order taking cognizance and the issuance of process against the Petitioners u/s. 204 Cr.P.C were bad in law and so the entire proceedings against the Petitioners deserved to be quashed, as the continuation of the same would be a gross abuse of process.

In a complaint case, where the JMFC, without taking cognizance refers the case to the police u/s. 156 (3) Cr.P.C, the same by necessary implication discloses (a) that the JMFC is not satisfied that the complaint, as filed, discloses the commission of a cognizable offence or any offence for that matter and (b) where the JMFC is satisfied that the allegations in complaint case though constitute a prima facie case against the accused persons but ***abundans cautela*** wants to ascertain the veracity of the allegations levelled in the complaint and is of the opinion that an investigation into the same by a qualified and neutral investigating agency 19 such as the police is desirable to assess the truth in the allegations. Therefore, where the police after investigation files a report to the effect that the complaint case does not disclose the commission of any offence and that the allegations only reveal a civil liability, there the Ld. JMFC is bound to give reasons, howsoever, brief they may be as to what are those compelling circumstances to take cognizance of the offences against the accused persons contrary to the police report. The Trial Court does not have to be elaborate while rejecting the police report but, at least, it is incumbent upon the Trial Court that its order, summoning the accused in such circumstances, reveals an application of mind as to why it was necessary to issue process to the accused persons when the police report filed after an investigation in compliance of the Trial Court's order u/s. 156 (3) Cr.P.C revealed only a civil liability. In such a case, where the Trial Court wants to reject the police report which does not disclose the commission of any offence, a reasoned order revealing the application of mind on the part of the Trial Court, albeit a brief one, is the only safeguard against arbitrariness. This assumes great significance when seen in the light of the judgment of the Supreme Court in ***Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, (1998) 5 SCC 749,*** wherein at paragraph 28, the Supreme Court held "Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the

Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto". In the facts of this case, the Ld. Trial Court, vide its order summoning the Petitioners dated 17/01/08, records that it has seen the complaint and all the documents filed therewith, the police report and the statement of the Respondent No.1 herein u/s. 200 Cr.P.C. In the next paragraph, the Ld. JMFC finds that on the basis of the above, there is adequate prima facie material to proceed against the Petitioners u/ss. 166 and 167 IPC and u/s. 120-B r/w 166 and 167 IPC. However, the said order is woefully silent on the aspect as to what was the material in the statement of the Respondent No.1 herein u/s. 200 Cr.P.C which compelled the Ld. Trial Court to reject the report of the police which stated that their investigation did not reveal the commission of any offence. Under the circumstances, I am inclined to hold that the order summoning the Petitioners dated 17/01/08 is deficient in material particulars and therefore the proceedings against the Petitioners is bad in law.

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Even otherwise, where the Doctrine of Election permits a person, having more than one option of seeking relief against the order of the Trial Court which summons him to stand trial as an accused exercising jurisdiction in a complaint case u/s. 204 Cr.P.C and where the options available under the law are mutually opposed to each other, the accused in such a situation can elect to either challenge the impugned order of the Trial Court by way of a revision petition before the Court of Sessions or the High Court u/s. 397 or 399 Cr.P.C as the case may be, or approach the High Court directly by invoking its inherent jurisdiction u/s. 482 Cr.P.C to quash an impugned order. However, if the accused seeks to have the proceedings in a complaint case itself quashed without impugning a specific order of the Trial Court, or where the quash of the proceedings are sought on the grounds that the complaint case has been instituted on malicious grounds, then such proceedings can only be entertained u/s. 482 Cr.P.C by the High Court as, (a) a criminal revision can only be preferred against an impugned order of a Court inferior to the High Court or the Court of Sessions and (b) in a criminal revision, the Court sitting in revision can only examine the correctness of the impugned order in the backdrop of the ***jus scriptum*** and the ***jus commune*** and go no further. A Court sitting in revision over the order passed by a Court judicially subordinate to it, cannot set aside an impugned order where the said order is consonance with the statute law and the common law of the land on the ground that the proceedings have been motivated by malicious intent on the part of the Complainant. That power is exclusively vested in the High Court u/s. 482 Cr.P.C. In the instant case, the prayer clause in both the petitions have sought the relief of quashing the entire proceedings before the Court of the Ld. JMFC and not the order summoning the Petitioners. Under the specific fact circumstances, even if the judgement of the Supreme Court in ***Mohit alias Sonu and another v. State of Uttar Pradesh and anr., AIR 2013 SC 2248,*** was still in existence, even then the said judgment would not have applied in this case as the Petitioners have not challenged the particular order summoning the

Petitioners to stand trial, but sought the quash of the complaint case itself pending before Ld. JMFC. However, in the light of the judgment of the Supreme Court in ***Prabhu Chawla v. State of Rajasthan, 2016 SCC OnLine SC 905,*** the embargo imposed upon approaching the High Court u/s. 482 Cr.P.C against an order in which a Criminal Revision could have been preferred, as held in ***Mohit alias Sonu*** (supra), no longer exists and is rendered purely academic. Under the circumstances, the contention of the Ld. Counsel for the Respondents that these petition u/s. 482 Cr.P.C were not maintainable and deserved to be dismissed on that ground alone is devoid of merit and is rejected.

The judgment of the Supreme Court in ***M. Gopalakrishnan v. State, AIR 2009 SC 2015,*** has been relied upon by the Ld. Counsel for the Respondents in order to buttress his contention as above, that the requirement for sanction can be appreciated by the Trial Court at the appropriate stage. In that case, the Supreme Court dismissed the contention of the Petitioner/Accused by holding that it was for the Trial Court to consider if the acts of the Petitioner came within the four corners of his discharge of official functions in the course of the trial. Another facet of the case was the inclusion of the charge u/s. 420 IPC for which the Supreme Court has consistently held that the commission of an offence u/s. 420 can never be considered as an act done in the discharge of official duties. The Ld. Counsel for the Respondents has tried to show the relevance of the above judgments in the backdrop of the facts of the present case where he has argued that the exercise of authority under rule 45 (3) of the Rules was wrong as the same related only to the competence of a person to be elected to the office and not for the removal of a person already on the post. In short, the Ld. Counsel for the Respondents has impressed upon the Court that the discharge of power/authority being motivated, the requirement of sanction is to be seen at the stage of trial and not before that. I am unable to agree with the contention of the Ld. Counsel for the Respondent. It is true that the requirement of a sanction u/s. 197 Cr.P.C is not always to be seen at the commencement of the trial and can also be appreciated in the course of the trial by the Trial Court. However, if the facts of the case reveal at the very outset that the acts of the accused were of such nature that they were so intrinsically associated to the discharge of official duties by the accused, then the requirement for sanction has to be considered at the very outset. In this regard, the judgement of the Supreme Court in ***Om Prakash and others v. State of Jharkhand, (2012) 12 SCC 72,*** wherein a case of alleged fake encounter, the High Court was pleased to quash the proceedings against a police officer on the ground that requisite sanction u/s. 197 Cr.P.C was not on record at the time the Trial Court took cognizance of the offences against the Petitioners in that case, is relevant and directly applicable in this case. On an appeal being filed before the Supreme Court by the father of the deceased, interalia the Supreme Court, while discussing the stage at which the issue of sanction can be looked into, held at paragraph 41 that “The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of

the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea". Under the circumstances, the Court must see if the alleged act of the accused is so unequivocally linked with the discharge of his official duties, in which case the requirement for sanction u/s. 197 Cr.P.C is a prerequisite to cognizance of the offences by the Trial Court. In this case, the judgment of the Supreme Court in ***P.K.Choudhury v. Commander, 48 BRTF (GREF), (2008) 13 SCC 229,*** which has been discussed elaborately in paragraph 23 supra which is identical to this case where the Supreme Court held that for offences u/s. 166 and 167 IPC, which by their very nature could only be committed by a person in the discharge of his official duties, sanction u/s. 197 Cr.P.C was a pre-requisite. Therefore, I hold that the prosecution of the Petitioners is vitiated on account of the absence of sanction u/s. 197 Cr.P.C

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13. CRIMINAL PROCEDURE CODE, 1973 – Sections 249, 256 and 302

Death of complainant – Effect on proceedings – Magistrate can permit legal representatives of the deceased complainant to continue the prosecution of complaint.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 249, 256 एवं 302

परिवादी की मृत्यु - कार्यवाही पर प्रभाव - मजिस्ट्रेट, मृत परिवादी के विधिकप्रतिनिधियों को परिवाद का अभियोजन चालू रखने की अनुमति दे सकता है।

Chand Devi Daga and ors.v. Manju K. Humatani and others. Judgment dated 03.11.2017 passed by the Supreme Court in Criminal Appeal No. 1860 of 2017, reported in (2018) 1 SCC 71 : AIR 2017 SC 5126

Relevant extracts from the judgment:

Analogous provision to Section 256 of Code 1973 was contained in Section 247 of Criminal Procedure Code, 1898. In Section 247 the proviso was added in 1955 saying that "where the Magistrate is of the opinion that personal attendance is not necessary, he may dispense with such attendance". The said proviso took out the rigour of the original rule and whole thing was left to the discretion of the Court. Sub-section (1) of Section 256 contains the above proviso in the similar manner. Thus, even in case of trial of summons-case it is not necessary or mandatory that after death of complainant the complaint is to be rejected, in

exercise of the power under proviso to Section 256 (1), the Magistrate can proceed with the complaint.

Moreso, the present is a case where offence was alleged under Sections 420, 467, 468, 471, 120 B and 201 read with 34 IPC for which procedure for trial of summons case was not applicable and there is no provision in Chapter XIX "Trial of warrant-cases by Magistrates" containing a provision that in the event of death of complainant the complaint is to be rejected. The Magistrate under Section 249 has power to discharge a case where the complainant is absent. The discharge under Section 249, however, is hedged with condition "the offence may be lawfully compounded or is not a cognizable offence". Had the Code 1973 intended that in case of death of complainant in a warrant case the complaint is to be rejected, the provision would have indicated any such intention which is clearly absent.

Section 302 of the Criminal Procedure Code is contained in Chapter XXIV with the heading "General provisions as to inquiries and trials". Section 302 relates to permission to conduct prosecution.

Two Judge Bench in ***Jimmy Jahangir Madan v. Bolly Caiyappa Hindley (dead) by LRs., (2004) 12 SCC 509 : AIR 2005 SC 48*** referring to this Court's judgment in ***Ashwin Nanubhai Vyas v. State of Maharashtra & anr, 1967 AIR 983,*** had held that heirs of complainant can continue the prosecution.

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***14. CRIMINAL PROCEDURE CODE, 1973 – Sections 256 and 378 (4)**

Criminal Revision – Scope – Whether revision is maintainable against an order dismissing a complaint in summons case? Held, No – Section 256 CrPC provides that dismissal of complaint in a summons case amounts to acquittal – Hence, appeal u/s 378 (4) Cr.P.C. would lie against such order.

दंड प्रक्रिया संहिता, 1973 - धारा 256 एवं 378 (4)

दाण्डिक पुनरीक्षण - विस्तार क्षेत्र - क्या समन मामले में परिवाद खारिज करने के आदेश के विरूद्ध पुनरीक्षण प्रचलनीय है? अभिनिर्धारित, नहीं - धारा 256 दं.प्र.सं यह उपबंधित करती है कि समन प्रकरण में परिवाद खारिज होना दोषमुक्ति की कोटि में आता है - अतः, ऐसे आदेश के विरूद्ध धारा 378 (4) दं.प्र.सं. के तहत अपील प्रस्तुत होगी।

Narendra Kumawat v. Ranjeet

Order dated 22.07.2016 passed by the High Court of Madhya Pradesh (Indore Bench) in Cr.R. No. 47 of 2015, reported in ILR (2017) MP 159

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15. CRIMINAL PROCEDURE CODE, 1973 – Section 386
Powers of appellate court to direct retrial – When warranted – Principles explained.
दण्ड प्रक्रिया संहिता, 1973 - धारा 386
पुनर्विचारण का निर्देश देने की अपीलीय न्यायालय की शक्तियाँ - कब आदिष्ट की जा सकती हैं - सिद्धांतों की व्याख्या की गई।
Issac Alias Kishore v. Ronald Cheriyan and others
Judgment dated 23.01.2018 passed by the Supreme Court in Criminal Appeal No. 165 of 2018, reported in (2018) 2 SCC 278

Relevant extracts from the judgment:

Under Section 386 (a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like, appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

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In appeal against acquittal, in exceptional circumstances, the High Court may set aside the order of acquittal even at the instance of private parties, though the State may not have thought it fit for appeal. But it is to be emphasized that this jurisdiction is to be exercised only in exceptional circumstances when there is glaring defect in the conduct of trial which has materially affected the trial or caused prejudice. In the present case, the High Court found that even though the trial court has framed an issue on the point of sharing of common intention of accused Nos. 1 and 2 in committing the offence, the omission to frame charges under Section 34 IPC has materially affected the trial. The High Court further observed that the fingerprint expert who prepared Ex. P8 ought to have been examined and other circumstances emerging out of evidence ought to have been examined by the trial court. The High Court further observed that because of the omission to frame the charges under Section 34 IPC, in spite of framing the issue of common intention, the trial court has not examined the

evidence in proper perspective, which according to the High Court has materially affected the trial which is called for retrial. The discretion exercised by the High Court under Section 386 (a) Cr.P.C. directing retrial with certain directions cannot be said to be erroneous warranting interference.

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***16. CRIMINAL TRIAL :**

CONSTITUTION OF INDIA – Article 20 (3)

(i) Voice Sample – Evidentiary Value – Voice sample is an essential piece of evidence to establish identity of accused – It may be used by prosecution or by accused for corroboration.

(ii) Collection of voice sample of accused, whether amounts to violation of Article 20 (3) – Held, No – Since the voice sample is used only for the purpose of identification of voice – Further, the voice sample should not contain any inculpatory statement of accused. (*Sudhir Chaudhary v. State (NCT of Delhi), (2016) 8 SCC 307* relied on.)

आपराधिक विचारणः

भारत का संविधान - अनुच्छेद 20 (3)

(i) आवाज नमूना - साक्ष्यिक मूल्य - अभियुक्त की पहचान स्थापित करने के लिये आवाज नमूना, साक्ष्य का आवश्यक अंग है - यह अभियोजन या अभियुक्त द्वारा संपुष्टि हेतु प्रयुक्त किया जा सकता है।

(ii) क्या अभियुक्त का आवाज नमूना एकत्रित करना, अनुच्छेद 20 (3) का उल्लंघन है? अभिनिर्धारित, नहीं - चूंकि आवाज नमूना का प्रयोग केवल आवाज पहचानने के उद्देश्य से किया जाता है - साथ ही, आवाज नमूना में अभियुक्त की दोषिता का कोई बयान नहीं होना चाहिये। (***सुधीर चौधरी वि. राज्य (एन.सी.टी. दिल्ली), (2016) 8 एससीसी 307*** अवलंबित)

Buddha Sen Kumhar v. State of Madhya Pradesh
Order dated 15.11.2017 passed by the High Court of Madhya Pradesh (DB) in M.Cr.C. No. 17905 of 2017, reported in 2018 (1) Crimes 414

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17. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – The test of essentiality of the degree of certainty is necessary to accept the facts narrated by witness as proved.

साक्ष्य अधिनियम, 1872 - धारा 3

साक्ष्य का मूल्यांकन - किसी साक्षी द्वारा बताये गये तथ्य को साबित के रूप में स्वीकार करने के लिये निश्चितता के अंश का परीक्षण आवश्यक है।

Kuna alias Sanjaya Behera v. State of Odisha
Judgment dated 17.11.2017 passed by the Supreme Court in Criminal Appeal No. 677 of 2010, reported in AIR 2017 SC 5364

Relevant extracts from the judgment:

With reference to Section 3 of the Evidence Act, which defines "proved", "disproved" and "not proved", this Court in ***Lokeman Shah and another v. State of West Bengal, AIR 2001 SC 1760,*** recalled its observations in ***M. Narsinga Rao v. State of A.P., 2001 Cri LJ 515,*** as herein below:

> "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition that it exists, (vide Section 3 of the Evidence Act). What is required is materials on which the court can reasonably act for reaching the supposition that a certain fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting on any important matter concerning him."

Prior thereto, in ***Vijayee Singh and others v. State of U.P., (1990) 3 SCC 190 : AIR 1990 SC 1459,*** this Court dwelling on the same theme, had recorded the following exposition:

> "27. It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under Section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an

appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'."

The quintessence of the enunciation is that the expression "proved", "disproved" and "not proved", lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man, so much so that while adopting the said requirement, as an appropriate concrete standard to measure "proof", full effect has to be given to the circumstances or conditions of probability or improbability. It has been expounded that it is this degree of certainty, existence of which should be arrived at from the attendant circumstances, before a fact can be said to be proved.

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18. EVIDENCE ACT, 1872 – Section 3
CRIMINAL PROCEDURE CODE, 1973 – Section 378
(i) Principles of appreciation of evidence – Reiterated
(ii) Scope of the powers of the Appellate Court – Reiterated

साक्ष्य अधिनियम, 1872 - धारा 3

दण्ड प्रक्रिया संहिता, 1973 - धारा 378

(i) साक्ष्य के मूल्यांकन के सिद्धांत - पुर्नरोद्धरित

(ii) अपीलीय न्यायालय की शक्तियों का क्षेत्र - पुर्नरोद्धरित

Khekh Ram v. State of H.P.
Judgment dated 10.11.2017 passed by the Supreme Court in Criminal Appeal No. 1110 of 2016, reported in AIR 2017 SC 5255

Relevant extracts from the judgment:

It is a common place proposition that in a criminal trial suspicion however grave cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of "must be true" and not "may be

true". This Court while dwelling on this postulation, in ***Rajiv Singh v. State of Bihar and another, (2015) 16 SCC 369,*** dilated thereon as hereunder:

> "It is well entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established cannon of criminal justice is "fouler the crime higher the proof."
>
> In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.
>
> The above enunciations resonated umpteen times to be reiterated in ***Raj Kumar Singh v. State of Rajasthan, AIR 2013 SC 3150, (Para 17)*** as succinctly summarized in paragraph 21 as hereunder:
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> > "21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused,

keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

In supplementation, it was held in affirmation of the view taken in ***Kali Ram v. State of H.P., 1974 Cr.L.J.1*** that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be" a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well-established that it does not call for multiple citations to further consolidate the same."

(ii) Earlier verdict in ***Murugesan and others v. State, AIR 2013 SC 274.*** The legal proposition as enunciated in paragraph 21 of the said ruling, as quoted hereunder, was noted:

"A concise statement of the law on the issue that had emerged after over half a century of evolution since Sheo Swarup is to be found in para 39 of the Report in ***Chandrappa v. State of Karnataka, AIR 2007 SC (Supp.) 111***. The same may, therefore, be usefully noticed below:

"From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(i) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes',

etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(iv) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

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19. EVIDENCE ACT, 1872 – Sections 3 and 106
CRIMINAL TRIAL :

(i) Inference of guilt, when can be drawn in a case based upon circumstantial evidence – Principles explained.

(ii) Evidence of witness, approach of appreciation – Explained.

(iii) Failure of accused to explain the fact within his knowledge under Section 106 Evidence Act, effect of – Explained. (*State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254* relied on)

साक्ष्य अधिनियम, 1872 - धाराएं 3 एवं 106

आपराधिक विचारण:

(i) परिस्थितिजन्य साक्ष्य पर आधारित मामले में अभियुक्त की दोषिता का निष्कर्ष कब निकाला जा सकता है - सिद्धांतों की व्याख्या की गई।

(ii) साक्षी का साक्ष्य, मूल्यांकन की पद्धति - व्याख्या की गई।

(iii) अभियुक्त उसके ज्ञान के तथ्य का धारा 106 साक्ष्य अधिनियम के अधीन स्पष्टीकरण करने में असफल, प्रभाव - व्याख्या की गई। (***राजस्थान राज्य वि. कांशीराम, (2006) 12 एससीसी 254***अवलंबित)

State of Himachal Pradesh v. Raj Kumar
Judgment dated 08.01.2018 passed by the Supreme Court in Criminal Appeal No. 31 of 2018, reported in (2018) 2 SCC 69

Relevant extracts from the judgment:

Prosecution case is based on circumstantial evidence. It is well settled that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

In a case, based on circumstantial evidence, the inference of guilt can be drawn only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused.

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While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to be truthful in the given circumstances of the case. Once that impression is formed, it is necessary for the court to scrutinize the evidence more particularly keeping in view the drawbacks and infrmities pointed out in the evidence and evaluate them to find out whether it is against the general tenor of the prosecution case.

Deceased Meena Devi was last seen alive in the company of accused Raj Kumar and the accused did not satisfactorily explain the missing of deceased Meena Devi and the same is a strong militating circumstance against the accused. Meena Devi who was residing in the same house with the accused and was last seen alive with the accused, it is for him to explain how the deceased died. The accused has no reasonable explanation as to how the body of Meena Devi was found hanging from the tree. As held in ***Kashi Ram*** case, it is for the accused to explain as to what happened to the deceased. If the accused does not throw light on the fact which is within his knowledge, his failure to offer any explanation would be a strong militating circumstance against him.

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***20. EVIDENCE ACT, 1872 – Section 50**

SPECIFIC RELIEF ACT, 1963 – Sections 37 and 41 (j)

(i) Presumption of marriage, when cannot be drawn – Where the woman has already been legally married to another man, presumption of marriage is not drawn.

(ii) Mere possession on land, whether entitles decree of perpetual injunction – No, mere possession on land in absence of any legal right or title, does not entitle relief of perpetual injunction. (*Premji Rataney Shah v. Union of India, (1994) 5 SCC 547* relied on)

साक्ष्य अधिनियम, 1872 - धारा 50

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धाराएं 37 एवं 41(ञ)

(i) विवाह की उपधारणा, कब नहीं की जा सकती - जहां स्त्री किसी अन्य पुरूष से पहले से ही विधिवत विवाहित है, तब विवाह की उपधारणा नहीं की जा सकती।

(ii) क्या भूमि पर कब्जा मात्र, स्थायी व्यादेश की आज्ञप्ति हेतु अधिकार देता है? अभिनिर्धारित, नहीं - किसी विधिक अधिकार या स्वत्व के बिना, भूमि पर कब्जा मात्र स्थायी व्यादेश के अनुतोष हेतु अधिकृत नहीं करता। (***प्रेमजी रत्ने शाह वि. भारत संघ, (1994) 5 एससीसी 547***अवलंबित)

Jagannath v. Smt. Sarjoo Bai and anr.
Order dated 25.10.2016 passed by the High Court of Madhya Pradesh in Second Appeal No. 684 of 2015, reported in ILR (2016) MP 3338

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21. EVIDENCE ACT, 1872 – Section 65B
Requirement of Certificate – Mandatory only when person producing electronic evidence is in a position to produce certificate – Where person producing does not have custody of device generating electronic evidence – Court may admit electronic evidence on satisfaction as to authenticity and relevancy – Further held, Section 65A and 65B are procedural provisions – Requirement of certificate can be relaxed where interest of justice so justifies.

साक्ष्य अधिनियम, 1872 - धारा 65ख

प्रमाण पत्र की आवश्यकता - मात्र तभी अनिवार्य है जबकि इलेक्ट्रानिक साक्ष्य प्रस्तुत करने वाला व्यक्ति प्रमाण पत्र प्रस्तुत करने की स्थिति में है - जहाँ पर प्रस्तुत करने वाले व्यक्ति के पास इलेक्ट्रानिक साक्ष्य उत्पन्न करने वाले उपकरण की अभिरक्षा नहीं है - न्यायालय सत्यता एवं सुसंगतता की संतुष्टि होने पर इलेक्ट्रानिक साक्ष्य ग्राह्य कर सकता है - आगे अभिनिर्धारित, धारा 65क एवं 65ख के प्रावधान प्रक्रियात्मक हैं - प्रमाण पत्र की आवश्यकता को शिथिल किया जा सकता है जहाँ न्याय हित में ऐसा न्यायोचित है।

Shafhi Mohammad v. State of Himachal Pradesh
Order dated 30.01.2018 passed by the Supreme Court of India in SLP (Cri.) No. 2302 of 2017, reported in (2018) 2 SCC 807

Relevant extracts from the order:

An apprehension was expressed on the question of applicability of conditions under Section 65B (4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted

that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

We have been taken through certain decisions which may be referred to. In ***Ram Singh and Others v. Col. Ram Singh, 1985 Supp and 1 SCC 611,*** a Three-Judge Bench considered the said issue. English Judgments in ***R. v. Maqsud Ali, 1965 2 AllER 464,*** and ***R. v. Robson, 1972 2 AllER 699,*** and American Law as noted in American Jurisprudence 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

In ***Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329,*** the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

In ***Tomaso Bruno and anr.v. State of Uttar Pradesh, (2015) 7 SCC 178,*** a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in ***Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1*** and ***State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600***.

We may, however, also refer to judgment of this Court in ***Anvar P.V. v. P.K. Basheer and others, (2014) 10 SCC 473,*** delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which

procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

Though in view of Three-Judge Bench judgments in ***Tomaso Bruno and Ram Singh,*** (supra) it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B (h).

Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In ***Anvar P.V.*** (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:

> "Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.

> "Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

The applicability of procedural requirement under Section 65B (4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where

electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B (4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B (h) is not always mandatory.

Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B (4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

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***22. EVIDENCE ACT, 1872 – Section 68**
SUCESSION ACT, 1925 – Section 63
Relevant factors for determining genuineness of will – Two wills – Earlier will registered and it was natural bequeath out of love and affection – Beneficiary was minor at the time of execution so as to exclude any possibility of illegal activity – Proved according to Section 68 of the Evidence Act – Second will, unregistered and does not mention about previous will – First will held to be genuine.

साक्ष्य अधिनियम, 1872 - धारा 68

उत्तराधिकार अधिनियम, 1925 - धारा 63

वसीयत की विशुद्धता निर्धारित करने हेतु सुसंगत कारक - दो वसीयतें - पूर्व वसीयत पंजीकृत एवं प्राकृतिक प्रेम व स्नेह के कारण की गई - निष्पादन के समय हितग्राही के अवयस्क होने से अवैध गतिविधि की संभावना अपवर्जित - साक्ष्य अधिनियम की धारा 68 के अनुसार साबित - द्वितीय वसीयत, अपंजीकृत एवं उसमें पूर्व वसीयत का उल्लेख नहीं - प्रथम वसीयत को विशुद्ध अभिनिर्धारित किया गया।

H.V. Nirmala and anr.v. R. Sharmila and anr.
Judgment dated 25.01.2018 passed by the Supreme Court of India in Civil Appeal No. 881 of 2018, reported in (2018) 3 SCC 303

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***23. EVIDENCE ACT, 1872 – Section 68**

(i) Will – Genuineness – Registration of will – Registration of a will is an important circumstance proving its genuineness, although non-registration of a document by itself would not *ipso facto* make it bad.

(ii) Will – Proof of execution – Registration of will does not dispense with the need of proving the execution and attestation of the document as required under Section 68 of the Evidence Act.

साक्ष्य अधिनियम, 1872 - धारा 68

(i) वसीयत - विशुद्धता - वसीयत का पंजीयन - वसीयत का पंजीयनविश्वसनीयता स्थापित करने हेतु महत्वपूर्ण परिस्थिति है - तथापि प्रलेख का अपंजीयन स्वतः उसे बुरा नहीं बनाता है।

(ii) वसीयत - निष्पादन का प्रमाण - वसीयत का पंजीयन धारा 68 साक्ष्य अधिनियम द्वारा अपेक्षित निष्पादन एवं अनुप्रमाणन की आवश्यकता से अभिमुक्ति प्रदान नहीं करता है।

Jahan Singh v. State of U. P and ors.
Judgment dated 18.05.2017 passed by the Allahabad High Court in Writ Case No. 1570 of 2017, reported in AIR 2017 Allahabad 247

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***24. FAMILY COURTS ACT, 1984 – Section 11**

Matrimonial dispute – Hearing by video conferencing – Permissibility – The Family Court after having regard to the facts and circumstances of the case, may so direct to subserve the ends of the justice.

कुटुम्ब न्यायालय अधिनियम, 1984 - धारा 11

वैवाहिक विवाद - वीडियो कानफ्रेन्सिंग द्वारा सुनवाई - अनुज्ञेयता - परिवार न्यायालय प्रकरण के तथ्यों और परिस्थितियों को देखते हुये न्याय के उद्देश्य की प्राप्ति हेतु ऐसे निर्देश दे सकते हैं।

Santhini v. Vijaya Venketesh
Judgment dated 09.10.2017 passed by the Supreme Court in Transfer Petition(Civil)Case No.422of2017, reported in(2018)1 SCC 1

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25. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Section 12

Rights of adoptee over coparcenary property of previous family – Only property "vested" in adopted child continues to vest – Meaning of "vested property" – Indefeasible right must be created – Fluctuating undivided interest in coparcenary property is not a vested right – Adoptee has no vested right to seek partition after his adoption.

हिन्दू दत्तक एवं भरण-पोषण अधिनियम, 1956 - धारा 12

दत्तक गृहीता के पूर्व परिवार की सहदायिक संपत्ति पर अधिकार - दत्तक गृहीता में "निहित" सम्पत्ति मात्र का निहित होना जारी रहेगा - "निहित संपत्ति" का अर्थ -

अजेय अधिकार का सृजन होना आवश्यक है - सहदायिक संपत्ति में अस्थिर अविभाजित हित "निहित हित" नहीं है - दत्तक गृहीता को दत्तक ग्रहण के पश्चात् विभाजन चाहने का कोई निहित अधिकार नहीं है।

Ranchhod and ors. v. Ramachandra and anr.
Judgment dated 21.06.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Second Appeal No. 57 of 1999, reported in AIR 2018 MP 42

Relevant extracts from the judgment:

In terms of proviso (b) to section 12 the property vested in adopted child before the adoption, continues to be vested in him subject to the obligations attached to it. In the present case admittedly no partition has taken place because the suit of the respondent itself is for partition, therefore, the pivotal question is that if undivided share in the ancestral property received by the respondent No.1 on the death of Sitaram, amounts to vesting of property in him? The position in this regard is that the share of a co-parcener in the undivided property is fluctuating share which keeps on varying with addition and extinct of members of coparcenery. The share is crystallized only when the property is partitioned, therefore, till the partition takes place the ancestral property can not be said to have vested in the coparcener. [See: ***Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe and others, 1988 AIR (SC) 845, Y.K. Nalavade and others v. Ananda G. Chavan and others, 1981 AIR (Bom) 109), Vasant and another v. Dattu and others, 1987 AIR(SC) 398***].

The Supreme Court in the matter of ***Dharma Shamrao Agalawe v. Pandurang Miragu Agawale and ors., AIR 1989 SC 845*** while approving the earlier judgment in the ***Vasant's case***, has held that:-

> "The decision of the High Court of Bombay in ***Y. K. Nalavade's case*** (supra) which was followed by the High Court in dismissing the appeal, out of which the present appeal arises, has been rightly given. We agree with the reasons given by the High Court of Bombay in that decision for taking the view that clause (c) to proviso of section 12 of the Act would not be attracted to a case of this nature since as observed by this Court in ***Vasant's case*** there was no 'vesting' of joint family property in ***Dharma*** (supra) the appellant took place on the death of Miragu and no 'divesting' or property took place when Pandurang-the first respondent was adopted. The decision of the Andhra Pradesh High Court in ***Narra Hanumantha Rao's case*** which takes a contrary view is not approved by us. It, therefore, stands overruled."

Initially Andhra Pradesh High Court in the matter of ***Yarlagadda Nayudamma v. The Government of Andhra Pradesh and others, 1981 AIR (AP) 19,*** had taken the view that under proviso (b) of Section 12 of the Act, a coparcener given in

adoption has vested right in the undivided property of his natural father but subsequently Bombay High Court in the matter of ***Devgonda Raygonda Patil v. Shamgonda Raygonda Patil and another, 1992 AIR (Bom) 189,*** after taking note of the judgment of the Supreme Court in the case of ***Vasant and Dharma Shamrao Agalawe*** (supra) has held that the adoptee cannot have vested right in the undivided joint family property of his natural birth. The view of the Bombay High Court in the case of ***Devgonda Raygonda Patil*** is that:-

> "The same view came to be reiterated by the Supreme Court in ***Dharmu Shamrao Agalawe v. Pandurang Miragu Agalawe, 1988 AIR (SC) 845.*** The Supreme Court also approved the decision of this Court in AIR 1981 page 109. Therefore, in my view, if there is coparcenary or joint family in existence in the family of birth on date of adoption, then the adoptee cannot be said to have any vested Property. The property does not vest and therefore provision of S.12 proviso (b) is not attracted. In the context of S.12 proviso (b) 'vested property' means where indefeasible right is created i.e. on no contingency it can be defeated in respect of particular property. In other words where full ownership is conferred in respect of a particular property. But this is not the position in case of coparcenary Property. The coparcenary property is not owned by a coparcener and never any particular property. All the properties vest in the joint family and are held by it. I therefore reject the contention of Mr. Ingale."

The same issue came up before the Patna High Court, wherein the Division Bench of the Patna High Court in the matter of ***Santosh Kumar Jalan @ Kanhaya Lal Jalan v. Chandra Kishore Jalan and anr., 2001 AIR (Pat) 125,*** while dissenting with the view of the Andhra Pradesh High Court in the matter of ***Yarlagadda Nayudamma***, (supra) has held that:-

> "I regret my inability to accept this as the correct legal position. I have already stated above that though a coparcener has vested right of joint possession and enjoyment of the estate of his natural family, proviso (b) refers to "any property which vested". As there is no vesting of "any property" and there is vesting of only community of interest with other coparceners, the proviso cannot be extended to cover such interest."

The Punjab & Haryana High Court also in the matter of ***Khidmat Singh v. Joginder Singh and others, 2010 4 RCR (Civ) 252,*** by the judgment dated 12.3.2010 in RSA No.1234/1985 has considered the similar question of law in the appeal which has been formulated in the present case and has taken note of the judgment of Bombay High Court in the case of ***Devgonda Raygonda*** (supra) ***Patil***

and Supreme Court in the case of ***Dharma Shamrao Agalawe*** (supra) and has held that the property inherited by a person before adoption only is protected under Section 12 of the Hindu Adoption and Maintenance Act and not mere interest in coparcenary property.

Having considered the aforesaid factual and legal position, I am of the opinion that only the property which stands vested in the adopted child before the adoption continues to be vested in him under proviso (b) to Section 12 of the Act and the respondent No.1 being a member of coparcenery having undivided share in the coparcenery before the adoption, the properties of the coparcenery of the natural father did not vest in him and are not protected under proviso (b) to Section 12 of the Act. Hence the respondent No.1 is not entitled to the partition of the said ancestral property after his adoption. The courts below have committed an error in appreciating the effect of proviso (b) of Section 12 of the Act while decreeing the suit of the respondent by holding that the undivided ancestral properties of the family of natural father of the respondent had vested in him. Such a conclusion of the courts below cannot be sustained in view of the legal position noted above.

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26. INDIAN PENAL CODE, 1860 – Sections 90 and 376

False promise of marriage – Allegations that accused obtained consent of the prosecutrix by misrepresentation – Prosecutrix knew that accused is a married person – Their houses were in the same village – No overt demand for marriage in four years of relationship – Consent under "misconception of fact" cannot be inferred.

भारतीय दण्ड संहिता, 1860 - धाराएं 90 एवं 376

विवाह का मिथ्या वचन - यह आक्षेप कि अभियुक्त द्वारा अभियोक्त्री की सहमति मिथ्या व्यपदेशन द्वारा प्राप्त की गई थी - अभियोक्त्री को यह ज्ञात था कि अभियुक्त विवाहित व्यक्ति है - उनके घर एक ही गांव में थे - संबंधों के चार वर्षों में विवाह हेतु कोई प्रत्यक्ष मांग नहीं - 'तथ्य के भ्रम' के अंतर्गत सहमति देना अनुमानित नहीं किया जा सकता।

State of Madhya Pradesh v. Gulab Chand Kahar
Judgment dated 08.03.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 22431 of 2015 (Unreported)

Relevant extracts from the judgment:

The main allegation against the accused is that he obtained the consent of prosecutrix on false representation that he intends to marry her. Therefore, this aspect of case whether the prosecutrix has made relations with the accused on her free will or whether her consent was obtained on false representation has to be considered.

In the case of ***Deelip Singh v. State of Bihar, (2005) 1 SCC 88*** Hon'ble the Apex Court while defining the consent under section 90 of IPC in para 12 and 14 observed that :

> "Section 90 IPC, though, does not define "consent", but describes what is not consent. It says that a consent is not such a consent as is intended by IPC (Sections 375 and 376 IPC in this case) if it is given under a misconception of fact. A misrepresentation as regards the intention of the person seeking consent i.e. the accused, could give rise to the misconception of fact. The consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC."

The prosecutrix lodged the report after four years of the first instance of alleged rape. From the statement of prosecutrix P.W.1 and eye witness P.W.5, it appears that on the same day, when accused committed rape on prosecutrix first time, this fact was brought into the notice of mother of prosecutrix, but no report of this incident had been lodged to police. Prosecutrix (P.W.1) in her statement admits that she had relations with the accused/respondent for the last four years, because the accused had made a promise to marry her. The parents of the prosecutrix P.W.6 (mother) and P.W.11 (father) also admitted this fact and stated that they knew that the prosecutrix and accused had sexual relations. Prosecutrix (P.W.1) in cross-examination para 14 has admitted that her relationship with the accused was known to everybody in the village and when village community objected to it and outcasted her, she had started living with the accused.

Thus, from the statement of the prosecutrix and her parents it is found that the prosecutrix and accused were in love and having relationship for the last four years. During this period the prosecutrix had physical relations with the accused. She lived with the accused in his house openly for long time.

Prosecutrix and accused are residents of same village. Accused was living with his wife and children in his house. Prosecutrix in cross-examination para 14 admitted that she had visited the house of accused and met his mother and wife also. The statement of prosecutrix that the accused had introduced his wife to her as maid servant, does not inspire confidence. It is not possible that in the same village, where prosecutrix and accused are living since birth, prosecutrix could not get information of the fact that the accused was a married person having children. During four years of relationship, it is not stated by the prosecution witnesses when prosecutrix or her parents asked the accused or his parents for marriage of prosecutrix with the accused. There is not even a whisper that they approached the respondent or his family members for marrying

the prosecutrix. If prosecutrix was having relationship with the accused on promise of marriage, then it would be natural for her to make demand of performance of marriage within reasonable time. For four years not making any demand for marriage is not natural. Thus the conduct of the prosecutrix creates doubt on her evidence.

The finding of the trial Court in the present case is correct that the prosecutrix was aware that the respondent was already married person.It is not proved that accused had concealed the fact of his marriage from prosecutrix. The prosecutrix made sexual relations with the respondent/accused knowingly that he was a married person. It is not believable that the accused gave a false promise to marry her and persuaded her to make sexual relationship with him. It is also not proved that consent of prosecutrix has been obtained by misrepresentation and misconception of facts. Prosecutrix is a major woman, competent to give consent as per her will. For the offence of rape, it is necessary to prove beyond reasonable doubt that the sexual intercourse was committed against her will or without her consent.

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27. INDIAN PENAL CODE, 1860 – Section 304A
CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 197
Prosecution of doctor working in Government service – Death of patient undergoing treatment – Alleged negligent omission while discharging official duties – Sanction is a *sine qua non* for taking cognizance – Guidelines issued.

भारतीय दण्ड संहिता, 1860 - धारा 304क

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 154 एवं 197

शासकीय सेवा में कार्यरत चिकित्सक का अभियोजन - उपचार के दौरान मरीज की मृत्यु - पदीय कर्त्तव्यों के निर्वहन के अनुक्रम में उपेक्षित लोप का अभिकथन - संज्ञान लेने हेतु मंजूरी आवश्यक एवं पूर्वभावी शर्त है - दिशानिर्देश निर्गत।

B.C. Jain v. Maulana Saleem
Order dated 28.02.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 965 of 2008, reported in 2017 LawSuit (MP) 253

Relevant extracts from the order:

Looking at the rising trend of roping in doctors working in the Government Hospitals by the next of kin of persons dying during the course of treatment at Government Hospitals, this Court considers it essential to lay down guidelines for the police and the courts below while dealing with cases implicating doctors working in Government Hospitals and Health Centres.

I. That, all allegations relating to negligent conduct on the part of a Government Doctor for which a prosecution u/s 304A IPC and/or its cognate provisions, or under such other law involving penal consequences is sought,

the same shall be enquired into by a Medical Board consisting of at least three doctors, constituted by the Dean of any Government Medical College in the State of Madhya Pradesh, upon the request of the Police, Administration or the directions of a Court/Tribunal/Commission, within seven days of such requisition.

II. The doctor so selected by the Dean of the Medical College concerned to sit on the Medical Board, shall not be inferior in seniority and experience to that of an Associate Professor.

III. The doctor against whom such negligence is alleged, shall be given an opportunity by the Medical Board to give his reply/explanation in writing and if the doctor so desires to be heard personally, he shall be given such an opportunity by the Medical Board. However, if the Medical Board is of the opinion that the request for personal hearing is with the intent of procrastinating the proceedings before the Board, it may, for reasons to be recorded, waive the opportunity of a personal hearing and proceed to decide the case on the basis of the documents/treatment record and give its finding.

IV. The Medical Board shall endeavour to complete the exercise within sixty days from the date on which it is constituted and upon completion of the enquiry, submit the report to the Police, Administration or the Court/Tribunal/Commission, as the case may be.

V. The police shall not register an FIR against such a doctor in the absence of the report of the Medical Board referred hereinabove and also, only when the report by the Medical Board has held the doctor prima facie guilty of “Gross Negligence” and not otherwise.

VI. If a complaint case has been preferred u/s. 200 Cr.P.C, there shall be no order u/s. 156(3) Cr.P.C unless the complaint is accompanied by the report of the Medical Board adverted to in guideline I with prima facie finding of “Gross Negligence” on the part of the Doctor. However, if the complaint is not accompanied with a report of the Medical Board, the Court may ask the Police to enquire into the case u/s. 202 Cr.P.C. The police, if so directed by the Court, shall approach the Dean of the Medical College for the constitution of the Medical Board and thereafter place the report of the Medical Board before the Court concerned.

VII. If the opinion of the Medical Board is one of “Gross Negligence” on the part of the doctor, the Court concerned shall direct the police to seek sanction u/s. 197 Cr.P.C from the State Government. The State Government shall, within thirty days from the date of such request for sanction, either grant or refuse the same, which the police shall convey to the Court concerned.

Thereafter, the Court concerned shall either dismiss the complaint case against the doctor by exercising jurisdiction u/s. 203 Cr.P.C or issue process u/s. 204 Cr.P.C and try the case in accordance with the law.

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***28. INDIAN PENAL CODE, 1860 – Section 306**

Framing of charge – Abetment of suicide – Merely goading or persuading the deceased to refund the alleged amount of loan may not by itself amount to abetment – On being unduly pressurized to repay loan, deceased may have taken recourse to law – Charge under Section 306 IPC set aside.

भारतीय दण्ड संहिता, 1860 - धारा 306

आरोप की विरचना - आत्महत्या का दुष्प्रेरण - मृतक को अभिकथित ऋण की राशि वापस करने के लिए प्रेरित करना या समझाना मात्र स्वतः दुष्प्रेरण नहीं हो सकता - ऋण प्रतिदाय करने के लिए अनावश्यक दबाव बनाए जाने पर मृतक विधिक उपचार प्राप्त कर सकता था - धारा 306 भा.दं.सं का आरोप अपास्त किया गया।

Dinesh v. State of M.P.
Order dated 17.08.2016 passed by the High court of Madhya Pradesh (Indore Bench) in Cr.R.No. 844 of 2016, reported in ILR (2017) MP 162

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***29. INDIAN PENAL CODE, 1860 – Section 498A**

Prosecution of near relatives other than the one residing with complainant – Relatives residing at different and distinct places – Only vague and omnibus allegations – No specific act or role attributed to them – Held, case of over implication of near relatives other than residing with complainant – Prosecution of applicants quashed.

भारतीय दण्ड संहिता, 1860 - धारा 498क

शिकायतकर्ता के साथ रह रहे रिश्तेदारों के अतिरिक्त अन्य निकट रिश्तेदारों का अभियोजन - रिश्तेदार पृथक एवं सुभिन्न स्थानों पर निवासरत - मात्र अस्पष्ट एवं बहुशीर्ष आक्षेप - उनका विनिर्दिष्ट कृत्य या भूमिका नहीं - अभिनिर्धारित, शिकायतकर्ता के साथ निवासरत रिश्तेदारों के अतिरिक्त अन्य निकट रिश्तेदारों को अतिआलिप्त किए जाने का मामला - आवेदकगण का अभियोजन अभिखंडित किया गया।

Sandeep Singh Bais @ Anshu v. State of Madhya Pradesh
Order dated 09.03.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 3658 of 2016, reported in 2017 Law Suit (MP) 552

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30. INSECTICIDE ACT, 1968 – Section 24

Complaint is filed on the basis of report of CIL – Question of exercising the right under section 24 (4) does not endure to the accused – Accused cannot ask for analysis of sample.

कीटनाशक अधिनियम, 1968 - धारा 24

केन्द्रीय अनुसंधान प्रयोगशाला की रिपोर्ट के आधार पर प्रस्तुत परिवाद - अभियुक्त को धारा 24 (4) का प्रयोग करने का अधिकार उत्पन्न नहीं होता है - अभियुक्त नमूने के विश्लेषण की मांग नहीं कर सकता।

Indofil Industries Ltd. and ors.v. State of Punjab
Judgment dated 03.7.2017 passed by the Supreme Court in Criminal Appeal No. 653 of 2017, reported in AIR 2017 SC 342

Relevant extracts from the judgment:

On a bare reading of sub-section (3), it is seen that the first part declares that the report signed by the Insecticide Analyst shall be evidence of the facts stated therein and it shall be conclusive, unless the "person from whom" the sample was taken exercises his right by notifying in writing within the specified time that he intends to adduce evidence in controversion of that report. Thus, the second part of this provision gives a right to the person from whom the sample was collected to raise an objection. Once the person from whom the sample was taken exercises that right in terms of sub-section (4), the conclusiveness of the report of the Insecticide Analyst (State Analyst) referred to in the first part of the same provision cannot be used against such person. These provisions are in the nature of rules of evidence. Further, if the criminal complaint is launched and the person is named as an accused, he can request the concerned Magistrate before whom the proceedings are pending to send the third sample produced before the Court to the CIL for testing or analysis. That right can be exercised only if the complaint is founded on the report of the State Insecticide Analyst. However, if the complaint is filed also on the basis of the report of the CIL, then the question of exercising the right under Section 24 (4) does not endure to the accused. For, the purport of Section 24 (4) is that the report of the CIL shall be conclusive evidence of the facts stated therein. It is pertinent to bear in mind that the opening part of sub-section (4) of Section 24 opens with the words, "Unless the sample has already been tested or analysed in the CIL". Therefore, in cases where such report is already obtained or available, the criminal prosecution must proceed on that basis. In other words, only if the analysis report of the CIL is not available or filed along with complaint or placed on record in the criminal prosecution, would the accused get a right to request the concerned Magistrate to direct testing or analysis of the third sample produced before that Court by the prosecution from the CIL and not otherwise. Any other view would entail in rewriting of the provisions, which are otherwise plain and unambiguous. Thus, if the report of the CIL has been obtained before filing of the complaint or pursuant to the direction given by the concerned Magistrate and made part of record of the criminal prosecution, as in this case, the accused named in the complaint cannot ask for analysis of the sample already

used at the instance of the person from whom it was taken and is named as co-accused.

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

Sufficient cause, consideration for – Liberal approach has to be adopted by the court while condoning the delay but the court cannot ignore another principle of law that the law comes to the rescue of vigilant litigants.

परिसीमा अधिनियम, 1963 - धारा 5

पर्याप्त हेतुक पर विचार करना - विलम्ब क्षमा किये जाते समय न्यायालय को उदार दृष्टिकोण अपनाना चाहिये किन्तु न्यायालय, विधि के अन्य सिद्धांत को अनदेखा नहीं कर सकती कि विधि जागरूक पक्षकारों के रक्षार्थ होती है।

Ratanlal v. Shivlal and ors.
Judgment dated 27.10.2016 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 784 of 2005, reported in ILR (2016) MP 3345

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***32. LIMITATION ACT, 1963 – Articles 64 and 65**

LAND REVENUE CODE, 1959 (M.P.) – Sections 157 and 158

(i) Inconsistent pleadings – Pleading of acquisition of title through fore-fathers as well as acquisition of title by adverse possession – Impermissible.

(ii) Adverse Possession – Point of time when possession was acquired and when it became adverse to its true owner must be established – Entry of "Maufi Devsthan" in revenue records – No contest to such entry at that time – Indicates absence of claim of hostile title.

परिसीमा अधिनियम, 1963 - अनुच्छेद 64 एवं 65

भू-राजस्व संहिता, 1959 (म.प्र.) - धाराएं 157 एवं 158

(i) असंगत अभिवचन - पूर्वजों के माध्यम से स्वत्व अर्जन किये जाने एवं साथ ही विरोधी आधिपत्य के द्वारा स्वत्व अर्जित किए जाने के अभिवचन - अनुज्ञेय नहीं।

(ii) विरोधी आधिपत्य - समय का वह बिंदु जबकि आधिपत्य अर्जित किया गया एवं यह जब वास्तविक स्वामी के विरूद्ध हो गया, स्थापित किया जाना चाहिए - राजस्व अभिलेख में 'मौफी देवस्थान' की प्रविष्टि - उक्त समय पर ऐसी प्रविष्टि को चुनौती न दिया जाना - पक्षद्रोही स्वत्व के दावे की अनुपस्थिति इंगित करता है।

State of M.P. v. Dev Gir and another
Judgment dated 31.01.2017 passed by the High Court of Madhya Pradesh (Indore Bench) in Second Appeal No. 137 of 1999, reported in 2017 Law Suit (MP) 120

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33. MOTOR VEHICLES ACT, 1988 – Sections 2 (30) and 166
Owner – Registered owner – Transferee owner – Liability of, explained – Held, Section 2 (30) of the Act provides that it is the registered owner, whom Parliament has regarded as the owner of the vehicle and not the transferee owner – The liability stands fastened on the registered owner – A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority.

मोटरयान अधिनियम, 1988 - धाराएं 2 (30) एवं 166

स्वामी - पंजीकृत स्वामी - अंतरिती स्वामी - दायित्व विवेचित - अभिनिर्धारित, अधिनियम की धारा 2 (30) के अनुसार संसद ने जिसे वाहन स्वामी के रूप में मान्य किया है वह पंजीकृत स्वामी ही है न कि अन्तरिती - दायित्व पंजीकृत स्वामी पर बंधनकारी है - क्षतिपूर्ति के आवेदक पर यह भार नहीं डाला जा सकता है कि वह उत्तरवर्ती अन्तरणों की आवली जो कि पंजीकृत नहीं है, का अनुसरण करे।

Naveen Kumar v. Vijay Kumar and ors.
Judgment dated 06.02.2018 passed by the Supreme Court in C.A. No. 1427 of 2018, reported in 2018 ACJ 677 (SC)

Relevant extracts from the judgment:

The expression 'owner' is defined in Section 2 (30) of the Act, 1988, thus:

> "2 (30) "owner" means a 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."

The person in whose name a motor vehicle stands registered is the owner of the vehicle for the purposes of the Act. The use of the expression 'means' is a clear indication of the position that it is the registered owner who Parliament has regarded as the owner of the vehicle. In the earlier Act of 1939, the expression 'owner' was defined in Section 2 (19) as follows:

> "2 (19) – 'owner' means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, the person in possession of the vehicle under that agreement."

Evidently, Parliament while enacting the Motor Vehicles Act, 1988 made a specific change by recasting the earlier definition. Section 2(19) of the earlier Act stipulated that where a person in possession of a motor vehicle is a minor the guardian of the minor would be the owner and where the motor vehicle was subject to a hire purchase agreement, the person in possession of the vehicle under the agreement would be the owner. The Act of 1988 has provided in the first part of section 2(30) that the owner would be the person in whose name the motor vehicle stands registered. Where such a person is a minor the guardian of the minor would be the owner. In relation to a motor vehicle which is the subject of an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement would be the owner. The latter part of the definition is in the nature of an exception which applies where the motor vehicle is the subject of a hire purchase agreement or of an agreement of lease or hypothecation. Otherwise the definition stipulates that for the purposes of the Act, the person in whose name the motor vehicle stands registered is treated as the owner.

The decision of the Bench of two judges of this Court in ***Pushpa v. Shakuntala, 2011 ACJ 705 (SC)*** was in a case where the offending vehicle was registered in the name of J who had sold it to S on 2 February 1993 and had given possession to the transferee. On the date of the transfer the truck was covered by a valid policy of insurance. Despite the sale of the vehicle the change of ownership was not reflected in the certificate of registration. The policy of insurance expired on 24 February 1993. Subsequently S took out an insurance policy in the name of the registered owner and it was valid and subsisting when the accident took place on 7 May 1994. The Tribunal held that no liability to pay compensation attached to J since he had ceased to be the owner of the vehicle after its sale on 2 February 1993. S alone was held to be liable for the payment of compensation to the claimants. On these facts the Bench of two judges of this Court held as follows:

> "(11). It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on 2-2-1993."

In the course of its decision, the two judge Bench referred to the earlier decision in ***Dr. T.V. Jose v. Chacko P.M., 2001 ACJ 2059 (SC)*** which had arisen under the Motor Vehicles Act 1939. In that context, this Court had held thus:

> "(10)...There can be transfer of title by payment of consideration and delivery of the car. The evidence on record shows that ownership of the car had been

transferred. However, the appellant still continued to remain liable to third parties as his name continued in the records of RTO as the owner. The appellant could not escape that liability by merely joining Mr Roy Thomas in these appeals."

The decision in ***Dr T. V. Jose*** (supra) was followed in ***P. P. Mohammed v. K. Rajappan, 2003 ACJ 1595 (SC)***. Noticing that the decision in ***Dr T.V. Jose*** (supra) was rendered under the Motor Vehicles Act, 1939, the Court in ***Pushpa*** (supra) held that the ratio of the decision "shall apply with equal force to the facts of the cases arising under the 1988 Act" in view of the provisions of Section 2 (30) and Section 50. Consequently, the view of this Court was that the person whose name continues in the record of the registering authority as the owner of the vehicle is equally liable together with the insurer.

The decision of a three judge Bench of this court in ***Purnya Kala Devi v. State of Assam, 2014 ACJ 1269 (SC)*** involved a situation where the registered owner of a vehicle involved in an accident denied his liability to compensate the legal heirs of the deceased victim on the ground that the state government had requisitioned the vehicle. On the date of the accident, the vehicle stood requisitioned under the Assam Requisition and Control of Vehicles Act, 1968. The state failed to establish that the vehicle was released from requisition after service of a notice in writing to the owner, to take delivery, as required by Section 5(1) of the state Act. Under the Assam Act, it was only upon the service of a notice to that effect that no lability for compensation would lie with the requisitioning authority. The High Court absolved the state government on the basis of the definition of the expression 'owner' in Section 2(30) of the Motor Vehicles Act, 1988. Reversing the judgment, this Court held thus :

"..the High Court, without adverting to Section 5 of the Assam Act, merely on the basis of the definition of "owner" as contained in Section 2(30) of the 1988 Act, mulcted the award payable by the owner of the vehicle. The High Court failed to appreciate that at the relevant time the offending vehicle was under the requisition of Respondent 1 State of Assam under the provisions of the Assam Act. Therefore, Respondent 1 was squarely covered under the definition of "owner" as contained in Section 2(30) of the 1988 Act. The High Court failed to appreciate the underlying legislative intention in including in the definition of "owner" a person in possession of a vehicle either under an agreement of lease or agreement of hypothecation or under a hire-purchase agreement to the effect that a person in control and possession of the vehicle should be construed as the "owner" and not alone the registered owner. The High Court further failed to appreciate the legislative intention that the registered owner of the vehicle should not be held liable if

> the vehicle was not in his possession and control. The High Court also failed to appreciate that Section 146 of the 1988 Act requires that no person shall use or cause or allow any other person to use a motor vehicle in a public place without an insurance policy meeting the requirements of Chapter XI of the 1988 Act and the State Government has violated the statutory provisions of the 1988 Act. The Tribunal also erred in accepting the allegation of Respondent 2 that the vehicle was released on the date of the accident at 10.30 a.m. and the accident occurred at 10.30 a.m. without any evidence even though in the claim petition, it was stated that the accident had occurred at 10.15 a.m."

The above observations would indicate that a combination of circumstances cumulatively weighed with this Court. Significantly, for the purposes of the present discussion, what emerges from the above judgment is the circumstance that the motor vehicle was on the date of the accident requisitioned by the state government. Requisitioning by its very nature is involuntary insofar as the person whose property is requisitioned is concerned. This Court observed that it is the person in control and possession of a vehicle which is under an agreement of lease, hypothecation or hire purchase who is construed as the owner and not the registered owner. The same analogy was drawn to hold that where the vehicle had been requisitioned, it was the state and not the registered owner who had possession and control and would hence be held liable to compensate. ***Purnya Kala Devi*** (supra) does not hold that a person who transfers the vehicle to another but continues to be the registered owner under Section 2(30) in the records of the registering authority is absolved of liability. The situation which arose before the court in that case must be borne in mind because it was in the context of a compulsory act of requisitioning by the state that this Court held, by analogy of reasoning, that the registered owner was not liable.

The subsequent decision of a Bench of three judges of this Court in ***HDFC Bank Limited v Reshma, 2015 ACJ 1 (SC)*** involved an agreement of hypothecation. The Tribunal held the financier of the vehicle to be jointly and severally liable together with the owner on the ground that it was under an obligation to ensure that the borrower had not neglected to get the vehicle insured. The High Court had dismissed the appeal filed by the Bank against the order of the Tribunal holding it liable together with the owner. In the appeal before this Court, Justice Dipak Misra (as the learned Chief Justice then was) adverted during the course of the judgment to the principles laid down by this Court in several earlier decisions, including of this Court. (See: ***Mohan Benefit (P) Ltd. v. Kachraji Raymalji, (1997) 9 SCC 103; Rajasthan SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481; National Insurance Co. Ltd. v. Deepa Devi, (2008) 1 SCC; Mukesh K. Tripathi v. LIC, (2004) 8 SCC 387, Ramesh Mehta v. Sanwal Chand Singhvi, (2004) 5 SCC 409, State of Maharashtra v. Indian Medical Assn., (2002) 1 SCC 589,*** and ***Pandey & Co. Builders (P) Ltd. v. State of Bihar, (2007) 1 SCC 467*** and placed reliance on ***Rajasthan***

SRTC v. Kailash Nath Kothari, (1997) 7 SCC 481, National Insurance Co. Ltd. v. Durdadahya Kumar Samal, AIR 1996 Guj 51; Godavari Finance Co. v. Degala Satyanarayanamma, (2008) 5 SCC 107; Pushpa (supra), T.V. Jose (supra) U.P. SRTC v. Kulsum, (2011) 8 SCC 142 and ***Purnya (supra)***.

Noticing that the case before the court involved a hypothecation agreement, this Court held:

> "In the present case, as the facts have been unfurled, the appellant Bank had financed the owner for purchase of the vehicle and the owner had entered into a hypothecation agreement with the Bank. The borrower had the initial obligation to insure the vehicle, but without insurance he plied the vehicle on the road and the accident took place. Had the vehicle been insured, the insurance company would have been liable and not the owner. There is no cavil over the fact that the vehicle was the subject of an agreement of hypothecation and was in possession and control of Respondent 2."

Since the second respondent was in control and possession of the vehicle this Court held that the High Court was in error in fastening the liability on the financier. The failure of the Second respondent to effect full payment for obtaining an insurance cover was neither known to the financier nor was there any collusion on its part. Consequently, the High Court was held to be in error in fastening liability on the financier.

The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression 'owner' in Section 2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the 'owner'. However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression 'owner' in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier Act of 1939. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the First respondent was the 'owner' of the vehicle

involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has proceeded upon a misconstruction of the judgments of this Court in ***Reshma*** (supra) and ***Purnya Kala Devi*** (supra).

The submission of the petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. In ***Dr. T.V. Jose*** (supra), this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the registering authority is the owner. The owner within the meaning of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled.

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34. MOTOR VEHICLES ACT, 1988 – Section 149

(i) Insurer's liability – No specific plea or proof by the owner of offending vehicle that it was driven by an authorized person having valid driving licence – Only copy of driving licence of a person was produced – In absence of specific pleading and proof that such person was driving the vehicle – Mere fact that offending vehicle was insured, would not make insurance company liable.

(ii) Pay & Recover – Law laid down in case of *Swarn Singh, AIR 2004 SC 1531* followed.

मोटरयान अधिनियम, 1988 - धारा 149

(i) बीमाकर्ता का दायित्व - वाहन स्वामी द्वारा ऐसा कोई विनिर्दिष्ट अभिवचन या प्रमाण नहीं कि अपघाती वाहन प्रभावी वाहन चालन अनुज्ञप्तिधारी व्यक्ति चला रहा था - किसी व्यक्ति की चालन अनुज्ञप्ति की प्रति मात्र प्रस्तुत - उसी व्यक्ति द्वारा वाहन चलाने संबंधी अभिवचन व प्रमाण के अभाव में - मात्र वाहन बीमित होना, बीमाकर्ता कंपनी को उत्तरदायी नहीं बनायेगा।

(ii) भरो व वसूल करो - न्याय दृष्टांत ***स्वर्ण सिंह, ए.आई.आर. 2004 एससी 1531*** के प्रकरण में प्रतिपादित विधि अनुसरित।

Pappu and ors.v. Vinod Kumar Lamba and another
Judgment dated 19.01.2018 passed by the Supreme Court in Civil Appeal No. 20962 of 2017, reported in AIR 2018 SC 592

Relevant extracts from the judgment:

The question is: whether the fact that the offending vehicle bearing No. DIL-5955 was duly insured by respondent No.2 Insurance Company would ***per se*** make the Insurance Company liable? This Court in the case of ***National Insurance Co. Ltd. v. Swarn Singh, AIR 2004 SC 1531,*** has noticed the defences available to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988. The Insurance Company is entitled to take a defence that

the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.

The next question is: whether in the fact situation of this case the insurance company can be and ought to be directed to pay the claim amount, with liberty to recover the same from the owner of the vehicle (respondent No.1)? This issue has been answered in the case of ***National Insurance Company Ltd.*** (supra). In that case, it was contended by the insurance company that once the defence taken by the insurer is accepted by the Tribunal, it is bound to discharge the insurer and fix the liability only on the owner and/or the driver of the vehicle. However, this Court held that even if the insurer succeeds in establishing its defence, the Tribunal or the Court can direct the insurance company to pay the award amount to the claimant(s) and, in turn, recover the same from the owner of the vehicle. The three-Judge Bench, after analysing the earlier decisions on the point, held that there was no reason to deviate from the said well-settled principle.

In the present case, the owner of the vehicle (respondent No.1) had produced the insurance certificate indicating that vehicle No. DIL- 5955 was comprehensively insured by the respondent No.2 (Insurance Company) for unlimited liability. Applying the dictum in the case of ***National Insurance Company Ltd.*** (supra), to subserve the ends of justice, the insurer (respondent No.2) shall pay the claim amount awarded by the Tribunal to the appellants in the first instance, with liberty to recover the same from the owner of the vehicle (respondent No.1) in accordance with law.

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***35. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168**

Compensation, determination of – Future prospects and multiplier – Deceased 20 year old pursuing professional Chartered Accountancy Course – An addition of 40% towards future prospects allowed in terms of judgment of the Constitution Bench in *Pranay Sethi* case – Further held, correct multiplier would be according to age of the deceased and not according to the age of dependents (*Sarla Verma v. DTC, (2009) 6 SCC 121* and *National Insurance Co. Ltd. v. Pranay Sethi, (2017) 13 Scale 12,* relied on)

मोटरयान अधिनियम, 1988 - धाराएं 166 एवं 168

प्रतिकर का निर्धारण - भविष्य की संभावनाएं एवं गुणांक - बीस वर्षीय मृतक व्यावसायिक चार्टड अकाउंटिंसी का कोर्स कर रहा था - संवैधानिक पीठ के प्रणय सेठी के निर्णय के अनुसार भविष्य की संभावनाओं के लिए 40 प्रतिषत की राशि जोड़ने की अनुमति दी गई - आगे यह भी अभिनिर्धारित कि, उचित गुणांक मृतक की उम्र के आधार पर होना चाहिए न कि आश्रितों की उम्र के आधार पर (***सरला वर्मा विरूद्ध डीटीसी, (2009) 6 एस सी सी 121 तथा नैशनल इंश्योरिंस कंपनी लिमिटिड विरूद्ध प्रणय सेठी, (2017) 13 स्केल 12*** अवलंबित)

Nagar Mal and ors v. Oriental Insurance Company Ltd. and ors. Judgment dated 19.01.2018 passed by the Supreme Court of India in Civil Appeal No. 448 of 2018, reported in (2018) 3 SCC 130

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***36. MOTOR VEHICLES ACT, 1988 – Section 168**

Compensation – Future prospects – Established income – Future prospects to be added even on notional or estimated income as per the ruling of five Judge Bench in case of *National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680*.

मोटरयान अधिनियम, 1988 - धारा 168

प्रतिकर - भविष्य की संभावना - स्थापित आय - न्याय दृष्टांत ***नेशनल इंश्योरेंस कं. लि. विरूद्ध प्रणय सेठी, (2017) 16 एससीसी 680*** के प्रकरण में पांच न्यायाधीश पीठ के निर्णयानुसार भविष्य की संभावना को परिकल्पित अथवा अनुमानित आय पर भी जोड़ा जावेगा।

Munusamy and others v. Managing Director, Tamil Nadu State Transport Corporation (Villupuram) Limited
Judgment dated 09.02.2018 passed by the Supreme Court in Civil Appeal No. 1754 of 2018, reported in (2018) 2 SCC 765

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37. MOTOR VEHICLES ACT, 1988 – Section 168
Just Compensation – Realistic approach must be adopted in assessment of compensation in case of deceased house wife.
मोटर यान अधिनियम, 1988 - धारा 168
न्यायसंगत क्षतिपूर्ति - मृतक गृहणी के प्रकरण में क्षतिपूर्ति के निर्धारण में सदैव यथार्थवादी दृष्टिकोण अपनाया जाना चाहिये।
Laxmidhar Nayak and ors. v. Jugal Kishore Behera and ors.
Judgmentdated 28.11.2017 passed by the SupremeCourt in SLP (C) No. 31405 of 2016, reported in (2018) 1 SCC 746 : AIR 2018 SC 204

Relevant extracts from the judgment:

Deceased Chanchali Nayak was an agricultural labourer. The tribunal has taken her income at the rate of ` 25/- per day and assessed the monthly income at ` 650/- per month. It is quite improbable that a labourer would be available for such a small amount of ` 25/- per day. The wages fixed by the tribunal for the daily labourer at ` 25/- per day and the monthly income at ` 650/- is too low. The reasoning of the tribunal that a lady labourer may not get engagement daily is not acceptable. Even though works like cutting of paddy and other agricultural labour may not be available on all days throughout the year, in rural areas other kinds of work are available for a labourer. Deceased Chanchali Nayak even though was said to be earning only ` 35/- per day at that time, over the years, she would have earned more. In our view, deceased Chanchali Nayak, being a woman and mother of three children, would have also contributed her physical labour for maintenance of household and also taking care of her children. The High Court as well as the tribunal did not keep in view the contribution of the deceased in the household work, being a labourer and also maintaining her husband, her daily income should be fixed at ` 150/- per day and ` 4,500/- per month.Taking income from the agricultural labour work at ` 3,000/- per month and ` 1,500/- per month for the household work, the monthly income of the deceased is fixed at ` 4,500/- per month.

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38. MUSLIM LAW:
Dispute regarding custody of children between Sunni Muslim parents governed by Hanafi Law – Factors to be taken into consideration, explained –
(i) Mother is not entitled to custody of minor children if she is leading an adulterous life.

(ii) While deciding custodial rights, welfare of the child is of paramount importance.

(iii) Ifthereisaconflictbetween the personal law andconsideration of welfare of the child, the latter should prevail.

(iv) Primacy should be given to higher education and moral values of life over and above the love and affection.

(v) If custody is given to father, it would be proper and humane to grant visitation rights to mother.

मुस्लिम विधि:

हनाफी विधि से शासित सुन्नी माता पिता के मध्य बच्चों की अभिरक्षा को लेकर विवाद - विचारणीय तथ्य समझाए गए -

(i) माता अवयस्क बच्चों की अभिरक्षा प्राप्त करने की अधिकारी नहीं यदि वह जारतापूर्ण जीवन व्यतीत कर रही है।

(ii) अभिरक्षा संबंधी अधिकार निर्णीत करते समय बालक का कल्याण सर्वोच्च महत्व का होता है।

(iii) स्वीय विधि और बालक के कल्याण के विचार के मध्य विरोध होने पर, कल्याण अभिभावी होगा।

(iv) प्रेम और स्नेह के बजाय उच्च शिक्षा और जीवन के नैतिक मूल्यों को ज्यादा महत्व दिया जाना चाहिए।

(v) यदि अभिरक्षा पिता को दी जाती है, तब माता को मिलने का अधिकार प्रदान करना उचित व मानवीय होगा।

Parveen Begam and ors. v. Mahfooj Khan
Order dated 10.08.2016 passed by the High Court of Madhya Pradesh in M.A. No. 1541 of 2013, reported in ILR (2017) MP 105

Relevant extracts from the order:

Admitted facts of the case amongst others are that appellant Parveen and the respondent are biological parents of appellant No.2 to 4 and that they are Sunni Muslims governed by the Hanafi Law. Hence, it will be first seen what are the provisions of grant of custody of minor children in the Hanafi Law. As per renowned Author Mulla on Mohomedan Law and the ratio laid down by this Court in ***Wazid Ali v. Rehana Anjum, AIR 2005 MP 141***, Hanafi mother is entitled to the custody of her minor male child until he has completed the age of seven years and of her minor female child until she has attained puberty i.e. age of 15 years. This right continues though she is divorced by the father of the child, unless she remarries in which case the custody belongs to the father. Failing the mother, the custody of the child belongs to other female relations i.e. maternal grand-mother, paternal grandmother, full sister and so on in that order. According to Mulla, a female including the mother, who is otherwise entitled to the custody of a child, loses the right of custody (i) if she remarries a person not related to the child within the prohibited degrees, or (ii) if she goes and resides during the subsistence of the marriage, at a distance from the father's place of residence;

or (iii) if she is leading an immoral life or (iv) if she neglects to take proper care of the child. In view of the said tenets of the Hanafi Law, the learned trial Judge has rightly disqualified appellant Parveen from the guardianship of appellant Nos. 2 to 4 on the ground that she is living an immoral life.

We are fully aware of the propositions of law that while deciding the issue of custodial rights and appointment of guardian under the Act, the welfare of the child has also to be considered and has to be given due weightage keeping the facts and circumstances of the case in mind and the personal law. But Section 17 of the Act provides that if there is a conflict between the personal law to which the child is subject and the consideration of his/her welfare, the latter must prevail. In this regard, references may be made to the decisions rendered in the cases namely ***Chandrakala Menon v. Upin Menon, (1993) 2 SCC 6; Shiela B. Das v. P.R. Sugasree, AIR 2006 SC 1343; Nil Ratan Kundu and another v. Abhijit Kundu, (2008) 9 SCC 413; Anjali Kapoor v. Rajiv Baijal, 2009 III M.P.J.R. (SC) 169; Ali Munnisan v. Mukhtar Ahmad, AIR 1975 All. 67 and Hassan Bhat v. Ghulam Mohd., AIR 1961 J & K 5***.

In the decisions reported in ***Mohammed Mehboob Khan v. Rahmit Bi and others, 1977 V-II W.N. 79*** and ***Rajkumar v. Indrakumari, 1972 J.L.J. 1045,*** this Court has observed that the dominant factor for consideration of the court is the welfare of the child, which is not to be measured only in terms of money and physical comforts. The word “Welfare” must be taken in its widest sense so as to embrace the material and physical well-being; the education and upbringing; happiness and moral welfare. The court must consider every circumstance bearing upon these considerations.

In a decision reported in ***R.V. Srinath Prasad v. Nandamuri Jayakrishna,***
AIR 2001 SC 1056, the Supreme Court has emphasized that the custody of child is a sensitive issue. It is also a matter involving the sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between attachment and sentiment of the parties towards the child and the welfare of child is of paramount importance.

Appellant Parveen had deposed before the trial court on 05.02.2013 and that time she has stated in para-10 of her evidence that the ages of appellant Nos. 2 to 4 are 14, 11 and 9 years respectively. Hence, it may be said that by this time each of them has become older by about two years. Therefore, they do not need the day to day care of appellant Parveen. On the other hand, it is the right time that they should get higher education for the betterment of their future lives. Hence, we give primacy to their higher education and moral values of life.

Upon the perusal of the impugned order, we find that the learned trial Judge has not granted visitation rights to appellant Parveen when appellant Nos.2 to 4 will be in custody of the respondent. Since appellant Parveen is their mother and she is also the legally wedded wife of the respondent as their marriage still subsists and as they have so far been in her custody and care, we deem it just, proper and humane to grant her visiting rights in recognition of her motherhood.

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***39. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 20**
EVIDENCE ACT, 1872 – Section 45
Handwriting expert – Examination of handwriting on cheque – Whether cheque should be sent for examination by handwriting expert if the accused admits giving the disputed cheque with his signature on it? Held, No – Presumption under section 20 of NI Act can be drawn – The Cheque not required to be sent to handwriting expert to ascertain handwriting of the remaining contents.

परक्राम्य लिखत अधिनियम, 1881 - धारा 20

साक्ष्य अधिनियम, 1872 - धारा 45

हस्तलिपि विशेषज्ञ - चैक पर हस्तलिपि का परीक्षण - यदि अभियुक्त ने स्वहस्ताक्षरित विवादित चैक देना स्वीकार किया है, तब क्या विवादित चैक को हस्तलिपि विशेषज्ञ के पास परीक्षण हेतु भेजा जाना आवश्यक है? अभिनिर्धारित, नहीं - धारा 20 परक्राम्य लिखत अधिनियम के अधीन उपधारणा की जा सकती है - चैक की अन्य अंतर्वस्तु की हस्तलिपि की जांच हेतु चैक को हस्तलिपि विशेषज्ञ के पास भेजा जाना आवश्यक नहीं है।

Nicky Chaurasia v. Vimal Kumar
Order dated 18.11.2016 passed by the High Court of M.P. (Gwalior Bench) in M.Cr.C No. 12242 of 2016, reported in ILR (2017) MP 236

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***40. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 31**
Non-payment of maintenance (interim or final) – Whether constitutes breach of protection order under section 31 of the Act? Held, Yes – Economic abuse includes deprivation of maintenance – Domestic violence under section 3 includes economic abuse – Hence, non-payment of maintenance (interim or final) is breach of protection order – Proceedings under section 31 of the Act can be invoked for the same. [Law laid down in *Sunil @ Sonu v. Sarita Chawla (Smt.), 2009 (5) MPHT 319* is in accordance with the scheme of the Act]

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 - धारा 31

भरण पोषण (अंतरिम या अंतिम) का भुगतान न किया जाना - क्या धारा 31 के अंतर्गत संरक्षण आदेश का उल्लंघन गठित करता है? अभिनिर्धारित, हाँ - आर्थिक दुरूपयोग के अंतर्गत भरणपोषण से वंचित करना भी शामिल है - धारा 3 के अंतर्गत घरेलू हिंसा में आर्थिक दुरूपयोग भी सम्मिलित है - अतः, भरणपोषण (अंतरिम या अंतिम) का भुगतान नहीं किया जाना संरक्षण आदेश का उल्लंघन है - इस हेतु धारा 31 के अंतर्गत कार्यवाही की जा सकती है। (***सुनील उर्फ सोनू वि. श्रीमती सरिता चावला, 2009 (5) एमपीएचटी 319*** में अधिनियम की योजना अनुसार विधि अभिनिर्धारित की गई है)

Surya Prakash v. Smt. Rachna
Order dated 10.10.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 16718 of 2015 (unreported)

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***41. PUBLIC TRUSTS ACT, 1951 – Section 8 (2)**
CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10
Impleadment of Registrar, Public Trust under Order 1 Rule 10 CPC after 15 years to comply with Section 8 (2) of the Act of 1951, whether permissible? Held, No – Section 8 (2) of the Act mandates issuance of notice to the State Government through Registrar after the institution of the suit.

लोक न्यास अधिनियम, 1951 - धारा 8 (2)

सिविल प्रक्रिया संहिता, 1908 - आदेश 1 नियम 10

क्या धारा 8 (2) के अनुपालन में, आदेश 1 नियम 10 के अधीन पंजीयक, लोक न्यास को 15 वर्षों पश्चात् पक्षकार बनाया जाना अनुज्ञेय है? अभिनिर्धारित, नहीं - अधिनियम की धारा 8 (2) वाद संस्थिति के पश्चात् पंजीयक के माध्यम से सरकार को सूचना दिया जाना आज्ञापक बनाती है।

Trimurti Charitable Public Trust and anr.v. Munikumar Rajdan and ors.
Order dated 29.07.2016 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 4731 of 2016, reported in ILR (2016) MP 3307

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***42. RENT CONTROL AND EVICTION :**
CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 (2)
Co-owner, whether a necessary party in an eviction suit? In an eviction suit, landlord and tenant are the only necessary parties – Only question required to be proved is existence of relationship between landlord and tenant – Question of title not germane for decision of eviction suit – Held, co-owner neither a necessary nor a proper party in eviction suit – In eviction suit, question of title or extent of shares of co-owners in suit premises neither be decided nor can it be made subject matter of determination.

भाड़ा नियंत्रण एवं बेदखली:

सिविल प्रक्रिया संहिता, 1908 - आदेश 1 नियम 10 (2)

क्या बेदखली के वाद में सह-स्वामी एक आवश्यक पक्षकार है? बेदखली के वाद में केवल भू-स्वामी एवं अभिधारी ही आवश्यक पक्षकार हैं - केवल भू-स्वामी तथा अभिधारी के संबंध का वियमान होना साबित किया जाना आवश्यक है - बेदखली के

वाद में निर्णय हेतु स्वत्व का प्रश्न तात्विक नहीं है - अभिनिर्धारित, बेदखली के वादों में सह-स्वामी न तो एक आवश्यक पक्षकार है और न ही उचित पक्षकार - बेदखली के वाद में स्वत्व का प्रश्न या वाद परिसर में सह-स्वामी के अंश का विस्तार न तो विनिश्चित होगा और न ही इसे अवधारण हेतु विषय वस्तु बनाया जा सकता है।

Kanaklata Das and others v. Naba Kumar Das and others
Judgment dated 25.01.2018 passed by the Supreme Court in Civil Appeal No. 3018 of 2008, reported in (2018) 2 SCC 352

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43. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (2) (v)
Effect of Amendment Act 1 of 2016 – Prior to Amendment, the words used in Section 3 (2)(v) of the SC/ST (Prevention of Atrocities) Act were "……on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" – By way of the amendment, above words have been substituted with the words "……..knowing that such person is a member of a Scheduled Caste or Scheduled Tribe" – Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community is sufficient to bring home the charge under Section 3 (2) (v) of the Act.

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 - धारा 3 (2) (अ)

सन् 2016 के अधिनियम क्रमांक 1 के संशोधन का प्रभाव - संशोधन के पूर्व अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम की धारा 3 (2)(v) में प्रयुक्त शब्द - ''..... इस आधार पर करेगा कि ऐसा व्यक्ति अनुसूचित जाति या अनुसूचित जनजाति का सदस्य है'' - संशोधन द्वारा उपरोक्त अभिव्यक्ति को- ''..... यह जानते हुये करेगा कि ऐसा व्यक्ति अनुसूचित जाति या अनुसूचित जनजाति का सदस्य है'' - से प्रतिस्थापित कर दिया गया है - इस प्रकार संशोधन के पश्चात् अभियुक्त का केवल यह ज्ञान की जिस व्यक्ति के विरूद्ध अपराध कारित किया जा रहा है वह अनुसूचित जाति/अनुसूचित जनजाति का है, अधिनियम की धारा 3 (2)(v) को आकर्षित करने के लिये पर्याप्त है।

Asharfi v. State of Uttar Pradesh
Judgment dated 08.12.2017 passed by the Supreme Court in Criminal Appeal No. 1182 of 2015, reported in (2018) 1 SCC 742

Relevant extracts from the judgment:

The gravamen of Section 3 (2)(v) of SC/ST (Prevention of Atrocities) Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging to

Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member".

Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe".

Section 3 (2)(v) of the SC/ST (Prevention of Atrocities) Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words ".....knowing that such person is a member of a Scheduled Caste or Scheduled Tribe".

Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3 (2)(v) of the SC/ST (Prevention of Atrocities) Act.

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***44. SPECIFIC RELIEF ACT, 1963 – Section 16**

Suit for specific performance – Question of title – Vendor/defendant denying right, title and interest in the suit property – Specific performance of contract can be ordered on proof of vendor having right to transfer the property.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 16

संविदा के विनिर्दिष्ट पालन हेतु वाद - स्वत्व का प्रश्न - विक्रेता/प्रतिवादी का वादग्रस्त सम्पत्ति में अधिकार, स्वत्व और हित से इंकार - विक्रेता को अन्तरण का अधिकार साबित होने पर संविदा का विनिर्दिष्ट पालन आदेशित किया जा सकता है।

Dharmabiri Rana v. Pramod Kumar Sharma (D) Thr. LRs. and anr.
Judgment dated 05.10.2017 passed by the Supreme Court in Civil Appeal No. 9906 of 2010, reported in AIR 2017 SC 5431

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***45. SPECIFIC RELIEF ACT, 1963 – Sections 16 (c) and 20**

Specific performance of agreement to sell – Reciprocal promises dependant on each other – Clause of payment of consideration after survey to be conducted by the seller/vendor – Failure of the seller/vendor to conduct survey – Request by purchaser/vendee to conduct survey shows his readiness and willingness – Argument of seller that performance is not equitable due to escalation of

prices – Held, seller/vendor cannot take advantage of his own wrong – Purchaser/Vendee entitled to specific performance of contract.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धाराएं 16 (ग) एवं 20

विक्रय के करार का विनिर्दिष्ट अनुपालन - एक दूसरे पर निर्भर व्यतिकारी वचन - विक्रेता द्वारा सर्वेक्षण कराये जाने के उपरांत प्रतिफल भुगतान का प्रावधान - विक्रेता की सर्वेक्षण करने में असफलता - क्रेता द्वारा सर्वेक्षण के लिए अनुरोध उसकी तैयारी एवं रजामंदी को दर्शित करता है - विक्रेता का तर्क कि कीमतों में वृद्धि के कारण अनुपालन साम्यिक नहीं - अभिनिर्धारित, विक्रेता स्वयं के दोष का लाभ नहीं ले सकता - क्रेता संविदा के विनिर्दिष्ट अनुपालन का अधिकारी है।

Ramathal v. Maruthathal and ors.
Judgment dated 22.08.2017 passed by the Supreme Court of India in Civil Appeal No. 10741 of 2017, reported in AIR 2018 SC 340

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46. SPECIFIC RELIEF ACT, 1963 – Section 21

Claim of compensation by purchaser *in lieu* of specific performance – Decree of specific performance becoming impossible due to subsequent acquisition of land *pendente lite* by the government, with no fault of purchaser – Held, purchaser is entitled for compensation from the amount of compensation received by the vendor consequent to acquisition of land.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 21

क्रेता द्वारा विनिर्दिष्ट अनुपालन के स्थान पर प्रतिकर का दावा - सरकार द्वारा वाद लंबित रहते हुए भूमि के पश्चातवर्ती अर्जन के कारण विनिर्दिष्ट अनुपालन की आज्ञप्ति असंभव हो गई, क्रेता का कोई दोष नहीं - अभिनिर्धारित, क्रेता, भूमि के अर्जन के परिणामस्वरूप विक्रेता द्वारा प्राप्त प्रतिकर की राशि में से प्रतिकर प्राप्त करने का हकदार है।

Urmila Devi and others v. Deity, Mandir Shree Chamunda Devi Through Temple Commissioner and others
Judgment dated 10.01.2018 passed by the Supreme Court in Civil Appeal No. 462 of 2018, reported in (2018) 2 SCC 284

Relevant extracts from the judgment:

This Court had occasion to consider Section 21 of the Specific Relief Act in context of a case which arose almost on similar facts in ***Jagdish Singh v. Nathu Singh, 1992 (1) SCC 647.*** In the above case also suit was filed for specific performance on the basis of a contract to sell dated July 3, 1973, the suit was dismissed by the trial court as well as First Appellate Court. However, the High Court in second appeal reversed the finding of the courts below and held that plaintiff was ready and willing to perform the contract and was entitled for decree.

In the above case also during the pendency of the second appeal before the High Court, proceedings for compulsory acquisition of the land was initiated and the land was acquired. Question arose as to whether plaintiff was entitled for the amount of compensation received in the land acquisition proceedings or was entitled only to the refund of the earnest money. The High Court in the above case has modified the decree of the specific performance of the contract with decree for a realisation of compensation payable in lieu of acquisition. In paragraph 13 of the judgment the directions of the High Court were extracted which is to the following effect:

> *"13. The High Court issued these consequential directions:*
> *"If the decree for specific performance of contract in question is found incapable of being executed due to acquisition of subject land, the decree shall stand suitably substituted by a decree for realisation of compensation payable in lieu thereof as may be or have been determined under the relevant Act and the plaintiff shall have a right to recover such compensation together with solatium and interest due thereon. The plaintiff shall have a right to recover it from the defendant if the defendant has already realised these amounts and in that event the defendant shall be further liable to pay interest at the rate of 12 per cent from the date of realisation by him to the date of payment on the entire amount realised in respect of the disputed land."*

In the above context, this Court in the case of ***Jagdish Singh*** (Supra) proceeded to examine the ambit and scope of Section 21 of the Specific Relief Act. This Court came to the opinion that when the contract has become impossible with no fault of the plaintiff, Section 21 enables the Court to award compensation in lieu of the specific performance. Paragraphs 24, 29 and 30 are extracted below:

> *"24. When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. That position is common to both Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act, 1963. But in Indian law where the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables award of compensation in lieu and substitution of specific performance.*
> *29. In the present case there is no difficulty in assessing the quantum of the compensation. That is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award.*

30. We accordingly confirm the finding of the High Court that respondent was willing and ready to perform the contract and that it was the appellant who was in breach. However, in substitution of the decree for specific performance, we make a decree for compensation, equivalent to the amount of the land acquisition compensation awarded for the suit lands together with solatium and accrued interest, less a sum of ` 1,50,000 (one lakh fifty thousand only) which, by a rough and ready estimate, we quantify as the amount to be paid to the appellant in respect of his services, time and money expended in pursuing the legal claims for compensation."

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Taking into consideration overall facts of the present case, we are of the view that ends of justice be served in awarding compensation of ` 10 lakh in favour of the plaintiff-appellants out of the compensation received consequent to the acquisition of the suit land. The rest of the compensation, if any, received towards land and shops in question has to be paid to the land owner that is defendant Nos. 1 to 5 (respondent Nos. 2 to 6 to this appeal) after deducting an amount of ` 10 lakh out of the said compensation. We further direct in event compensation has not yet been disbursed, the compensation be disbursed to the appellants (legal heirs of the plaintiff) and respondent Nos. 2 to 6 in the above manner and in the event the compensation has been received by defendant No.6 (respondent No. 1), respondent No.1 shall return the compensation to the extent of ` 10 lakh to the appellants and the rest of the amount to defendant Nos.1 to 5 (respondent Nos. 2 to 6). The judgment and decree of the High Court dated 02.11.2012 is modified to the above extent.

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47. STAMP ACT, 1899 – Sections 2 (12), 2 (14), 2 (16) and Article 35 of Schedule I
TRANSFER OF PROPERTY ACT – Section 105
The expression "Lease" under the Stamp Act has a wider meaning as compared to its original meaning contained in Section 105 of Transfer of Property Act – Award of contract to recover the tolls (fees) from squatters, vendors, kiosks etc. fall under Section 2 (16)(c) of the Stamp Act.

स्टाम्प अधिनियम,1899 - धाराएं 2(12), 2 (14), 2(16) एवं अनुसूची 1 का अनुच्छेद क्रमांक 35

संपत्ति अंतरण अधिनियम - धारा 105

स्टाम्प अधिनियम के अधीन ''पट्टा'' की परिभाषा संपत्ति अंतरण अधिनियम में दी गई मूल परिभाषा की तुलना में विस्तृत है - बैठकर या फेरी लगा कर सामान बेचने वालों,

गुमटी इत्यादि से शुल्क वसूलने की संविदा स्टाम्प अधिनियम की धारा 2 (16) (ग) के अन्तगत आती है।

Nasiruddin and anr. etc. v. State of Uttar Pradesh through Secretary

Judgment dated 06.12.2017 passed by the Supreme Court in Civil Appeal No. 3695 of 2009, reported in AIR 2018 SC 127

Relevant extracts from the judgment:

The expression "Lease" defined in Section 2 (16) clause (c) shows that it also includes therein "any instrument by which tolls of any description are let."

The expression "Lease" under the Stamp Act has a wider meaning as compared to its original meaning contained in Section 105 of Transfer of Property Act. If "Lease" under Section 2 (16) of the Stamp Act includes therein four specified catagory of documents set out in clauses (a) to (d), we do not find any such inclusion in Section 105 of the Transfer of Property Act. It is for this reason, we are of the view that the definition of "Lease" for the purpose of Stamp Act is extensive in nature. It is also clear from the use of the expression "and includes also" in Section 2 (16) of the Stamp Act.

The Corporation in these cases awarded the contract to the appellants to recover the tolls (fees) from squatters, vendors, kiosks etc. and for parking the vehicles in specified places. The contract was, therefore, for recovery of tolls and created rights and liabilities in favour of contracting parties qua each other. It cannot be disputed that the expression "tolls of any description" in clause (c) would include all kinds of levy, charges, fees etc. which the Corporation is entitled to charge under its Bye-laws. ***A fortiori***, the fees in question would also fall under Section 2 (16)(c) of the Stamp Act.

In our opinion, the contract in question also satisfied the definition of the expression "Instrument" as defined in Section 2 (14) of the Stamp Act because it created a right and liability and lastly, it also satisfied the definition of expression "executed" and "execution" as defined in Section 2 (12) of the Stamp Act because it contained the signature of contracting parties.

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48. SUCCESSION ACT, 1925 – Section 263
LIMITATION ACT, 1963 – Article 137

(i) Probate – Revocation of – Just cause – Mere non-issuance of summon at place where the property is situated not always amounts to 'just cause' for revocation of probate.

(ii) Allegation of fraud – The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out.

(iii) Revocation of probate – Limitation – Three years from the date of grant of probate.

उत्तराधिकार अधिनियम, 1925 - धारा 263

परिसीमा अधिनियम, 1963 - अनुच्छेद 137

(i) प्रोबेट - प्रतिसंहरण - न्यायसंगत हेतुक - केवल यह कि जहां संपत्ति स्थित है वहां समन जारी नहीं किया गया, सदैव प्रोबेट के प्रतिसंहरण के लिये 'न्यायसंगत हेतुक' नहीं होगा।

(ii) छल का अभिकथन - छल का अभिकथन करने वाले पक्षकार को हमेशा छल के पूर्ण विवरण दर्शित करना चाहिये और प्रकरण को केवल इस प्रकार दर्शित किये गये विवरणों के आधार पर अभिनिश्चित किया जा सकता है।

(iii) प्रोबेट का प्रतिसंहरण - परिसीमा - प्रोबेट प्रदान किये जाने की तिथि से तीन वर्ष तक है।

Mrs. Lynette Fernandes v. Mrs. Gertie Mathias since deceased by LRs. Judgment dated 08.11.2017 passed by the Supreme Court in Civil Appeal No. 2933 of 2010, reported in AIR 2017 SC 5453

Relevant extracts from the judgment:

Section 263 of the Indian Succession Act, makes it very clear as to what 'just cause' means and includes. The grant of probate may be revoked or annulled for 'just cause' only. The explanation to this Section further clarifies that 'just cause' shall be deemed to exist where the proceedings to obtain the grant were defective in substance.

In our opinion, a mere non-issuance of citation at Chikmagalur where the property is situated does not amount to rendering the proceedings defective in substance under the facts and circumstances of this case. It may be procedural irregularity in this case inasmuch as though the property existed at Chikmagalur, all the parties including the owner of the property resided at Mangalore. Mr. Richard P. Mathias left behind his Will at Mangalore. Mr. Richard P. Mathias, who bequeathed the property in favour of his wife, also lived in Mangalore till his death. The beneficiary under the Will, namely, Mrs. Gertie Mathias also lived in Mangalore along with her husband and children, including the appellant. It is also not in dispute that the appellant lived in Mangalore till the initiation of these proceedings. Even if it is assumed that the citation had been issued at Chikmagalur, the appellant would not have got any benefit out of the same. The appellant wanted the citation to be issued at Chikmagalur on the assumption that she would have had the knowledge of the Will and the proceedings. As mentioned supra, since the appellant was residing at Mangalore, she would not have been benefitted, had the citation been issued at Chikmagalur. Section

263 of the Indian Succession Act vests a judicial discretion in the Court to revoke or annul a grant for 'just cause'. Defective in substance must mean that defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. The very fact that the appellant kept quiet for 36 long years would clearly reveal that she was not interested in filing a caveat or in opposing grant of probate.

Moreover, as mentioned supra, Mrs. Gertie Mathias was the only beneficiary under the Will, and the Will remained unquestioned till the filing of the application seeking revocation for grant of probate. There is nothing on record to show that the grant of probate would not have been made, had the children of Mr. Richard P. Mathias been arrayed. Moreover, the other two children of Mrs. Mathias have not questioned the grant of probate. On the other hand, they are opposing the appellant throughout.

Coming to the second ground for just cause, re-allegation that the grant of probate was obtained by the appellant in fraudulent manner, as mentioned supra, the appellant has not come forward to adduce any evidence to prove the so called allegation of fraud. The signature of Mr. Richard P. Mathias on the Will has not been challenged. The Trial Court as well as the High Court has recorded the finding that the genuineness of the Will was not challenged by the appellant. Moreover, the particulars of fraud are neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient. Merely because the appellant has made bald allegations in the revocation application that the Will executed by the deceased is void because the same has been brought out by Mrs. Mathias and the same is constituted by fraud and undue influence, it will not absolve her from providing specifically the particulars of fraud and undue influence. Mere bald pleading will not help her in the absence of proof.

In the absence of any evidence on record showing prejudice because of non-issuance of citation at Chikmagalur, and in the absence of any evidence - much less cogent evidence - to prove fraud and undue influence, we conclude that the Trial Court as well as the High Court is justified in concluding that there is no just cause for revocation of grant of probate under Section 263 of the Indian Succession Act.

To crown all the aforementioned, the appellant's application for revocation of grant of probate was highly belated. The District Court as well as the High Court is correct in holding that the appellant's application for revocation of grant of probate is hopelessly barred by limitation. As there is no provision under the Limitation Act specifying the period of limitation for an application seeking

revocation of grant of probate, Article 137 of Limitation Act will apply to the case in hand.

One must keep in mind that the grant of probate by a Competent Court operates as a judgment in rem and once the probate to the Will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate.

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***49. URBAN LAND (CEILING AND REGULATION) ACT, 1976 – Sections 10 (3), 10 (5) and 10 (6)**
URBAN LAND (CEILING AND REGULATION) REPEAL ACT, 1999 – Sections 3 (2) and 4
Abatement of proceeding – Vesting of the land into Government on taking of possession – Taking of possession means taking of actual possession and not symbolic possession on paper – Service of notice on dead person is invalid service under Section 10 (5) – In absence of voluntary surrender of possession or peaceful dispossession or forceful dispossession, by operation of Repeal Act, 1999, proceeding abates.

नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम, 1976 - धाराएं 10 (3), 10 (5) एवं 10 (6)

नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 - धाराएं 3 (2) एवं 4

कार्यवाही का उपशमन - आधिपत्य लेने पर भूमि का सरकार में निहित होना -आधिपत्य लिये जाने से तात्पर्य वास्तविक आधिपत्य लिये जाने से है और कागज पर प्रतीकात्मक आधिपत्य से नहीं - मृत व्यक्ति पर सूचना का निर्वहन धारा 10 (5) के अंतर्गत अवैध है - आधिपत्य के स्वैच्छिक अभ्यर्पण या शांतिपूर्ण आधिपत्य विहीन किये जाने या बलपूर्वक आधिपत्य विहीन किये जाने के अभाव में, निरसन अधिनियम, 1999 के प्रभाव से, कार्यवाही उपषमित हो जाती है।

Gayatri Devi (Smt.) and ors.v. State of M.P. and anr.
Order dated 17.08.2016 passed by the High Court of Madhya Pradesh in Writ Petition No. 11515 of 2013, reported in ILR (2016) MP 3310

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50. WAKF ACT, 1995 – Sections 61 (3), 68 (2) and 68 (3)

(i) Whether application under Section 68 (2) and 68 (3) of the Wakf Act, 1995 filed before JMFC by successor mutwalli, without permission of Board under Section 61(3) of the Act, for an order directing delivery of charge by removed mutwalli, is maintainable? Held, Yes.

(ii) Duty of Magistrate under Section 68 (2) explained – Magistrate must specify the period for delivery of charge by removed mutwalli to successor mutwalli – On failure to deliver charge within the period so specified, Magistrate can convict removed mutwalli u/s 68.

वक्फ अधिनियम,1995 – धाराएं 61 (3), 68 (2) व 68 (3)

(i) क्या न्यायिक मजिस्ट्रेट प्रथम श्रेणी के समक्ष, धारा 61 (3) के तहत बोर्ड की अनुमति के बिना, धारा 68 (2) व 68 (3) वक्फ अधिनियम के तहत हटाए गए मुतवली को प्रभार देने संबंधी आदेश पारित करने हेतु उत्तराधिकारी मुतवली द्वारा प्रस्तुत आवेदन पोषणीय है ? अभिनिर्धारित, हां।

(ii) धारा 68 (2) के अंतर्गत मजिस्ट्रेट के कत्र्तव्य बताए गए - हटाए गए मुतवली द्वारा उत्तराधिकारी मुतवली को प्रभार देने की समय सीमा मजिस्ट्रेट को स्पष्ट निर्धारित करनी चाहिए - निर्धारित अवधि में प्रभार प्रदान करने में विफल रहने पर, मजिस्ट्रेट हटाए गए मुतवली को धारा 68 (3) के तहत दोषसिद्ध कर सकता है।

Mohd.Arif v. Mohd. Arif Raeen

Order dated 20.07.2016 passed by the High Court of M.P. in M.Cr.C No.13232 of 2015, reported in ILR (2017) MP 189

Relevant extracts from the order:

Looking to the various sections of the Chapter, it is clear that mutwalli owe certain duties to perform towards the Board. Simultaneously, the Wakfs Board are required to regulate the function of mutwalli, conferring the powers on the Board; i.e. alienation of wakf property is restricted and in case the illegal possession has been given, the action may be taken as per Section 52. The Board is also having powers to put restriction on purchase of property on behalf of Wakf, power of removal of encroachment from the wakf property and restrictions to grant lease of Wakf property as specified under Sections 53, 54, 55 and 56. In case the duty as specified on the mutwalli towards Board has not been performed and the Board is satisfied for not discharging the function as classified in Section 50, and Section 61(1) (a) to (h) or under sub-section (2) the action may be taken by the Board or by the authorized person, as per Section 61(3). Thus, it is apparent that the intention of legislature in Chapter-VI from Sections 44 to 60 is to classify certain duties of the mutwalli towards Board and on failure to discharge the said duties, the Board may take action for the penalty

as specified under Section 61. However, sub-section (3) of Section 61 is inserted with the said intent using the words that “the court may take cognizance of an offence punishable under the Act upon complaint made by the Board or an officer duly authorized by the Board in this behalf.” Thereafter, power to remove the mutwalli has been conferred to the Board as per Section 64. In case the Board is not exercising such powers, the State Government, in certain contingencies, may exercise those powers. Thus under Chapter VI, from Sections 44 to 61 deals the duties of mutwalli to discharge towards the Board, and the powers of the Board towards mutwalli, which includes to take steps for penalties against mutwalli. Thereafter Section 64 onwards deals the power of the Board to remove the mutwalli who is not performing his duties, and to appoint new mutwalli, and the procedure, how the charge and possession of the property of the Wakf can be taken. However, on removal and on appointment of mutwalli as per Section 67 certain duties have been classified on the mutwalli or the committee so removed as well on newly appointed. In case of failure to discharge those duties the newly appointed mutwalli conferred the right as per Section 68 (2) to apply to the Magistrate and in case of failure to carry out the order passed by the Magistrate First Class with respect to handing over of the charge, delivery of the possession of the record, accounts and all properties of the wakf including cash to the successor mutwalli within the time the Judicial Magistrate First Class for deciding it afresh considering the fact of stay granted by the Court. The Judicial Magistrate has again passed an order of conviction. In appeal, the conviction was maintained, but the sentence was reduced. However, in the said context the court was influenced of the fact that the action taken by the Judicial Magistrate convicting the appellant ignoring the order of stay was not justified. In addition to the said fact, the reference of Section 61(3) of the Act has been made without taking note of the scope of Section 61 (3) and 68 (2) and (3) of the Act. However, the said judgment is not a precedent in the context of Section 61(3) to maintain the application under Section 68 (2) and (3) of the Act. In view of the foregoing discussion and analysis of scope and object of Section 61(3) as well as Section 68 (2) and (3) and also the context the judgment of ***Said-ur-rehman*** (supra) is hereby explained. Thus, in my considered opinion the arguments as advanced by the counsel for the applicant is devoid of any merit, hence, repelled.

It is to be noted here that on filing an application under Section 68 (2) by the successive mutwalli for handing over of the charge and delivery of the possession of records, accounts and all properties of the wakf including cash, the Magistrate is duty bound to pass an order specifying the period for delivery of the said charge to the successive mutwalli and in case of failure to carry out the said direction of the Magistrate within the time so specified, he can exercise power under sub-section (3) of Section 68 of the Act convicting removed mutwalli and to sentence him for the period as specified therein and also of fine or both.

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PART - II A

GUIDELINES ON SECTION 156 (3) Cr.P.C.

The purpose of the procedural law is to aid and assist the Court in the dispensation of justice, a veritable handmaiden. Criminal Procedure, Code, 1973 is also a processual legislation which is aimed to administer the substantive law. A person committing an offence is not automatically stigmatised and punished. It is for this reason that the procedural criminal law has been designed to look after the process of the administration and enforcement of the substantive criminal law.

The scheme of the Code distinguishes cognizable and non-cognizable offences and this distinction also demarcates the powers of the police in respect of criminal investigations. Chapter XII of the Code [Sections 154 to 176] deal with "Information to the Police and Their Powers to Investigate". Section 154 (1) provides that every information relating to the commission of a cognizable offence, given to an officer in charge of a police station shall be reduced to writing and entered in a prescribed book. This information is usually mentioned in practice as the first information report.

Although, police cannot and should not refuse to register a cognizable offence, but practice has shown that this provision is often misused. Code provides several alternatives to the aggrieved person. One of such alternative remedy is to approach concerning Judicial Magistrate with an application under Section 156 (3) of the Cr.P.C.

According to Section 156 (3) Cr.P.C., any Magistrate empowered under Section 190 to take cognizance can direct an officer incharge of a police station to investigate any cognizable offence. Section 156 (3) Cr.P.C. gives a Magistrate very wide power not only to order investigation, but also to monitor proper investigation including power to issue directions for further investigation, before taking the cognizance of an offence.

However, looking to the misuse of this provision by litigants and fanciful exercise of jurisdiction by courts, the Supreme Court of India and the High Court of Madhya Pradesh have, over the years, issued several directions and guidelines to be followed while exercising powers under Section 156 (3) Cr.P.C.

This is an attempt to compile all the directions and guidelines issued in this regard.

PROCEDURE TO BE FOLLOWED ON APPLICATIONS UNDER SECTION 156 (3) OR ON COMPLAINTS UNDER SECTION 200 Cr.P.C.

In ***Sakiri Vasu v. State of Uttar Pradesh, AIR 2008 SC 907,*** the Supreme Court has held that –

> "If a person has a grievance that his FIR has not been registered by the police station; his first remedy is to approach the Superintendent of Police under Section 154 (3) Cr.P.C.

or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156 (3) Cr.P.C. Moreover, he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C."

In ***Devarapalli Lakshminarayana Reddy v. V Narayana Reddy, (1976) 3 SCC 252,*** the Supreme Court has issued following directions to the Magistrates while exercising powers under Sec.156 (3) CrPC –

1. It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence.
2. If on a reading of the complaint Magistrate finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself.
3. In the case of a complaint regarding the commission of a cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156 (3).

In ***Dilawar Singh v. State of Delhi, (2007) 12 SCC 641,*** the Apex Court went ahead and held that Magistrate may direct SHO to register an FIR and even if it is not so directed, should himself register an FIR and start investigation. The directions of the Court may be summarised as under –

1. The clear position, therefore, is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156 (3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.
2. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so.
3. Even if a Magistrate does not say in so many words while directing investigation under Section 156 (3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

The High Court of Madhya Pradesh also had an occasion to issue guidelines on exercise of jurisdiction under Section 156 (3) Cr.P.C. in ***Ramyash Tiwari v. State of Madhya Pradesh, 2014 ILR (MP) 1404***. The guidelines are as follows –

1. Whenever a Magistrate is called upon to pass orders under Section 156(3) of the Code, at the outset, the Magistrate should ensure that before coming to the Court, the complainant did approach the police officer in charge of the police station having jurisdiction over the area for recording the information available with him disclosing the commission of a cognizable offence by the person/persons arrayed as an accused in the complainant. It should also be examined what action was taken by the SHO, or even by the senior officer of the police, when approached by the complainant under Section 154 (3) of the Code.
2. The Magistrate should then form his own opinion whether the facts mentioned in the complaint disclose commission of cognizable offences by the accused persons arrayed in the complaint which can be tried in his jurisdiction. He should also satisfy himself about the need for investigation by the police in the matter. A preliminary enquiry as this is permissible even by an SHO and if no such enquiry has been done by the SHO, then it is all the more necessary for the Magistrate to consider all these factors. Upon a preliminary satisfaction, unless there are exceptional circumstances to be recorded in writing, a status report by the police is to be called for before passing final orders.
3. The Magistrate, when approached with a complaint under Section 200 of the Code, should invariably proceed under Chapter XV by taking cognizance of the complaint, recording evidence and then deciding the question of issuance of process to the accused. In that case also, the Magistrate is fully entitled to postpone the process if it is felt that there is a necessity to call for a police report under Section 202 of the Code.

The part of guideline mandating that when approached with a complaint under Section 200 of the Code, the Magistrate should invariably proceed under Chapter XV by taking cognizance of the complaint, is not in confirmity with the law laid down by the Supreme Court in ***Devarapalli (1976) 3 SCC 252***. (supra) Therefore, according to law of precedent, the law still holds the ground that a Magistrate may pass an order for investigation under Section 156 (3) even on a complaint.

4. Of course, it is open to the Magistrate to proceed under Chapter XII of the Code when an application under Section 156 (3) of the Code is also filed along with a complaint under Section 200 of the Code, if the Magistrate decides not to take cognizance of the complaint.
5. However, in that case, the Magistrate, before passing any order to proceed under Chapter XII, should not only satisfy himself about the pre-requisites as aforesaid, but, additionally, he should also be satisfied that it is necessary to direct police investigation in the matter for collection of

evidence which is neither in the possession of the complainant nor can be produced by the witnesses on being summoned by the Court at the instance of complainant, and the matter is such which calls for investigation by a State agency.

6. The Magistrate must pass an order giving cogent reasons as to why he intends to proceed under Chapter XII instead of Chapter XV of the Code.

APPLICATION OF MIND BY MAGISTRATE : REASONED ORDER

The requirement of reasoned order has been incorporated in the principles of natural justice. The Apex Court in ***Anil Kumar v. M.K. Aiyappa, (2013) 10 SCC 705,*** has held that –

> "The application of mind by the Magistrate should be reflected in the order. The mere 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) Cr.P.C. should be reflected in the order, though a detailed expression of his views is neither required nor warranted."

In ***Ramdev Food Products Private Limited v. State of Gujarat, AIR 2015 SC 1742,*** it has further been held that –

1. The direction under Section 156 (3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued.
2. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightway direct investigation, such a direction is issued.
3. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed."

POWER TO MONITOR PROPER INVESTIGATION

In ***Sakiri Vasu v. State of Uttar Pradesh, AIR 2008 SC 907,*** the question of Magisterial competence of monitoring proper investigation by police was raised. The law laid down by the Supreme Court may be deduced as under –

1. Even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156 (3), Cr.P.C.

2. If the Magistrate is satisfied that investigation is not proper, he can order a proper investigation and take other suitable steps and pass such order as he thinks necessary for ensuring a proper investigation.
3. The power in the Magistrate to order further investigation under Section 156 (3) is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173 (8). Hence the Magistrate can order re-opening of the investigation even after the police submits the final report.
4. Section 156 (3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police.

JURISDICTIONAL COMPETENCE UNDER SECTION 156 (3)

In ***CBI v. State of Rajasthan, (2001) 3 SCC 333,*** it has been held that–

1. The magisterial power under Section 156 (3) cannot be stretched beyond directing the officer in charge of a police station in his jurisdiction to conduct the investigation.
2. A Magistrate has no power to direct the Central Bureau of Investigation (CBI), to conduct investigation into any offence.

REQUIREMENT OF AFFIDAVIT

Looking to the rampant increase in frivolous and motivated litigations taking the route of Section 156 (3) Cr.P.C. to harass their adversaries, the Supreme Court in ***Priyanka Srivastava Vs. State Of U.P., (2015) 6 SCC 287,*** has expressed its concern and has held that efforts are to be made to scuttle and curb the same. It has further been directed that –

1. Section 156 (3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate.
2. In an appropriate case, the Magistrate may verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible.

PROCEDURE TO BE FOLLOWED ON PRODUCTION OF CLOSURE REPORT BY POLICE

In ***Abhinandan Jha & ors v. Dinesh Mishra, AIR 1968 SC 117,*** the Apex Court has held that –

> "A Magistrate has three options to deal with a closure report filed by the police u/s. 173 (2) Cr.P.C. These are -
>
> (1) to reject the closure report and proceed to take cognizance of the offences against the accused on the basis

of the evidence on record u/s. 190 (1)(b) Cr.P.C and issue process to the accused, or

(2) it could accept the closure report filed by the police and close the case after giving the Complainant an opportunity to protest against the closure report, or

(3) it could direct the police to conduct further investigation u/s. 156 (3) Cr.P.C.

But it is unlawful for the Magistrate to pass an order directing the police to file a charge sheet instead of a closure report."

This question is again considered by the High Court of M.P. in ***MCRC No. 9969/2016, Kuntal Baran Chaakraaborty v. Superintendent Of Police & Others, decided on 03/10/2017*** and following guidelines have been issued –

1. Where the police/investigating agency files a closure report or a charge sheet u/s. 173 (2) Cr.P.C after the completion of investigation, the Court may, if it is not satisfied by the investigation conducted by the police, direct further investigation u/s. 156 (3) Cr.P.C. Such an order may be passed only once by the Court. However, before passing such an order, the Magistrate shall study the final report diligently and shall be assisted in this endeavour by the Public Prosecutor, who bears upon his shoulders the responsibility of ensuring that the final report filed by the police is such that the same can effectively stand the scrutiny of a criminal trial. He must assist the Magistrate in the scrutiny of the charge sheet/closure report, if called upon to do so by the Magistrate. Thereafter, the order u/s. 156 (3) passed by the Court shall be precise giving clear cut directions to investigating agency to further investigate into specific areas, hitherto not done by the investigating agency.
2. Where the investigating agency in compliance of the order u/s. 156 (3) Cr.P.C files a closure report yet again or a charge sheet which is not to the satisfaction of the Court, it shall not indulge in the subliminal coercion of the investigating agency by passing an order u/s. 156 (3) Cr.P.C a second time and instead, where the offence is one for which no previous sanction of the state is required to take cognizance of the offence, proceed under Chapter XV of the Cr.P.C and issue notice to the defacto Complainant, take cognizance of the offence u/s. 190 (1)(a) Cr.P.C, record the statement of the Complainant and his witnesses and if need be, direct the police or anyone else to investigate u/s. 202 Cr.P.C and file a report and thereafter decide whether a case exists for the issuance of process against the accused u/s. 204 Cr.P.C or whether the case ought to be dismissed u/s. 203 Cr.P.C.
3. Where the offence is one which requires previous sanction of a sanctioning authority before cognizance can be taken, the Court may exercise the power of inquiry on its own u/s. 311 Cr.P.C without taking cognizance of the offence and, if necessary summon and examine as witnesses all such persons whose

testimony the Court feels would be essential to unravel the truth and also exercise powers u/s. 91 Cr.P.C and direct a person to produce a document or thing which the Court considers desirable for the purposes of the inquiry. Thereafter, if the Court is of the opinion that there lies before it a case fit for trial, it shall place the report of the police u/s. 173 (2) Cr.P.C as well as the material collected by it in the course of its inquiry u/s. 311 Cr.P.C before the sanctioning authority (through the investigating agency).

4. The sanctioning authority shall, as soon as possible, decide on the question of sanction, preferably within three months from the receipt of material forwarded by the Court through the police. If sanction is granted, the Court shall proceed to take cognizance of the offence u/s 190 (1)(b) Cr.P.C and issue process to the accused person. If sanction is declined, the case shall be closed by the Court.

WHEN TO INVOKE SECTION 156 (3)

The biggest question which is posed to a Magistrate with an application under Section 156 (3) is that in which cases he should exercise his powers to order investigation under Section 156 (3) and in which cases he should proceed with the complaint under Section 200 Cr.P.C.?

There is no straight jacket formula to answer these questions. It all depends upon the facts and circumstances of each case. However, guidance may be taken from the verdict of the Apex Court in ***Ramdev Food Products Private Limited v. State of Gujarat, AIR 2015 SC 1742,*** where it has been held that –

> "..... where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.
>
> Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed."

Therefore, following factors may be taken into account while dealing with an application under Section 156 (3) Cr.P.C.:-

1. Application discloses commission of a cognizable offence;
2. the information of such offence is highly credible;
3. there are ***prima facie*** sufficient grounds to proceed;
4. investigation by police is necessary for collection of evidence;
5. court cannot collect sufficient evidence itself on enquiry under Chapter XV of Cr.P.C.;
6. requirement of search and seizure by police; etc.

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PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE PAYMENT AND SETTLEMENT SYSTEMS ACT, 2007
(Act No. 51 of 2007)

[20th December, 2007]

An Act to provide for the regulation and supervision of payment systems in India and to designate the Reserve Bank of India as the authority for that purpose and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Fifty-eighth Year of the Republic of India as follows:—

CHAPTER I
PRELIMINARY

1. Short title, extent and commencement.— (1) This Act may be called the **Payment and Settlement Systems Act, 2007**.

(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 and different dates may be appointed for different provisions of this Act, and any reference to the commencement in any such provision of this Act shall be construed as a reference to the commencement of that provision.

2. Definitions.— (1) In this Act, unless the context otherwise requires,—

(a) "bank" means,—

(i) a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);

(ii) a post office savings bank;

(iii) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);

(iv) a co-operative bank as defined in clause (cci) of section 5, as inserted by section 56 of the Banking Regulation Act, 1949 (10 of 1949); and

(v) such other bank as the Reserve Bank may, by notification, specify for the purposes of this Act;

(b) "derivative" means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities (also called

"underlying"), or any other underlying or a combination of more than one of them and includes interest rate swaps, forward rate agreements, foreign currency swaps, foreign currency rupee swaps, foreign currency options, foreign currency rupee options or any other instrument, as may be specified by the Reserve Bank from time to time;

(c) "electronic funds transfer" means any transfer of funds which is initiated by a person by way of instruction, authorisation or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawal of funds, transfers initiated by telephone, internet and card payment;

(d) "gross settlement system" means a payment system in which each settlement of funds or securities occurs on the basis of separate or individual instructions;

(da) "issuer" means a person who issues a legal entity identifier or such other unique identification (by whatever name called), as may be specified by the Reserve Bank from time to time;

(db"legal entity identifier" means a unique identity code assigned to a person by an issuer for the purpose of identifying that person in such derivatives or financial transactions, as may be specified by the Reserve Bank from time to time;]

(e) "netting" means the determination by the system provider of the amount of money or securities, due or payable or deliverable, as a result of setting off or adjusting, the payment obligations or delivery obligations among the system participants, including the claims and obligations arising out of the termination by the system provider, on the insolvency or dissolution or winding up of any system participant or such other circumstances as the system provider may specify in its rules or regulations or bye-laws (by whatever name called), of the transactions admitted for settlement at a future date so that only a net claim be demanded or a net obligation be owned;

(f) "notification" means a notification published in the Official Gazette;

(g) "payment instruction" means any instrument, authorisation or order in any form, including electronic means, to effect a payment,—

(i) by a person to a system participant; or

(ii) by a system participant to another system participant;

(h) "payment obligation" means an indebtedness that is owned by one system participant to another system participant as a result of clearing or settlement of one or more payment instructions relating to funds, securities or foreign exchange or derivatives or other transactions;

(i) "payment system" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange.

Explanation.— For the purposes of this clause, "payment system" includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;

(j) "prescribed" means prescribed by regulations made under this Act;

(k) "regulation" means a regulation made under this Act;

(l) "Reserve Bank" means the Reserve Bank of India, constituted under the Reserve Bank of India Act, 1934 (2 of 1934);

(m) "securities" means the Government securities as defined in the Public Debt Act, 1944 (18 of 1944) or such other securities as may be notified by the Central Government from time to time under that Act;

(n) "settlement" means settlement of payment instructions and includes the settlement of securities, foreign exchange or derivatives or other transactions which involve payment obligations;

(o) "systemic risk" means the risk arising from—

(i) the inability of a system participant to meet his payment obligations under the payment system as and when they become due; or

(ii) any disruption in the system, which may cause other participants to fail to meet their obligations when due and is likely to have an impact on the stability of the system:

Provided that if any doubt or difference arises as to whether a particular risk is likely to have an impact on the stability of the system, the decision of the Reserve Bank shall be final;

(p) "system participant" means a bank or any other person participating in a payment system and includes the system provider;

(q) "system provider" means a person who operates an authorised payment system;

(r) "trade repository" means a person who is engaged in the business of collecting, collating, storing, maintaining, processing or disseminating electronic records or data relating to such derivatives or financial transactions, as may be specified by the Reserve Bank from time to time.

(2) Words and expressions used, but not defined in this Act and defined in the Reserve Bank of India Act, 1934 (2 of 1934) or the Banking Regulation Act, 1949 (10 of 1949), shall have the meanings respectively assigned to them in those Acts.

CHAPTER II

DESIGNATED AUTHORITY AND ITS COMMITTEE

3. Designated authority and its Committee.— (1) The Reserve Bank shall be the designated authority for the regulation and supervision of payment systems under this Act.

(2) The Reserve Bank may, for the purposes of exercising the powers and performing the functions and discharging the duties conferred on it by or under this Act, by regulation, constitute a committee of its Central Board to be known as the Board for Regulation and Supervision of Payment and Settlement Systems.

(3) The Board constituted under sub-section (2) shall consist of the following members, namely:—

(a) Governor, Reserve Bank, who shall be the Chairperson of the Board;

(b) Deputy Governors, Reserve Bank, out of whom the Deputy Governor who is in-charge of the Payment and Settlement Systems, shall be the Vice-Chairperson of the Board;

(c) Not exceeding three Directors from the Central Board of the Reserve Bank of India to be nominated by the Governor, Reserve Bank.

(4) The powers and functions of the Board constituted under sub-section (2), the time and venue of its meetings, the procedure to be followed in such meetings, (including the quorum at such meetings) and other matters incidental thereto shall be such as may be prescribed.

(5) The Board for Regulation and Supervision of Payment and Settlement Systems constituted under clause (i) of sub-section (2) of section 58 of the Reserve Bank of India Act, 1934 (2 of 1934) shall be deemed to be the Board constituted under this section and continue accordingly until the Board is reconstituted in accordance with the provisions of this Act and shall be governed by the rules and regulations made under the Reserve Bank of India Act, 1934 in so far as they are not inconsistent with the provisions of this Act.

CHAPTER III

AUTHORISATION OF PAYMENT SYSTEMS

4. Payment system not to operate without authorisation.— (1) No person, other than the Reserve Bank, shall commence or operate a payment system except under and in accordance with an authorisation issued by the Reserve Bank under the provisions of this Act:

Provided that nothing contained in this section shall apply to—

(a) the continued operation of an existing payment system on commencement of this Act for a period not exceeding six months from such commencement, unless within such period, the operator of such payment system obtains an authorisation under this Act or the application for authorisation made under section 7 of this Act is refused by the Reserve Bank;

(b) any person acting as the duly appointed agent of another person to whom the payment is due;

(c) a company accepting payments either from its holding company or any of its subsidiary companies or from any other company which is also a subsidiary of the same holding company;

(d) any other person whom the Reserve Bank may, after considering the interests of monetary policy or efficient operation of payment systems, the size of any payment system or for any other reason, by notification, exempt from the provisions of this section.

(2) The Reserve Bank may, under sub-section (1) of this section, authorise a company or corporation to operate or regulate the existing clearing houses or new clearing houses of banks in order to have a common retail clearing house system for the banks throughout the country:

Provided, however, that not less than fifty-one per cent of the equity of such company or corporation shall be held by public sector banks.

***Explanation.*—** For the purposes of this clause, "public sector banks" shall include a "corresponding new bank", "State Bank of India" and "subsidiary bank" as defined in section 5 of the Banking Regulation Act, 1949 (10 of 1949).

5. Application for authorisation.— (1) Any person desirous of commencing or carrying on a payment system may apply to the Reserve Bank for an authorisation under this Act.

(2) An application under sub-section (1) shall be made in such form and in such manner and shall be accompanied by such fees as may be prescribed.

6. Inquiry by the Reserve Bank.— After the receipt of an application under section 5, and before an authorisation is issued under this Act, the Reserve Bank may make such inquiries as it may consider necessary for the purpose of satisfying itself about the genuineness of the particulars furnished by the applicant, his capacity to operate the payment system, the credentials of the participants or for any other reason and when such an inquiry is conducted by any person authorised by it in this behalf, it may require a report from such person in respect of the inquiry.

7. Issue or refusal of authorisation.— (1) The Reserve Bank may, if satisfied, after any inquiry under section 6 or otherwise, that the application is complete in all respects and that it conforms to the provisions of this Act and the regulations issue an authorisation for operating the payment system under this Act having regard to the following considerations, namely:—

(i) the need for the proposed payment system or the services proposed to be undertaken by it;

(ii) the technical standards or the design of the proposed payment system;

(iii) the terms and conditions of operation of the proposed payment system including any security procedure;

(iv) the manner in which transfer of funds may be effected within the payment system;

(v) the procedure for netting of payment instructions effecting the payment obligations under the payment system;

(vi) the financial status, experience of management and integrity of the applicant;

(vii) interests of consumers, including the terms and conditions governing their relationship with payment system providers;

(viii) monetary and credit policies; and

(ix) such other factors as may be considered relevant by the Reserve Bank.

(2) An authorisation issued under sub-section (1) shall be in such form as may be prescribed and shall—

(a) state the date on which it takes effect;

(b) state the conditions subject to which the authorisation shall be in force;

(c) indicate the payment of fees, if any, to be paid for the authorisation to be in force;

(d) if it considers necessary, require the applicant to furnish such security for the proper conduct of the payment system under the provisions of this Act;

(e) continue to be in force till the authorisation is revoked.

(3) Where the Reserve Bank considers that the application for authorisation should be refused, it shall give the applicant a written notice to that effect stating the reasons for the refusal:

Provided that no such application shall be refused unless the applicant is given a reasonable opportunity of being heard.

(4) Every application for authorisation shall be processed by the Reserve Bank as soon as possible and an endeavour shall be made to dispose of such application within six months from the date of filing of such application.

8. Revocation of authorisation.— (1) If a system provider,—

(i) contravenes any provisions of this Act, or

(ii) does not comply with the regulations, or

(iii) fails to comply with the orders or directions issued by the designated authority, or

(iv) operates the payment system contrary to the conditions subject to which the authorisation was issued, the Reserve Bank may, by order, revoke the authorisation given to such system provider under this Act:

Provided that no order of revocation under sub-section (1) shall be made—

(i) except after giving the system provider a reasonable opportunity of being heard; and

(ii) without prejudice to the direction of the Reserve Bank to the system provider that the operation of the payment system shall not be carried out till the order of revocation is issued.

(2) Nothing contained in sub-section (1) shall apply to a case where the Reserve Bank considers it necessary to revoke the authorisation given to a payment system in the interest of the monetary policy of the country or for any other reasons to be specified by it in the order.

(3) The order of revocation issued under sub-section (1) shall include necessary provisions to protect and safeguard the interests of persons affected by such order of revocation.

(4) Where a system provider becomes insolvent or dissolved or wound up, such system provider shall inform that fact to the Reserve Bank and thereupon the Reserve Bank shall take such steps as deemed necessary to revoke the authorisation issued to such system provider to operate the payment system.

9. Appeal to the Central Government.— (1) Any applicant for an authorisation whose application for the operation of the payment system is refused under sub-section (3) of section 7 or a system provider who is aggrieved by an order of revocation under section 8 may, within thirty days from the date on which the order is communicated to him, appeal to the Central Government.

(2) The Central Government shall endeavour to dispose of an appeal under sub-section (1) within a period of three months.

(3) The decision of the Central Government on the appeal under sub-section (1) shall be final.

CHAPTER IV

REGULATION AND SUPERVISION BY THE RESERVE BANK

10. Power to determine standards.— (1) The Reserve Bank may, from time to time, prescribe—

(a) the format of payment instructions and the size and shape of such instructions;

(b) the timings to be maintained by payment systems;

(c) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks and other system participants;

(d) such other standards to be complied with the payment systems generally;

(e) the criteria for membership of payment systems including continuation, termination and rejection of membership;

(f) the conditions subject to which the system participants shall participate in such fund transfers and the rights and obligations of the system participants in such funds.

(2) Without prejudice to the provisions of sub-section (1), the Reserve Bank may, from time to time, issue such guidelines, as it may consider necessary for the proper and efficient management of the payment systems generally or with reference to any particular payment system.

11. Notice of change in the payment system.— (1) No system provider shall cause any change in the system which would affect the structure or the operation of the payment system without—

(a) the prior approval of the Reserve Bank; and

(b) giving notice of not less than thirty days to the system participants after the approval of the Reserve Bank:

Provided that in the interest of monetary policy of the country or in public interest, the Reserve Bank may permit the system provider to make any changes in a payment system without giving notice to the system participants under clause (b) or requiring the system provider to give notice for a period longer than thirty days.

(2) Where the Reserve Bank has any objection, to the proposed change for any reason, it shall communicate such objection to the systems provider within two weeks of receipt of the intimation of the proposed changes from the system provider.

(3) The system provider shall, within a period of two weeks of the receipt of the objections from the Reserve Bank forward his comments to the Reserve Bank and the proposed changes may be effected only after the receipt of approval from the Reserve Bank.

12. Power to call for returns, documents or other information.— The Reserve Bank may call for from any system provider such returns or documents as it may require or other information in regard to the operation of his payment system at such intervals, in such form and in such manner, as the Reserve Bank may require from time to time or as may be prescribed and such order shall be complied with.

13. Access to information.—The Reserve Bank shall have right to access any information relating to the operation of any payment system and system provider and all the system participants shall provide access to such information to the Reserve Bank.

14. Power to enter and inspect.— Any officer of the Reserve Bank duly authorised by it in writing in this behalf, may for ensuring compliance with the provisions of this Act or any regulations, enter any premises where a payment system is being operated and may inspect any equipment, including any computer system or other documents situated at such premises and call upon any employee of such system provider or participant thereof or any other person working in such premises to furnish such information or documents as may be required by such officer.

15. Information, etc., to be confidential.— (1) Subject to the provisions of sub-section (2), any document or information obtained by the Reserve Bank under sections 12 to 14 (both inclusive) shall be kept confidential.

(2) Notwithstanding anything contained in sub-section (1), the Reserve Bank may disclose any document or information obtained by it under sections 12 to 14 (both inclusive) to any person to whom the disclosure of such document or information is considered necessary for protecting the integrity, effectiveness or security of the payment system, or in the interest of banking or monetary policy or the operation of the payment systems generally or in the public interest.

16. Power to carry out audit and inspection.—The Reserve Bank may, for the purpose of carrying out its functions under this Act, conduct or get conducted audits and inspections of a payment system or participants thereof and it shall be the duty of the system provider and the system participants to assist the Reserve Bank to carry out such audit or inspection, as the case may be.

17. Power to issue directions.— Where the Reserve Bank is of the opinion that,—

(a) a payment system or a system participant is engaging in, or is about to engage in, any act, omission or course of conduct that results, or is likely to result, in systemic risk being inadequately controlled; or

(b) any action under clause (a) is likely to affect the payment system, the monetary policy or the credit policy of the country, the Reserve Bank may issue directions in writing to such payment system or system participant requiring it, within such time as the Reserve Bank may specify —

(i) to cease and desist from engaging in the act, omission or course of conduct or to ensure the system participants to cease and desist from the act, omission or course of conduct; or

(ii) to perform such acts as may be necessary, in the opinion of the Reserve Bank, to remedy the situation.

18. Power of Reserve Bank to give directions generally.— Without prejudice to the provisions of the foregoing, the Reserve Bank may, if it is satisfied that for the purpose of enabling it to regulate the payment systems or in the interest of management or operation of any of the payment systems or in public interest, it is necessary so to do, lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions in writing as it may consider necessary to system providers or the system participants or any other person either generally or to any such agency and in particular, pertaining to the conduct of business relating to payment systems.

19. Directions of Reserve Bank to be complied with.— Every person to whom a direction has been issued by the Reserve Bank under this Act shall comply with such direction without any delay and a report of compliance shall be furnished to the Reserve Bank within the time allowed by it.

CHAPTER V
RIGHTS AND DUTIES OF A SYSTEM PROVIDER

20. System provider to act in accordance with the Act, regulations, etc.— Every system provider shall operate the payment system in accordance with the provisions of this Act, the regulations, the contract governing the relationship among the system participants, the rules and regulations which deal with the operation of the payment system and the conditions subject to which the authorisation is issued, and the directions given by the Reserve Bank from time to time.

21. Duties of a system provider.— (1) Every system provider shall disclose to the existing or potential system participants, the terms and conditions including the charges and the limitations of liability under the payment system, supply them with copies of the rules and regulations governing the operation of the payment system, netting arrangements and other relevant documents.

(2) It shall be the duty of every system provider to maintain the standards determined under this Act.

22. Duty to keep documents in the payment system confidential.— (1) A system provider shall not disclose to any other person the existence or contents of any document or part thereof or other information given to him by a system participant, except where such disclosure is required under the provisions of this Act or the disclosure is made with the express or implied consent of the system participant concerned or where such disclosure is in obedience to the orders passed by a court of competent jurisdiction or a statutory authority in exercise of the powers conferred by a statute.

(2) The provisions of the Bankers' Book Evidence Act, 1891(18 of 1891) shall apply in relation to the information or documents or other books in whatever form maintained by the system provider.

23. Settlement and netting.— (1) The payment obligations and settlement instructions among the system participants shall be determined in accordance with the gross or netting procedure, as the case may be, approved by the Reserve Bank while issuing authorisation to a payment system under section 7, or, such gross or netting procedure as may be approved by it under any other provisions of this Act.

(2) Where the rules providing for the operation of a payment system indicates a procedure for the distribution of losses between the system participants and the payment system, such procedure shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

(3) A settlement effected under such procedure shall be final and irrevocable.

(4) Where a system participant is declared by a court of competent jurisdiction as insolvent or is dissolved or wound up, then notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or the Banking Regulation Act, 1949 (10 of 1949) or any other law for the time being in force, the order of adjudication or dissolution or winding up, as the case may be, shall not affect any settlement that has become final and irrevocable and the right of the system

provider to appropriate any collaterals contributed by the system participant or bye-laws of such system provider.

(5) Where an order referred to in sub-section (4) is made with respect to a central counter party, then, notwithstanding such order or anything contained in the Banking Regulation Act, 1949 (10 of 1949) or the Companies Act,1956 (1 of 1956) or the Companies Act, 2013 (18 of 2015) or any other law for the time being in force, the payment obligations and settlement instructions between the central counter party and the system participants including those arising from transactions admitted for settlement at a future date, shall be determined forthwith by such central counter party in accordance with the gross or netting procedure, as the case may be, approved by the Reserve Bank, while issuing authorisation or under any other provisions of this Act, and such determination shall be final and irrevocable.

(6) Notwithstanding anything contained in the Banking Regulation Act, 1949 (10 of 1949) or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or any other law for the time being in force, the liquidator or receiver or assignee (by whatever name called) of the central counter party, whether appointed as provisional or otherwise, shall—

(a) not re-open any determination that has become final and irrevocable;

(b) after appropriating in accordance with the rules, regulations or bye-laws of the central counter party, the collaterals provided by the system participants towards their settlement or other obligations, return the collaterals held in excess to the system participants concerned.

Explanation 1.— For the removal of doubts, it is hereby declared that the settlement, whether gross or net, referred to in this section is final and irrevocable as soon as the money, securities, foreign exchange or derivatives or other transactions payable as a result of such settlement is determined, whether or not such money, securities or foreign exchange or derivatives or other transactions is actually paid.

Explanation 2.— For the purposes of this section, the expression "central counter party" means a system provider who by way of novation interposes between system participants in the transactions admitted for settlement, thereby becoming the buyer to every seller and the seller to every buyer, for the purpose of effecting settlement of their transactions.

23A. Protection of funds collected from customers.— (1) The Reserve Bank may, in public interest or in the interest of the customers of designated payment systems or to prevent the affairs of such designated payment

system from being conducted in a manner prejudicial to the interests of its customers, require system provider of such payment system to —

(a) deposit and keep deposited in a separate account or accounts held in a scheduled commercial bank; or

(b) maintain liquid assets in such manner and form as it may specify from time to time, of an amount equal to such percentage of the amounts collected by the system provider of designated payment system from its customers and remaining outstanding, as may be specified by the Reserve Bank from time to time:

Provided that the Reserve Bank may specify different percentages and the manner and forms for different categories of designated payment systems.

(2) The balance held in the account or accounts, referred to in sub-section (1), shall not be utilised for any purpose other than for discharging the liabilities arising on account of the usage of the payment service by the customers or for repaying to the customers or for such other purpose as may be specified by the Reserve Bank from time to time.

(3) Notwithstanding anything contained in the Banking Regulation Act, 1949 (10 of 1949), or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or any other law for the time being in force, the persons entitled to receive payment under sub-section (2) shall have a first and paramount charge on the balance held in that account and the liquidator or receiver or assignee (by whatever name called) of the system provider of the designated payment system or the scheduled commercial bank concerned, whether appointed as provisional or otherwise, shall not utilise the said balances for any other purposes until all such persons are paid in full or adequate provision is made therefor.

Explanation.— For the purposes of this section, the expressions—

(a) "designated payment system" shall mean a payment system or a class of payment system, as may be specified by the Reserve Bank from time to time, engaged in collection of funds from their customers for rendering payment service;

(b) "scheduled commercial bank" shall mean a "banking company", "corresponding new bank", "State Bank of India" and "subsidiary bank" as defined in section 5 of the Banking Regulation Act, 1949 (10 of 1949) and included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

CHAPTER VI
SETTLEMENT OF DISPUTES

24. Settlement of disputes.— (1) The system provider shall make provision in its rules or regulations for creation of panel consisting of not less than three system participants other than the system participants who are parties to the dispute to decide the disputes between system participants in respect of any matter connected with the operation of the payment system.

(2) Where any dispute in respect of any matter connected with the operation of the payment system arises between two or more system participants, the system provider shall refer the dispute to the panel referred to in sub-section (1).

(3) Where any dispute arises between any system participant and the system provider or between system providers or where any of the system participants is not satisfied with the decision of the panel referred to in sub-section (1), the dispute shall be referred to the Reserve Bank.

(4) The dispute referred to the Reserve Bank for adjudication under sub-section (3) shall be disposed of by an officer of the Reserve Bank generally or specially authorised in this behalf and the decision of the Reserve Bank shall be final and binding.

(5) Where a dispute arises between the Reserve Bank, while acting in its capacity as system provider or as system participant, and another system provider or system participant, the matter shall be referred to the Central Government which may authorise an officer not below the rank of Joint Secretary for settlement of the dispute and the decision of such officer shall be final.

25. Dishonour of electronic funds transfer for insufficiency, etc., of funds in the account.— (1) Where an electronic funds transfer initiated by a person from an account maintained by him cannot be executed on the ground that the amount of money standing to the credit of that account is insufficient to honour the transfer instruction or that it exceeds the amount arranged to be paid from that account by an agreement made with a bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the electronic funds transfer, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the electronic funds transfer was initiated for payment of any amount of money to another person for the discharge, in whole or in part, of any debt or other liability;

(b) the electronic funds transfer was initiated in accordance with the relevant procedural guidelines issued by the system provider;

(c) the beneficiary makes a demand for the payment of the said amount of money by giving a notice in writing to the person initiating the electronic funds transfer within thirty days of the receipt of information by him from the bank concerned regarding the dishonour of the electronic funds transfer; and

(d) the person initiating the electronic funds transfer fails to make the payment of the said money to the beneficiary within fifteen days of the receipt of the said notice.

(2) It shall be presumed, unless the contrary is proved, that the electronic funds transfer was initiated for the discharge, in whole or in part, of any debt or other liability.

(3) It shall not be a defence in a prosecution for an offence under sub-section (1) that the person, who initiated the electronic funds transfer through an instruction, authorisation, order or agreement, did not have reason to believe at the time of such instruction, authorisation, order or agreement that the credit of his account is insufficient to effect the electronic funds transfer.

(4) The Court shall, in respect of every proceeding under this section, on production of a communication from the bank denoting the dishonour of electronic funds transfer, presume the fact of dishonour of such electronic funds transfer, unless and until such fact is disproved.

(5) The provisions of Chapter XVII of the Negotiable Instruments Act, 1881 (26 of 1881) shall apply to the dishonour of electronic funds transfer to the extent the circumstances admit.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability, as the case may be.

CHAPTER VII
OFFENCES AND PENALTIES

26. Penalties.— (1) Where a person contravenes the provisions of section 4 or fails to comply with the terms and conditions subject to which the authorisation has been issued under section 7, he shall be punishable with imprisonment for a term which shall not be less than one month but

which may extend to ten years or with fine which may extend to one crore rupees or with both and with a further fine which may extend to one lakh rupees for every day, after the first during which the contravention or failure to comply continues.

(2) Whoever in any application for authorisation or in any return or other document or on any information required to be furnished by or under, or for the purpose of, any provision of this Act, wilfully makes a statement which is false in any material particular, knowing it to be false or wilfully omits to make a material statement, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which shall not be less than ten lakh rupees and which may extend to fifty lakh rupees.

(3) If any person fails to produce any statement, information, returns or other documents, or to furnish any statement, information, returns or other documents, which under section 12 or under section 13, it is his duty to furnish or to answer any question relating to the operation of a payment system which is required by an officer making inspection under section 14, he shall be punishable with fine which may extend to ten lakh rupees in respect of each offence and if he persists in such refusal, to a further fine which may extend to twenty-five thousand rupees for every day for which the offence continues.

(4) If any person discloses any information, the disclosure of which is prohibited under section 22, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five lakh rupees or an amount equal to twice the amount of the damages incurred by the act of such disclosure, whichever is higher or with both.

(5) Where a direction issued under this Act is not complied with within the period stipulated by the Reserve Bank or where no such period is stipulated, within a reasonable time or where the penalty imposed by the Reserve Bank under section 30 is not paid within a period of thirty days from the date of the order, the system provider or the system participant which has failed to comply with the direction or to pay the penalty shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine which may extend to one crore rupees or with both and where the failure to comply with the direction continues, with further fine which may extend to one lakh rupees for every day, after the first during which the contravention continues.

(6) If any provision of this Act is contravened, or if any default is made in complying with any other requirement of this Act, or of any regulation, order or direction made or given or condition imposed thereunder and in respect of which no penalty has been specified, then, the person guilty of such contravention or default, as the case may be, shall be punishable with fine which may extend to ten lakh rupees and where a contravention or default is a continuing one, with a further fine which may extend to twenty-five thousand rupees for every day, after the first during which the contravention or default continues.

27. Offences by companies.— (1) Where a person committing a contravention of any of the provisions of this Act or any regulation, direction or order made thereunder is a company, every person who, at the time of the contravention, was in-charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any regulation, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

***Explanation.*—** For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

28. Cognizance of offences.— (1) No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by an officer of the Reserve Bank generally or specially authorised by it in writing in this behalf, and no court, lower than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any such offence:

Provided that the Court may take cognizance of an offence punishable under section 25 upon a complaint in writing made by the person aggrieved by the dishonour of the electronic funds transfer.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a Magistrate may dispense with the personal attendance of the officer of the Reserve Bank filing the complaint, but the Magistrate may, in his discretion, at any stage of the proceedings, direct the personal attendance of the complainant.

29. Application of fine.— A court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in, or towards payment of, the costs of the proceedings.

30. Power of Reserve Bank to impose fines.— (1) Notwithstanding anything contained in section 26, if a contravention or default of the nature referred to in sub-section (2) or sub-section (6) of section 26, as the case may be, the Reserve Bank may impose on the person contravening or committing default a penalty not exceeding five lakh rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where such contravention or default is a continuing one, a further penalty which may extend to twenty-five thousand rupees for every day after the first during which the contravention or default continues.

(2) For the purpose of imposing penalty under sub-section (1), the Reserve Bank shall serve a notice on the defaulter requiring him to show cause why the amount specified in the notice should not be imposed as a penalty and a reasonable opportunity of being heard shall also be given to such defaulter.

(3) Any penalty imposed by the Reserve Bank under this section shall be payable within a period of thirty days from the date on which notice issued by the Reserve Bank demanding payment of the sum is served on the defaulter and, in the event of failure of the person to pay the sum within such period, may be recovered on a direction made by the principal civil court having jurisdiction in the area where the registered office of the defaulter company or the official business of the person is situated:

Provided that no such direction shall be made, except on an application made by an officer of the Reserve Bank authorised by it in this behalf.

(4) The Reserve Bank may recover the amount of penalty by debiting the current account, if any, of the defaulter or by liquidating the securities held to the credit of the defaulter or in accordance with the provisions of this Act.

(5) The court which makes a direction under sub-section (3) shall issue a certificate specifying the sum payable by the defaulter and every such certificate shall be enforceable in the same manner as it were a decree made by the court in a civil suit.

(6) Where any complaint has been filed against any person in any court in respect of the contravention or default of the nature referred to in sub-section (2), or, as the case may be, sub-section (4) of section 26, then, no proceeding for the imposition of any penalty on the person shall be taken under this section.

31. Power to compound offences.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act for any contravention, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, on receipt of an application from the person committing such contravention either before or after the institution of any proceeding, be compounded by an officer of the Reserve Bank duly authorised by it in this behalf.

(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

CHAPTER VIII
MISCELLANEOUS

32. Act to have overriding effect.— The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

33. Mode of recovery of penalty.— (1) The penalty imposed on the defaulter by the Reserve Bank under section 30 may be recovered by issuing a notice to any person from whom any amount is due to the defaulter, by requiring such person to deduct from the amount payable by him to the defaulter, the amount payable to the Reserve Bank by way of penalty and pay to the Reserve Bank.

(2) Save as otherwise provided in this section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where such notice is issued to a post office, bank or an insurer, it shall not be necessary for any passbook, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(3) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(4) Where a person to whom the notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the defaulter or that he does not hold any money for or on account of the defaulter, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Reserve Bank to the extent of his own liability to the defaulter on the date of the notice, or to the extent of the penalty imposed on the defaulter by the Reserve Bank, whichever is less.

(5) The Reserve Bank may at any time or from time to time, amend or revoke any notice issued under this section or extend the time for making the payment in pursuance of such notice.

(6) The Reserve Bank shall grant a receipt for any amount paid to it in compliance with a notice issued under this section and the person so paying shall be fully discharged from his liability to the defaulter to the extent of the amount so paid.

(7) Any person discharging any liability to the defaulter after the receipt of a notice under this section shall be personally liable to the Reserve Bank to the extent of his own liability to the defaulter so discharged or to the extent of the penalty imposed on the defaulter by the Reserve Bank, whichever is less.

(8) If the person to whom the notice under this section is sent fails to make payment in pursuance thereof to the Reserve Bank, he shall be deemed to be the defaulter in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him in the manner provided in this section.

Explanation.— For the purposes of this section, "defaulter" means any person or system provider or system participant on whom the Reserve Bank has imposed a penalty under section 30.

34. Act not to apply to stock exchanges or clearing corporations of stock exchanges.— Nothing contained in this Act shall apply to stock exchanges or the clearing corporations of the stock exchanges.

34A. Act to apply to designated trade repository and issuer.— (1) The provisions of this Act shall apply to, or in relation to, a designated trade repository or issuer, as they apply to, or in relation to, payment systems to the extent applicable, subject to the modification that, throughout this Act, unless the context otherwise requires,—

(a) references to a "payment system" or "system provider" shall be construed as references to a "designated trade repository" or "issuer", as the case may be;

(b) references to "commencement of this Act" shall be construed with reference to––

(i) a designated trade repository, as references to the date on which a trade repository is specified by the Reserve Bank as a designated trade repository; and

(ii) an issuer, as references to commencement of the Payment and Settlement Systems (Amendment) Act, 2015 (18 of 2015).

(2) The Reserve Bank may, on an application by a designated trade repository or otherwise, permit or direct the designated trade repository to provide such other services as are deemed necessary from time to time.

***Explanation.*—** For the purposes of this section, the expression "designated trade repository" shall mean a trade repository or a class of trade repositories, as may be specified by the Reserve Bank from time to time.

35. Certain persons deemed to be public servants.— Every officer of the Reserve Bank who has been entrusted with any power under this Act, shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

36. Protection of action taken in good faith.— No suit or other legal proceedings shall lie against the Central Government, the Reserve Bank, or any officer thereof for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act, any regulations, order or direction made or given thereunder.

37. 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 provision not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no 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.

38. Power of Reserve Bank to make regulations.— (1) The Reserve Bank may, by notification, make regulations consistent with this Act to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely:—

(a) the powers and functions of the Committee constituted under sub-section (2), the time and venue of its meetings and the procedure to be followed by it at its meetings (including the quorum at such meetings) under sub-section (4) of section 3;

(b) the form and manner in which an application for authorisation for commencing or carrying on a payment system shall be made and the fees which shall accompany such application under sub-section (2) of section 5;

(c) the form in which an authorisation to operate a payment system under this Act shall be issued under sub-section (2) of section 7;

(d) the format of payment instructions and other matters relating to determination of standards to be complied with by the payment systems under sub-section (1) of section 10;

(e) the intervals, at which and the form and manner in which the information or returns required by the Reserve Bank shall be furnished under section 12;

(f) such other matters as are required to be, or may be, prescribed.

(3) Any regulation made under this section shall have effect from such earlier or later date (not earlier than the date of commencement of this Act) as may be specified in the regulation.

(4) Every regulation shall, as soon as may be after it is made by the Reserve Bank, be forwarded to the Central Government and that Central Government shall cause a copy of the same to be laid 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 regulation, or both Houses agree that the regulation should not be made, the regulation 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 regulation.

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