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

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FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director Incharge

Respected Judges

Wish you all a very happy and spirited Republic Day. The resolve to make India a Sovereign, Socialist, Secular, Democratic, Republic is resounding to the present day. New challenges are facing us to ensure to all the citizens social, economic and political justice and also to ensure liberty of thought, belief, worship and faith. I am sure that the Judges stand committed to this resolve. Let our endeavour speak louder than the words.

The Academy is strengthened by joining of two young Researchers namely; Mr. Vidhan Maheshwari and Ms. Swati Bajaj. Their enthusiasm and innovative ideas will certainly enrich the Academy to understand the perspectives of 'generation next'. The articles contributed by these two young researchers are being published in this issue. Your benevolent critical response would guide them towards improvement.

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

In case of ***Laliteshwar Prasad Singh,*** the Apex Court provided guidelines for proper judgment of First Appellate Court in civil cases. The judgment of First Appellate Court must reflect application of mind by recording its finding supported by reasons. The points for determination must be explicitly set out and reason thereby must be recorded and the reasoning must be based on evidence.

In case of ***R. Rachaiah,*** the Supreme Court while elaborately dealing with sections 216 and 217 of Cr.P.C. regarding alteration of charge held that whenever a charge of new species is added, new charge must be treated as charge made for first time and trial has to proceed from that stage. The prosecutor as well as the accused must be allowed to call/recall witnesses with reference to such alteration or addition.

In case of ***State (NCT of Delhi) v. Shiv Kumar Yadav*** while dealing with recalling of witnesses u/s 311 of Cr.P.C., the Apex Court held that mere change of counsel cannot be a ground to recall the witnesses. In this case the application for recalling of witnesses on the ground that the defence counsel was not competent was held to be rightly rejected.

While dealing with sentence in an acid attack case, the Supreme Court commenting on inadequacy of sentence, in case of ***Ravada Sasikala*** observed that when a substantive sentence of one month is imposed in the crime of present nature i.e. acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". So Judges must be careful while sentencing in such heinous offences.

The Apex Court in the case of ***Saloni Arora*** held that procedure described under section 197 CrPC is mandatory. Non-compliance of such procedure makes prosecution under section 182 of IPC void ab initio.

The High Court of M.P. in the case of ***Rishin Paul*** explained the import of term "dangerous weapon" for the purpose of framing charge under sections 324, 325 and 326 of IPC. It was held that the fact involved in particular case, depending upon various factors like; size, sharpness, would throw light on the question as to whether the weapon is a dangerous or deadly weapon or not.

In case of ***Mukarrab v. State of U.P.,*** the Supreme Court cautioned that a blind and mechanical view regarding age of person cannot be adopted solely on the basis of medical opinion by the Radiological observation. Medical evidence though a very useful guiding factor, is not conclusive and would be considered alongwith other circumstances. In this case the Supreme Court has declined to accept determination of age on the basis of report of Radiological examination conducted after the age of 30 years. The Supreme Court also observed that the object of the Juvenile Justice (Care & Protection of Children) Act, 2015 is not to give shelter to accused of grave and heinous offences.

The Apex Court, in the case of ***Harjas Rai Makhija*** reiterated the position of law that if a decree is obtained by playing fraud on the Court, it is to be treated ***non est*** by every Court and such a decree can be challenged at any time, in any proceeding. The Court cautioned that fraud must be proved and not merely alleged and inferred. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent

The Hindu Succession Act, 1956 brought about various changes in the matter of inheritance. The survivorship under co-parcenary has been replaced by succession under the Act. The Apex Court in the case of ***Uttam v. Saubhagh Singh*** considered various aspects of devolution of Mitakshara co-parcenary property and held that when Hindu male dies intestate after coming into force of Hindu Succession Act, 1956 leaving behind a widow and four sons, his property will devolve by intestate succession under section 8 of the Act and not by survivorship. Surviving heirs would hold the property as tenants in common and not joint tenants. Thus, the property received on succession would be "separate property" in hands of the surviving heirs.

We are also publishing the Law relating to Video-conferencing and guidelines laid down by High Courts for conduction of Video-conferencing. These guidelines may be utilized by learned Judges to lay down direction to ensure proper recording of evidence through video-conferencing.

A new website of MPSJA is functional on the web address ***http://mpsja.mphc.gov.in.*** The website contains various information relating to academic activities and courses of the Academy. A feature "Knowledge Gateway" has been created where the JOTI JOURNAL, the institutional magazine, has been converted into a software. With this option, a user can search into the data of JOTI JOURNALS. All the articles (400) and head notes of around 8,000 cases right from the start of the magazine have been included in the data base. In another feature of JOTI JOURNAL in 'Knowledge Gateway', all the issues of Journal can be browsed issue-

wise. A blog based platform “ishare” has been created. Any Judge using his official ID provided by the High Court, can share views in the form of article and research paper authored by him by posting it on ishare. Other users can comment and discuss the content posted by any user. It is a matter of immense pleasure that Judges of District Judiciary are contributing their invaluable legal articles on ishare. The Academy is getting enriched by their well researched contributions.

The National Judicial Academic Council, under the Chairmanship of Hon’ble the Chief Justice of India, has been constituted to guide and monitor the working of the State Judicial Academies. The Concept Note submitted before the Council mandates for conduction of Field Training including Excurtion Tour.

In tune with the Concept Note, Madhya Pradesh State Judicial Academy has undertaken the task of acquainting our next generation with the problems facing the weaker section of the society which continues to live in pathetic conditions in villages. The field training comprises educating them with various aspects of wild life including the hardship faced by forest officers in investigation of wildlife crimes and presentation of cases before the Court.

In order to make the Trainee Judges sensitized with protection of environment and safety of forest cover, Madhya Pradesh State Judicial Academy in association with Forest Authorities has conducted training session at Kanha National Park on 27th & 28th January, 2017. It has proved to be immensely educative. The trainee Judges got firsthand experience and learnt the perspective of ground realities.

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

Keep blessing our pursuit for judicial excellence.

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GLIMPSES OF INAUGURAL FUNCTION OF THE ACADEMIC & ADMINISTRATIVE BLOCK OF THE NEW BUILDING OF MADHYA PRADESH STATE JUDICIAL ACADEMY HELD ON 26.01.2017

HON'BLE SHRI JUSTICE SUBHASH KAKADE AND HON'BLE SHRI JUSTICE JARAT KUMAR JAIN, DEMITS OFFICE

Hon'ble Shri Justice Subhash Raosahab Kakade demitted office on His Lordship's attaining superannuation. Was Born on 23.01.1955 at Dewas. After obtaining degrees of B.A. LL.B., joined Judicial Services as Civil Judge Class II on 29.10.1979 at Shajapur. Confirmed as Civil Judge in the year 1983 and appointed as CJM in the year 1991. Was posted as officiating District Judge in Higher Judicial Services in the year 1992.

Worked as Registrat S.A.T. Bhopal in the year 1997. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Worked in different capacities as Special Judges SC/ST (P.A.) Act, Tikamgarh in the year 2003, District and Sessions Judge, Neemuch and thereafter at Guna and Bhopal. Also worked as Registrar, High Court of M.P., Bench at Indore in the year 2006. Was grated Super Time Scale w.e.f. 19.05.2006. Was Registrar General, High Court of M.P. from 03.01.2011 till elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 01.04.2013 and as Permanent Judge on 06.09.2014

Hon'ble Shri Justice Jarat Kumar Jain demitted office on His Lordship's attaining superannuation. Was Born on 23.01.1955 in Khandwa. After obtaining degrees of M.Com. and LL.B., joined Madhya Pradesh Judicial Services as Civil Judge Class II on 19.09.1981. Promoted to Higher Judicial Services as Additional District & Sessions Judge in the year 1994. Granted Selection Grade with effect from 08.07.2000 and Super Time Scale with effect from 10.10.2007.

Worked in different capacities as Principal Registrar (ILR), High Court of Madhya Pradesh, Jabalpur and District & Sessions Judge, Jabalpur. Was District & Sessions Judge, Chhindwara prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 28.02.2014 and as Permanent Judge on 27.02.2016

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

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AN ANALYSIS OF MAGISTRATE'S POWER TO ORDER FURTHER INVESTIGATION

Vidhan Maheshwari
O.S.D. (Research and Training)
MPSJA, Jabalpur

INTRODUCTION-

Generally, the investigation agency is master of the investigation and the formation of opinion whether, on the material collected, a case is made out to place the accused for trial is the exclusive domain of the Police officer-in-charge. The Magistrate, while accepting or rejecting the report, cannot compel the investigation agency to change its opinion and to form a particular opinion or to submit Final Report in a particular way, but at the same time it is always open for the Magistrate to exercise his discretion in declining to accept the final report/closure report and to direct further investigation of the matter.

Before further discussion, it would be appropriate to refer to some of the relevant provisions relating to further investigation.

> **Section 173(8) Cr.P.C.:** "Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."
>
> **Section 156(3) Cr.P.C.:** "Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."
>
> **Section 190 Cr.P.C.** ''(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-Section (2), may take cognizance of any offence –
>
> (a) upon receiving a complaint of facts which constitute such offence;
> (b) upon police report of such facts;
> (c) ****
> ****"

From the plain reading of S.190 (1), it is clear that the Magistrate may take cognizance of any offence subject to the conditions in that section. The word **'may'** used herein includes **'may not'**. Hence, if the Magistrate, after reading the Final report and the documents filed alongwith it (which is explained judicially as applying his mind) finds that it does reveal an offence, for which he is empowered to take cognizance, he takes cognizance. In case of ***Abhinandan Jha and ors. v. Dinesh Mishra, AIR 1968 SC 117,*** it was held that:

> "The use of the words 'may take cognizance of any offence', in sub-section (1) of S.190 in our opinion imports the exercise of a 'judicial discretion', and the Magistrate, who receives the report, under S.173, will have to consider the said report and judicially take a decision, whether or not to take cognizance of the offence."

Further, at the time when final report or closure report is filed before the Magistrate there may be different situations and recourse available to the magistrate. In ***Bhagwant Singh v. Commissioner of Police and another, (1985) 2 SCC 537,*** the Apex Court observed:

> "Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things; (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the repot and drop the proceedings or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceedings or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156."

Noticeably, these three recourses referred to hereinabove are available at the ***pre-cognizance stage***. The power to further investigate can be exercised by police ***suo motu*** or may be on the order of the Magistrate. While it is a statutory right and duty of the police to further investigate as often as necessary when

fresh information comes into light after filing of the charge sheet, the power of the Magistrate to order further investigation is circumscribed by few conditions.

As regards the nature of further investigation the Supreme Court in the case of ***Vinay Tyagi v. Irshad Ali @ Deepak & ors., (2013) 5 SCC 762*** has observed as follows:

> "'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or ***'de novo'*** investigation'."

The Supreme Court in the above case further went on to observe that fresh investigation, reinvestigation, ***de novo*** investigation can neither be undertaken by the investigating agency ***suo motu*** nor can be ordered by the Magistrate and that it is essentially within the domain of the higher judiciary to direct the same and that too under limited compelling circumstances warranting such probe to ensure a just and fair investigation and trial.

In relation to further investigation though the officer-in-charge of a police station, by virtue of Section 173(8) in categorical terms, has been empowered to conduct further investigation and to lay a supplementary report assimilating the evidence but, no such authorization has been extended to the Magistrate. It is, however no longer ***res integra*** that a Magistrate, if exigent to do so, to espouse the cause of justice, can also direct further investigation after a final report is submitted under Section 173(8), but the question that may arise is whether such a power is available ***suo motu*** or on the prayer made by any party. Also in

a case where cognizance has been taken and the trial is in progress, whether such power can be exercised by the court ***suo motu*** or on application of the complainant or on the request of the Investigating Officer.

The power of the police officer to further investigate and submit supplementary final report came for consideration before the Supreme Court in the case of ***Ram Lal Narang v. State (Delhi Administration), (1979) 2 SCC 322.*** The Apex Court held that despite a Magistrate taking cognizance of an offence upon a police report, the right of police to further investigate even under the old 1898 Code was not exhaustive and the police could exercise such right often as necessary when fresh information came to light. (This position is now absolutely clear because of Section 173(8) of the Code.) But then a condition was added by the Apex Court stating that if the cognizance has been taken, then with a view to maintain independence of the magistracy and the judiciary, interests of the purity of administration of criminal justice and interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would "ordinarily be ***desirable*** that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light".

In ***Dinesh Dalmia v. CBI, (2007) 8 SCC 770*** the Supreme Court has held as following:

> "Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of Sub-section (8) of Section 173 is not taken away only because a charge sheet under Sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate."

In ***Hasanbhai Valibhai Qureshi v. State of Gujarat and others, (2004) 5 SCC 347,*** the Supreme Court held that the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of investigating agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

In ***Ram Lal Narang case*** (supra) although the Apex Court has observed that it is desirable that the police should inform the court and seek formal permission to make further investigation, but it was not held to be mandatory. In the case of ***Rama Choudhary v. State of Bihar, AIR 2009 SC 2308,*** the Supreme Court has specifically held that the law does not mandate taking prior permission from the Magistrate for further investigation. It is settled law that carrying out further investigation even after filing of the charge-sheet is a statutory right of Police. It can be inferred from these observations that the material collected in further

investigation cannot be rejected only because it has been filed without permission or at the stage of trial.

Many times, while taking cognizance or during the trial, the Court on the basis of the record feels the necessity of further investigation for a just decision. As to the stage, when the Court ***suo motu*** can order further investigation, the Supreme Court in the case of ***Tula Ram and others v. Kishore Singh, (1977) 4 SCC 459*** has held as under:

> "That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14, he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202, he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code."

In ***Randhir Singh Rana v. State (Delhi Administration), (1997) 1 SCC 361,*** the Apex court was considering whether a Judicial Magistrate, after taking congnizance of an offence on the basis of a police report and after appearance of the accused in pursuance of the process issued, can order further investigation in the case. It was held that the Magistrate of his own cannot order for further investigation.

It must be noted that power to order further investigation originates from Section 156(3) which is a pre-cognizance stage proceeding. A magistrate, therefore, can ***suo motu*** order further investigation after perusal of the final report but once he has taken the cognizance, he cannot relegate back to the stage of investigation by ordering further investigation. As far as the power of the police officer to further investigate and file supplementary final report is concerned, as discussed above, the same can be done at any stage in the light of Section 173(8) whenever the new facts having bearing on the case emerges, even at the stage of the trial.

In another case of ***Reeta Nag v. State of West Bengal, (2009) 9 SCC 129,*** the trial court took cognizance against sixteen persons and ten were discharged at further stage. At that stage an application was moved by the complainant asking for reinvestigation. The Apex Court held that:

> "What emerges from the decisions of this Court is that once a charge-sheet is filed under Section 173 (2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit

further investigation under Section 173(8). The Magistrate cannot ***suo motu*** direct a further investigation under Section 173(8) Cr.P.C. or direct a re-investigation into a case on account of the bar of Section 167(2) of the Code.

In the instant case, the investigating authorities did not apply for further investigation and it was only upon the application filed by the de facto complainant under Section 173(8), was a direction given by the learned Magistrate to re-investigate the matter. As we have already indicated above, such a course of action was beyond the jurisdictional competence of the Magistrate. Not only was the Magistrate wrong in directing a re-investigation on the application made by the de facto complainant, but he also exceeded his jurisdiction in entertaining the said application filed by the de facto complainant.

Since no application had been made by the investigating authorities for conducting further investigation as permitted under Section 173(8) Cr.P.C., the other course of action open to the Magistrate as indicated by the High Court was to take recourse to the provisions of Section 319 of the Code at the stage of trial".

The decision of ***Randhir Singh*** (supra) and ***Reeta Naag*** (supra) although has been discussed and differentiated in the case of ***Vinay Tyagi*** (supra) but it must be kept in mind that in those two earlier cases the Apex Court was concerned with the question of ***suo motu*** order after taking of the cognizance. The question as to the stage of order of further investigation as well as whether further investigation can be ordered ***suo motu*** or on the basis of the application of the complainant has been further clarified recently by the Supreme Court in the case of ***Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel & ors, AIR 2017 SC 774.*** The Court after enunciating the above dicussed law proceeded to held as following:

"On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto. At that stage, neither the learned Magistrate ***suo motu*** nor

on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

**** **** ****

If the power of the Magistrate, in such a scheme envisaged by the Cr.P.C to order further investigation even after the cognizance is taken, accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of the Cr.P.C. adumbrated hereinabove. Additionally, had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) of the Cr.P.C would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in ***Bhagwant Singh*** (supra), the Magistrate, in both the contingencies, namely; when he takes cognizance of the offence or discharges the accused, would be committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his permission to conduct further investigation, he ***suo motu*** cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant. Not only such power to the Magistrate to direct further investigation ***suo motu*** or on the request or prayer of the complainant/informant after cognizance is taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of Sections 311 and 319 Cr.P.C., whereunder any witness can be summoned by a Court and a person can be issued notice to stand trial at any stage, in a way redundant."

CONCLUSION:

From the above discussion, following points emerge:

1. The magistrate has power to order further investigation ***suo motu*** before taking cognizance at the time when Final Report is presented.
2. The magistrate cannot order for Fresh investigation or reinvestigation or ***de novo*** investigation at any stage.
3. The Investigating officer may further investigate at any stage even at the time of trial, when fresh information comes to light, but it is ***desirable*** to take formal permission from the Court before which trial is pending. The permission must be granted where fresh facts have bearing on the case and necessitates further exploration thereof in the interest of complete and fair trial.
4. After taking the cognizance, further investigation can be ordered only on the application of the investigating officer. The Court cannot ***suo motu*** or on the basis of an application of the complainant/victim order further investigation.

उपरोक्त विवेचन से निम्नलिखित बिन्दु प्रकट होते हैंः

1. मजिस्ट्रेट को स्वमेव अग्रिम अन्वेषण करने हेतु आदेश करने की शक्तियाँ मात्र संज्ञान लेने के पूर्व अंतिम प्रतिवेदन प्रस्तुत किये जाते समय प्राप्त है।
2. मजिस्ट्रेट किसी भी स्तर पर नवीन अन्वेषण अथवा पुर्न अन्वेषण हेतु आदेशित नहीं कर सकता है।
3. अन्वेषण अधिकारी द्वारा किसी भी स्तर पर (विचारण के स्तर पर भी) नवीन तथ्यों के आलोक में अग्रिम अन्वेषण किया जा सकता है, परन्तु उनके द्वारा विचारण न्यायालय से औपचारिक अनुमति लिया जाना अपेक्षित है। जहाँ नवीन तथ्य मामले को प्रभावित करते हैं एवं उनका अग्रिम अन्वेषण पूर्ण एवं न्यायसंगत विचारण हेतु आवश्यक है वहाँ अनुमति दी जावेगी।
4. संज्ञान पश्चात् स्तर पर अग्रिम अन्वेषण मात्र अन्वेषणकर्ता अधिकारी के आवेदन पर ही आदेशित किया जा सकता है। न्यायालय स्वमेव अथवा शिकायतकर्ता/पीड़ित के आवेदन पर अग्रिम अन्वेषण आदेशित नहीं कर सकता है।

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DISHONOUR OF POST-DATED CHEQUE GIVEN AS SECURITY: AN OVERVIEW

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INTRODUCTION:

In the present era of commercial dealings, the issuance of post-dated cheques has become a common phenomenon among lenders and financial institutions and therefore, the significance of such post-dated cheques cannot be under-emphasized. In this context, a predominant question arises, i.e., whether the issuance of post-dated cheque for satisfaction of a subsisting liability/ debt and issuing a post-dated cheque as security yield identical or similar consequences under section 138 of the Negotiable Instruments Act.

Post-dated cheques act as a two-fold weapon in the hands of the lenders by means of which they pressurise the borrowers as well as create a deterrent impact on all the other borrowers or debtors so that there is no room for default on repayment of outstanding debt to the creditors.

POST DATED CHEQUE:

According to **Black's Law Dictionary:**

> "A postdated cheque is a cheque which bears a date after the date of its issue. That is, a cheque which is dated subsequent to the actual date on which it is drawn and which is issued before the date it appears, is called a postdated cheque. Its negotiability is not affected by being postdated and it is payable on its stated date"

According to **Halsbury's Laws of England (4th Reissue), Volume 3(1) p. 143:**

> "Postdated cheques are not invalid, but the banker should not pay such a cheque if presented before the date it bears. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer 'postdated'. A postdated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be postdated, and even if it has been presented before the date and refused payment".

Section 5 of the Act defines Bill of Exchange as "an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument".

Section 6 of the Act defines Cheque as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form."

In ***S. Hajee Mohamed Haneef Saheb and Co. v. S. Abu Bucker, 1956(1) MLJ 471,*** it was held by Madras High Court that:-

> "A post-dated cheque is as much negotiable as a cheque for which payment is due immediately on presentation, and there is no authority for holding that a person in whose favour such a cheque is endorsed before the date of payment is not a holder in due course or that such an assignment or endorsement is not enforceable at the instance of the assignee or endorsee."

Although there is no provision in the Act specifically allowing post-dated cheques, like S.17(2) of the English Bill of Exchange Act, 1882, but on the basis of section 5 and 6 of the Act, it can be said that all cheques are "Bill of exchange" but all "Bill of exchange" are not cheque. **"Post-dated cheque"** is only a bill of exchange when it is written or drawn, it becomes a **cheque** when it is payable on demand. As a bill of exchange, a **post-dated cheque** remains negotiable but it will become a **cheque** on the date when it becomes payable on demand. Thus, a post-dated cheque becomes a cheque for the purpose of S.138 of the Act only on the date mentioned thereon and in between the date of drawl of the cheque and the date mentioned in the cheque, it is only a bill of exchange.

ESSENTIAL COMPONENTS OF POST-DATED CHEQUES

It is very essential to know components of a post-dated cheque in order to analyse whether the dishonor of such post-dated cheque given as security would attract liability under section 138 of the Act, In this context, reference must be made to a landmark judgment of the Supreme Court in the case of ***Anil Kumar Sawhney v. Gulshan Rai, (1993) 4 SCC 424,*** in which the Apex Court has elucidated that at the time when a post-dated cheque is drawn, it is in nature of a negotiable instrument ("bill of exchange") whereas it attains the nature of a cheque from the date appearing on the face of such cheque. Following was held in the judgment:

> "A "Bill of Exchange" is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. A "cheque" on the other hand is a bill of exchange drawn on a bank by the holder of an account payable on demand. Thus a "cheque" under Section 6 of the Act is also a bill of exchange but it is drawn on a banker and is payable on demand. It is thus obvious that a bill of exchange even though drawn on a banker, if it is not payable on demand, it is not a cheque. A "post- dated cheque" is only a bill of

exchange when it is written or drawn, it becomes a "cheque" when it is payable on demand. The post-dated cheque is not payable till the date which is shown on the face of the said document. It will only become cheque on the date shown on it and prior to that it remains a bill of exchange under Section 5 of the Act. As a bill of exchange a post-dated cheque remains negotiable but it will not become a "cheque" till the date when it becomes "payable on demand".

In ***Ashok Yeshwant Badeve v. Surendra Madhav Rao Nighojakar, AIR 2001 SC 1315,*** the Supreme Court while considering section 5 and 6 of the Act held that a post-dated cheque is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange. It also stated that post-dated cheque is not payable till the date, which is shown thereon, arrives and it becomes cheque on the said date and prior to that date the same remains bill of exchange.

BLANK POST-DATED CHEQUE AND ITS VALIDITY:

A blank post-dated cheque is a one which has a certain future date of maturity mentioned thereon but it doesn't have the amount written on it (though it has been duly signed by the drawer). Such a cheque is not even a bill of exchange during the period from the date when it was drawn till the date of maturity written on it; because of the fact that under S.5 of the Act, for an instrument to be a 'bill of exchange' it has to have a ***'certain sum'*** of amount written on it. Such a blank post-dated cheque doesn't constitute a cheque.

The pre-requisite for criminal liability under section 138 is that the cheque in question was issued in discharge of any debt due or other liability. In ***Ramkrishna Urban Co-operative Credit Society Limited v. Rajendra Bhagchand Warma, 2010(1) Bom.C.R. (Cri) 891,*** it was held that where the blank post-dated cheque is issued as a collateral security, that is to say, where a blank PDC is issued prior to disbursement of a loan, no debt is due at the time of issuance of the PDC and case does not fall within the corners of offence u/s 138 of N.I. Act, 1881.

In ***M/s Avon Organics v. Poineer Products Ltd., 2004(1) Crimes 567,*** the High Court of Andhra Pradesh has distinguished between blank cheque and a post-dated cheque. It was opined by the High Court that issuing of post-dated cheque and cheques without putting the dates is different. If the cheque is not drawn for a specified amount, it does not fall under the definition of bill of exchange. It cannot be called a cheque within the meaning of Sections 5 and 6 of the Negotiable Instruments Act. Section 138 contemplates drawing of cheque by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability if the said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount

arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque or with both.

Further, it was also held that post-dated cheque is not payable till the date, which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

SECURITY CHEQUE:

According to the **Black's Law Dictionary** (6th edition), **"security"** means:

> "Protection; assurance; Indemnification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to assure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. Collateral given by debtor to secure loan. Document that indicates evidence of indebtedness. The name is also sometimes given to one who becomes surety or guarantor for another".

Similarly, the word **"security"** is defined in the Shorter **Oxford English Dictionary** (5th edition), as:

> "Property etc. deposited or pledged by or on behalf of a person as a guarantee of the fulfillment of an obligation (as an appearance in court or the payment of a debt) and liable to forfeit in the event of default."

In ***V.K. Ashokan v. CCE, (2009) 14 SCC 85,*** the Supreme Court has observed that:

> "The term "security" signifies that which makes secure or certain. It makes the money more assured in its payment or more readily recoverable as distinguished from, as for example, a mere IOU, which is only evidence of a debt, and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. (See ***Chetumal Bulchand v. Noorbhoy Jafeerji, AIR 1928 Sind 89***). It is a word of general import signifying an assurance".

In ***Suresh Chandra Goyal v. Amit Singhal, 2015(3) DCR 362,*** the concept of security cheques was discussed by Single Bench of Delhi High Court and it was held that:

> "There is no magic in the word "security cheque", such that, the moment the accused claims that the dishonored cheque (in respect whereof a complaint under Section 138 of the Act is preferred) was given as a "security cheque", the Magistrate would acquit the accused. The expression "security cheque" is not a statutorily defined expression in the NI Act. The NI Act does not per-se carve out an exception in respect of a security cheque, to say that a complaint in respect of such a cheque would not be maintainable. There can be myriad situations in which the cheque issued by the accused may be called as security cheque, or may have been issued by way of a security, i.e. to provide an assurance or comfort to the drawee, that in case of failure of the primary consideration on the due date, or on the happening (or not happening) of a contingency, the security may be enforced. While in some situations, the dishonor of such a cheque may attract the penal provisions contained in Section 138 of the Act, in others it may not."

So, the term security cheque has not been defined specifically in the Act, but security cheques are the cheques like any other cheques, they create same liability to discharge as if they are the ordinary cheques and attract the provisions of section 138 Negotiable Instruments Act when they are dishonored.

WHETHER POST DATED CHEQUE ISSUED AS SECURITY ATTRACTS LIABILITY UNDER SECTION 138 OF THE ACT?

Explanation appended to section 138 of the Act explains the meaning of "debt or other liability" as legally enforceable debt or other liability. Section 138 of the Act shall be applicable when the cheque issued by the borrower to the lender is dishonored in relation to a **subsisting** debt or liability and when post-dated cheque attains the nature of a cheque, i.e., with effect from such date as is mentioned on it. However, when the post-dated cheque retains the nature of a negotiable instrument (bills of exchange), such post-dated cheque cannot be presented to the bank so the question of return or dishonor of cheque does not arise.

In a spate of decisions delivered by different High Courts, it has been held that undated/ post dated cheques given as 'security' would not attract the provisions of section 138 of the Act, as no debt or liability existed on the date of handing over of cheques and therefore dishonor of such cheques would fall outside the purview of section 138 of the Act.

In the case of ***Balaji Seafoods Exports v. Mac Industries Ltd, 1999 (1) CrLJ (Criminal) 372,*** the Madras High Court held that an undated cheque, issued as security, did not represent any legally enforceable debt or liability. It is not a post dated cheque but a blank cheque. Undated cheque is issued for the security of the contract, that is to say, cheque was not issued with the intention to satisfy

any subsisting debt. Therefore, the dishonor of such a cheque did not attract Section 138 of the Act.

Further, in ***M/s. Collage Culture v. Apparel Export Promotion Council, 2007 (99) DRJ 251,*** Delhi High Court has categorically made distinction between two kinds of cheques namely one issued in discharge in presenti but payable in future and the other issued in respect of a debt which comes into existence on the occurrence of a contingent event, and is not in existence on the date of issue of a cheque. The latter cheque, being by way of security cheque, will not be covered under Section 138 of NI Act. In the aforesaid decision, definition of the word 'due' has been given as 'outstanding on the relevant date'. The Court, therefore, held that the debt has to be in existence as a crystallized demand akin to liquidated damages and not a demand which may or may not come into existence.

The Supreme Court had elucidated the broad ambit and scope of section 138 N.I Act in relation to dishonour of post dated cheque which are given as security in case of ***I.C.D.S Ltd. v. Beena Shabeer and another, (2002) 6 SCC 426.*** The question that came before the Supreme Court in this case was whether proceeding u/s 138 of the Act is maintainable against a guarantor? The Supreme Court held in its judgment that since the guarantor had issued the cheque towards payment of the dues outstanding against the principal debtor, in such circumstances, complaint u/s 138 against the guarantor is maintainable. The Supreme Court elucidated it in the following words:

> "The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well."

Section 138 of the Act will indeed be attracted when a cheque is dishonored on account of 'stop payment' instructions given by the accused to his bank in respect of a post-dated cheque. This position was clarified by Supreme Court in ***Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232,*** wherein it was held:

> "Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely.
>
> The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque."

In ***M/s S.T.P Ltd. v. Usha Paints and Decorators, 2006 (5) Kar LJ 323,*** Karnataka High Court opined that the distinction sought to be made between issuance of a cheque for repayment of debt and issuance of a cheque as a security for repayment of debt is illusory in law and any cheque if dishonored would incur liability of prosecution under section 138.

In ***M.S Narayana Menon (Mani) v. State of Kerala and anr., AIR 2006 SC 3366,*** the Supreme Court observed that if a cheque is issued for security or for any other purpose, it would not come within the purview of section 138. However, Karnataka High Court in ***M/s Shree Ganesh Steel Rolling Mills and another v. M/s STCL Limited, 2014 (2) Kant.L.J. 142,*** observed that this was a passing observation of the Supreme Court, which cannot be mechanically applied in all circumstances.

In ***Rangappa v. Sri Mohan, (2010) 11 SCC 441,*** it was held by the Supreme Court that once a cheque or post dated cheque has been issued and signed, the presumption of legally enforceable debt in favour of the holder of the cheque arises and it is for the accused to rebut the presumption.

It is immaterial whether cheque is a security cheque or post dated cheque. Even a security cheque can be treated as normal cheque, if it is issued for existing legally enforceable debt on the date of its presentation. Section 138 of the Act does not distinguish between a cheque issued by the debtor in discharge of an existing debt or other liability, or a cheque issued as a security cheque on the premise that on the due future date the debt which shall have crystallized by then, shall be paid. So long as there is a debt existing, in respect whereof the cheque in question is issued, the same would attract criminal liability under section 138 of NI Act in case of its dishonor.

POST-DATED CHEQUE ISSUED FOR AN ADVANCE PAYMENT:

Whether post-dated cheque issued for an advance payment, constitute an offence under section 138 of the Act can be studied or classified under 2 heads namely:

1. Post-dated cheque issued as an advance payment for purchase of goods and subsequently purchase order cancelled due to any reason.
2. Post-dated cheque issued as an advance payment for purchase of goods and subsequently goods supplied.

Post-dated cheque issued as an advance payment for purchase of goods and subsequently purchase order cancelled due to any reason:

In ***Indus Airways Private Limited and others v. Magnum Aviation Private Limited and another, (2014) 12 SCC 539,*** the question before the Supreme Court in this case was "whether dishonor of post-dated cheque issued as an advance payment against purchase order will invite prosecution u/s 138 for discharging legal enforceable debt or other liability, if purchase order was cancelled and no goods or services were supplied to purchaser but cheque issued by him was presented for payment before the bank and the same was returned as dishonored with remark stop payment?"

The Supreme Court in para 13 of its judgment held that **"drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence u/s 138 N.I. Act".** If the cheque has been drawn as an advance payment for purchase of goods and thereafter, for any reason the purchase order is not carried out to its logical conclusion, either because of its cancellation or otherwise and the material/goods for which purchase order was placed were not supplied, then, the cheque cannot be held to have been drawn for an existing debt or their liability and payment of the cheque in the nature of an advance payment indicates that, at the time of drawal of the cheque, there was no existing debt or other liability. The purchaser can be held liable for tort or breach of contract but proceedings under section 138 N.I. Act cannot be launched against him.

In ***Indus Airways*** (supra) the Supreme Court has only taken into consideration the fact situation wherein the purchase order was not executed with supply of goods and thus it was held that the cheque issued by the purchaser towards advance payment is not covered u/s 138. But, where the purchaser while placing the purchase order issues in advance a post-dated cheque, goods are also supplied in terms of the contract and cheque gets dishonor, principle laid down in ***Indus Airways*** (supra) that no pre-existing or pre-determined debt or liability did not exists on the date of issue of the cheque by the purchaser will exist? In my humble opinion, the answer is no, because it would defeat the very object of Section 138 to hold that the seller cannot enforce his right conferred by Section 138 and it will encourage dishonest buyers to evade their penal liability.

Post-dated cheque issued as an advance payment for purchase of goods and subsequently goods supplied:

As mentioned in ***Indus Airways*** (supra) that cheque issued for advance payment for purchase of goods and subsequently purchase order has been cancelled, in such a situation section 138 will not constitute as there was no

existing debt or liability. But position will change if after the issuance of cheque as advance payment goods are delivered and subsequently cheque dishonor. Same situation arose before the Delhi High Court in ***Credential Leasing & Credits Ltd. v. Shruti Investments and anr., 2015 (151) DRJ 147.*** The Delhi High Court opined that, when accused places purchase order and draws post-dated cheque as security and subsequently after delivering the goods, cheque dishonors, in such a situation accused is guilty of an offence u/s 138 of the Act. Further, held that:

(i) Merely because cheque was issued as security cheque, it could not be held that accused is not liable under Section 138 of N.I. Act.

(ii) Scope of Section 138 would cover cases where the ascertained and crystallised debt or other liability exists on the date that the cheque is presented, and not only to case where the debt or other liability exists on the date on which it was delivered to the seller as a post-dated cheque, or as a current cheque with credit period.

(iii) If, on the date that the cheque is presented, the ascertained and crystallised debt or other liability relatable to the dishonored cheque exists, the dishonor of the cheque would invite action under Section 138 of the Act.

Relevant para of the judgment is reproduced for reference:

> "Thus, I am of the considered view that there is no merit in the legal submission of the respondent accused that only on account of the fact that the cheque in question was issued as security in respect of a contingent liability, the complaint under section 138 of the NI Act would not be maintainable. At the same time, I may add that it would need examination on a case to case basis as to whether, on the date of presentation of the dishonored cheque the ascertained and crystallized debt or other liability did not exist. The onus to raise a probable defence would lie on the accused, as the law raises a presumption in favour of the holder of the cheque that the dishonored cheque was issued in respect of a debt or other liability."

POST-DATED CHEQUE ISSUED FOR REPAYMENT OF LOAN INSTALMENT:

Post dated cheque are frequently used to secure payments that arise in the future. The classic example is the use of post dated cheque to secure monthly installments that are payable against a loan granted. The Supreme Court in ***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited, AIR 2016 SC 4363,*** examined whether dishonor of a post-dated cheque

given for repayment of a loan installment which is also described as "security" in the loan agreement would be covered by Section 138 of the Act.

The Supreme Court held that the question whether a post dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If, on the date on which the cheque is issued, liability or debt exists or the amount is legally recoverable, section 138 of the act would be attracted. It was also held that a dishonored post-dated cheque for repayment of a loan installment that was described as 'security' in the loan agreement is covered by the criminal liability set out in section 138 of the Act, 1881.

Interpreting the word 'security' as used in the underlying agreement between the parties, the Supreme Court held that it referred to the cheques issued to repay installments of the loan. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. Once the loan is disbursed and the installments falls due on the date of the cheque as per the agreement, the dishonor of such cheques gives rise to criminal liability under Section 138 of the Act.

The relevant extract of the judgment is as under -

> "Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonor of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability."

In ***Sampelly Satyanarayan Rao*** (supra), the Apex Court also distinguished between a cheque given towards an advance payment for a purchase order and post-dated cheque given under a loan agreement, as under-.

When the cheque is issued towards advance payment for the purchase order and purchase order is cancelled and payment of the cheque was stopped, it does not cover under section 138 of the act as issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability whereas, when post dated cheque is issued for securing repayment of loan installments, the moment the loan is disbursed by the bank and the installments falls due on the cheque, dishonour of such cheques would cover under section 138 of the Act.

The Supreme Court further observed that the crucial issue for consideration was whether the cheque represented a discharge of existing enforceable debt or liability or whether it represented advance payment without there being subsisting debt or liability. The Supreme Court has in this case placed great emphasis on (i) the language used in the Loan Agreement and (ii) the pleadings of the Complainant.

The Supreme Court observed that although the cheques have been placed under the head of "Security" in the Loan Agreement, the same clause refers to the cheques being towards repayment of the installments and that the Loan Agreement records that the cheques have been deposited ***"towards repayment***

of installments of principal loan amount in accordance with agreed repayment schedule and installments of interest payable thereon". This, coupled with the pleadings of the Complainant that the cheques were towards partial repayment of dues under the loan agreement, led to conclude that although the cheque was also described as security, the primary purpose of such a cheque was towards repayment of installments which are immediately due as on the date of the PDC(s).

It can be impliedly construed that, in order to bring home an offence u/s 138 of the Act, in regard to issuance of post-dated cheque as security for repayment of loan, post-dated cheque should be obtained as a condition subsequent to the disbursement and not as a condition precedent, so as to ensure that the liability or debt exists on the date of issuance of post-dated cheque.

CONCLUSION:

Thus, the present scenario of law may be summarised as under:

i) Post-dated cheque is a valid mode of transaction.
ii) Post-dated cheque is only a bill of exchange when it is drawn and is not payable.
iii) Post-dated cheque attains the nature of a cheque from the date appearing on the face of the cheque.
iv) Drawal of cheque in discharge of an existing or past adjudicated liability is essential for constituting an offence u/s 138.
v) Issuance of post-dated cheque towards advance payment can not be considered as discharge of any subsisting liability, when purchase order cancelled subsequent to the issuance of post-dated cheque. (But position will be different in case of delivery of goods subsequent to purchase order)
vi) Whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction.
vii) If on the date on which cheque is issued, liability or debt exists or the amount has become legally recoverable, offence u/s 138 of the Act is constituted.
viii) If blank post-dated cheque issued prior to disbursement of a loan, offence u/s 138 is not constituted.
ix) Despite the fact that the post-dated cheques have been referred as "Security" in the Loan Agreement, they are recorded as deposited towards repayment of installments of principal loan amount and installments of interest payable thereon, cheque would be considered for repayment of existing liability to attract offence u/s 138 of the Act.

इस प्रकार विधि की स्थिति संक्षिप्त में निम्नानुसार है–

1. उत्तर दिनांकित (पोस्ट डेटेड) चैक वैधानिक रूप से किया गया संव्यवहार है।
2. उत्तर दिनांकित (पोस्ट डेटेड) चैक जारी करते समय मात्र विनिमय पत्र होता है एवं भुगतान योग्य नहीं होता है।
3. उत्तर दिनांकित चैक उस पर अंकित दिनांक से पूर्णतः चैक के स्वरूप का हो जाता है।
4. धारा 138 के अंतर्गत अपराध गठित होने के लिए यह आवश्यक है कि लेखीवाल द्वारा चैक किसी पूर्व अभिनिर्धारित दायित्व या वर्तमान दायित्व के उन्मोचन के लिए जारी किया गया हो।
5. अग्रिम भुगतान के लिए जारी किया गया उत्तर दिनांकित चैक किसी वर्तमान दायित्व के उन्मोचन के लिए जारी किया जाना नहीं माना जा सकता, जबकि क्रय आदेश पोस्ट डेटेड चैक जारी किये जाने के पश्चात् निरस्त किया गया हो। (परन्तु यह स्थिति तब भिन्न होगी यदि, क्रय आदेश के पालन में माल पहुंचाया जा चुका हो)
6. उत्तर दिनांकित (पोस्ट डेटेड) चैक किसी दायित्व के उन्मोचन के लिए दिया गया था, यह बात उस संव्यवहार की प्रकृति पर निर्भर करेगा।
7. यदि जिस दिनांक को चैक जारी किया गया था, तब यदि भुगतान का दायित्व था अथवा वैधानिक रूप से ऋण अथवा दायित्व का भुगतान करवाया जा सकता था, तब धारा 138 के अंतर्गत अपराध किया जाना माना जावेगा।
8. किसी ऋण राशि के प्रदाय के पहले यदि कोरा उत्तर दिनांकित चैक जारी किया गया हो तो धारा 138 के अंतर्गत अपराध गठित होना नहीं माना जावेगा।
9. यद्यपि ऋण अनुबंध में उत्तर दिनांकित (पोस्ट डेटेड) चेक को ''सुरक्षा'' प्रयोजनार्थ उल्लेख किया गया हो परन्तु यदि उन्हें ऋण के मूलधन या उस पर देय ब्याज राशि की किश्त के भुगतान हेतु जमा किये जाने का उल्लेख हो तो ऐसे चेक वर्तमान दायित्व के भुगतान हेतु आशयित होकर धारा 138 के अधीन दण्डनीय अपराध गठित करेंगे।

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PART - II
NOTES ON IMPORTANT JUDGMENTS

1. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 6, 12 (1)(c) and 23

(i) Condition as to enhancement of rent in rent note, legality of – Rent agreement to the effect that if tenant do not vacate the premises after two years, the tenant would pay enhanced rent – As rent at enhanced rate was in continuation of tenancy, the condition is held to be contrary to Sections 6 (1) and 6 (2) of the Act.

(ii) Denial of title – Tenant in his written statement admitted himself to be a tenant having taken shop on tenancy from plaintiff, however called upon plaintiff to prove his title – Defendant never disowned that he is not a tenant – Such an act of defendant does not attract the provisions of Section 12 (1) (c).

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) – धाराएं 6, 12 एवं 23 (1)(ग)

(I) किराया नामा में किराया बढ़ाये जाने की शर्त की वैधानिकता – किराया करार इस आषय का कि यदि किरायेदार द्वारा दो वर्ष के पष्चात् परिसर खाली नहीं किया जाता है तो किरायेदार बढ़ा हुआ किराया देगा – चूंकि किराये का बढ़ी दर पर दिया जाना, किरायेदारी को जारी रखे जाने के संबंध में था, शर्त को अधिनियम की धारा 6 (1) एवं 6 (2) के विपरीत होना अभिनिर्धारित किया गया।

(II) स्वत्व से इंकार – किरायेदार द्वारा लिखित कथन में उसके किरायेदार होकर वादी से दुकान किराये पर लिये जाने के संबंध में स्वीकृति दी गई – परंतु वादी को स्वत्व साबित करने को कहा गया – प्रतिवादी द्वारा कभी भी किरायेदार न होना नहीं कहा गया – प्रतिवादी का उक्त कृत्य धारा 12 (1)(ग) के प्रावधान आकृष्ट नहीं करता है।

Rajendra Kumar Gupta v. Ram Sewak Gupta

Judgment dated 08.05.2015 passed by the High Court of Madhya Pradesh in Second Appeal No. 423 of 2005, reported in ILR (2016) MP 1429

Relevant extracts from the judgment :

The question is whether the clause ''यदि मैं समय पर दुकान खाली न करूं तो दुकान मालिक मु. 700.00 सात सौ रू. किराया अदा करने का जिम्मेदार रहूंगा।'' can be said to be lawful. Evidently, it is in addition to the monthly rent of Rs. 400 p.m. from 15.4.1988 to 15.4.1989 and Rs. 500 per month from 16.4.1989 to 16.4.1990. Earlier part of rent note as evident there from stipulates that nonpayment of rent as agreed i.e. Rs. 400 and Rs. 500 as the case may be would make the tenant liable to pay interest on delayed payment and would make him vulnerable to the proceedings

for eviction. But in a case where tenant continues beyond the period of tenancy he would be liable for enhanced rent of Rs. 700 per month.

Clause (a) of sub-Section (1) of Section 12 of 1961 Act entitles the landlord for rent "legally recoverable". Section 6 of 1961 Act envisages that "unlawful charges not to be claimed or received".

Whereas sub-Section (1) of Section 6 envisages that subject to the provisions of the Act of 1961, no person shall claim or receive any rent in excess of the standard rent, notwithstanding any agreement to the contrary; sub-Section (2) clause (a) of Section 6 stipulates that no person shall in consideration of the continuance of a tenancy claim or receive any consideration what so ever, in cash or in kind, in addition to the rent.

Evidently, since Rs. 700 per month, as agreed was for continuation of tenancy, it is contrary to the stipulations contained under Section 6(1) and 6(2) of 1961 Act.

* * *

The question is whether such a defense would mean disclaimer of landlord's title as would substantially and adversely affect the plaintiff's title. The answer lay in recent decision by the Supreme Court in ***Keshar Bai v. Chhunulal, AIR 2014 SC 1394,*** wherein their Lordships were pleased to hold:

> "17.....A tenant bonafide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of Section 12(1)(c)..."

When the facts of the present case as adverted are considered in the light of law laid down in ***Kesharbai*** (supra) it leaves no iota of doubt that the concurrent findings that there is disclaimer of title by the defendant are perverse and are hereby set aside. Substantial question of law are accordingly answered in favour of the defendants.

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2. ACCOMMODATON CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) and 12 (1) (f)

(i) Suit for Eviction – *Bonafide* requirement – Landlord *bonafidely* required the premises to commence business of electronic goods – Landlord need not to show his experience/education and availability of capital to establish *bonafide* requirement to commence business – Landlord need not to explain details of prospective business if *bonafide* requirement is proved.

(ii) Eviction on the basis of arrears of rent – Burden of proof – Defendant/tenant has to prove the fact that rent has been paid regularly – Tenants failed to establish about their *bonafide* regular payment of rent – Held, trial court correctly decreed the suit under section 12 (1) (a).

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) – धारा 12 (1)(क) एवं 12 (1) (च)

(i) निष्कासन हेतु वाद – सद्भाविक आवष्यकता – भू–स्वामी को इलेक्ट्रानिक सामान का व्यवसाय प्रारंभ करने हेतु परिसर की सद्भाविक आवष्यकता – भू–स्वामी को व्यवसाय प्रारंभ करने की सदभाविक आवष्यकता दर्षित करने हेतु अनुभव, षिक्षा एवं पूँजी की उपलब्धता दर्षित करना आवष्यक नहीं है – यदि वास्तविक आवष्यकता साबित हो चुकी है तो भू–स्वामी को भावी व्यवसाय के ब्यौरे स्पष्ट करना आवष्यक नहीं है।

(ii) अवषेष भाड़े के आधार पर निष्कासन – सबूत का भार – प्रतिवादी/किरायेदार को यह साबित करना होगा कि किराये को नियमित रूप से भुगतान किया गया है – किरायेदार उसके सद्भाविक नियमित किराये के भुगतान को स्थापित करने में विफल रहा – अभिनिर्धारित, विचारण न्यायालय ने धारा 12 (1)(क) के अंतर्गत वाद में सहीं रूप से डिक्री पारित की गयी।

Ramesh Chandra v. Gurubaksmal and others
Judgment dated 27.09.2016 passed by the High Court of Madhya Pradesh in Second Appeal No. 566 of 2006, reported in 2017 (1) MPLJ 333

Relevant extracts from the judgment:

The Supreme Court in the matter of ***Shamshad Ahmad and others v. Tilak Raj Bajaj and others, (2008) 9 SCC 1*** has held that the plaintiff/landlord need not to prove his experience/education to start the business. Even otherwise plaintiff need not to prove the availability of capital for running the business. Therefore, in light of above settled law, the trial Court as well as appellate Court have committed error in ignoring the plaintiff's requirement of suit premises merely on the basis of absence of proof of fund and experience without considering the merits in respect of ***bonafide*** requirement and non availability of alternative accommodation. The Court below should have decreed the suit in the light of pleadings and evidence led by the plaintiff. Similarly, burden to prove that plaintiff has alternative accommodation, was on the defendants which defendants have failed to discharge. [See: ***Baby Bai v. Smt. Kamla Bai, 2010 (III) MPWN 35***]. Therefore, trial Court erred in not dealing and deciding the issue No.5(b) in any manner, whereas it ought to had been decided in favour of plaintiff. Thus, the judgment and decree in respect of finding in relation to Section 12(1)(f) of the Act are hereby set aside.

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Here, in the present case, the defendants/tenants have failed to lead such evidence so as to establish their ***bonafide*** about the regular payment of rent as per the provisions of the Act. The burden was not on the plaintiff to prove that the defendants have not paid the rent between March, 1994 to September, 1995. Defendant No.1 Gurbaksmal (DW-1) has categorically admitted in paras 29, 30 and 31 of his statements that he has not submitted any receipt in respect of payment of rent before the trial Court. Once the defendant himself in dilemma and negligent to submit the rent receipt so as to dispel the allegation of arrears of rent, no other conclusion can be drawn (except arrears of rent) against the defendants and in favour of plaintiff, establishing the allegation of arrears of the rent and therefore, the ground enumerated under Section 12 (1)(a) of the Act is established and proved. Thus, the trial Court has rightly decreed the suit of plaintiff on the ground of Section 12 (1)(a) of the Act which was wrongly rejected by the appellate Court. Learned first appellate Court has erred in law in reversing the decree under Section 12 (1)(a) of the Act by wrongly placing the burden of proof of noncompliance of provisions of Section 13(1) of the Act over the plaintiff.

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3. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12(1)(f)

Availability of alternative accommodation – Once the *bonafide* requirement of a landlord is established, then the choice of the accommodation has to be left to the subjective choice of the landlord – Court cannot thrust its own choice upon him – Mere availability of another accommodation with the landlord does not disqualify him from claiming eviction.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) – धारा 12(1) (च)

वैकल्पिक स्थान की उपलब्धता – एक बार भू–स्वामी की आवष्यकता स्थापित कर दी गई, इसके पष्चात् स्थान का चयन भू–स्वामी के व्यक्तिनिष्ठ चयन पर छोड़ दिया जाना चाहिये – न्यायालय स्वयं का चयन उस पर थोप/भारित नहीं कर सकती है – मात्र भू–स्वामी के पास अन्य स्थान की उपलब्धता उसे निष्कासन का दावा करने से अयोग्य नहीं बना देती है।

Vinod Kumar Goyal v. Avneet Kumar Gupta

Judgment dated 15.06.2016 passed by the High Court of Madhya Pradesh in Second Appeal No. 38 of 2016, reported in 2016 (IV) MPJR 174

Relevant extracts from the judgment:

In the case of ***Akhileshwar Kumar and others v. Mustaqim and others, (2003) 1 SCC 462,*** the Supreme Court has held that once the ***bonafide*** requirement of a landlord is established, as in the present case wherein there is a concurrent finding of fact to that effect and which is not assailed by the appellant in the present appeal, then the choice of the accommodation which would by more

suitable for his requirement has to be left to the subjective choice of the landlord and the Court cannot thrust its own choice upon him and while discussing the availability of other alternative accommodation has held as under in para 4:–

> "4. So is the case with the availability of alternative accommodation, as opined by the High Court. There is a shop in respect of which a suit for eviction was filed to satisfy the need of plaintiff No.2. The suit was compromised and the shop was got vacated. The shop is meant for the business of plaintiff No.2. There is yet another shop constructed by the father of the plaintiffs which is situated over a septic tank but the same is almost inaccessible inasmuch as there is a deep ditch in front of the shop and that is why it is lying vacant and unutilized. Once it has been proved by a landlord that the suit accommodation is required ***bonafide*** by him for his own purpose and such satisfaction withstands the test of objective assessment by the Court of facts then choosing of the accommodation which would be reasonable to satisfy such requirement has to be left to the subjective choice of the needy. The Court cannot thrust upon its own choice upon the needy. Of course, the choice has to be exercised reasonably and not whimsically. The alternative accommodations which have prevailed with the High Court are either not available to the plaintiff No.1 or not suitable in all respects as the suit accommodation is. The approach of the High Court that an accommodation got vacated to satisfy the need of plaintiff No.2, who too is an educated unemployed, should be diverted or can be considered as relevant alternative accommodation to satisfy the requirement of plaintiff No.1, another educated unemployed brother, cannot be countenanced. So also considering a shop situated over a septic tank and inaccessible on account of a ditch in front of the shop and hence lying vacant cannot be considered a suitable alternative to the suit shop which is situated in a marketing complex, is easily accessible and has been purchased by the plaintiffs to satisfy the felt need of one of them."

Similarly in the case of ***Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, (1999) 6 SCC 222,*** wherein the landlord had other suitable accommodation available with him and on that ground the High Court had reversed the finding of the trial court, the Supreme Court while setting aside the judgment of the High Court and affirming the choice of the landlord in respect of the accommodation held as under in para 13:–

"13.....Once the court is satisfied of the ***bonafides*** of the need of the landlord for premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of ***bonafide*** need or genuine requirement needs a practical approach instructed by realities of life. An approach either too liberal or two conservative or pedantic must be guarded against."

In view of the above pronouncement by the Apex Court a conclusion can be drawn that mere availability of another accommodation with the landlord does not disqualify him from claiming eviction, therefore, no fault can be found with the findings of both the Courts below.

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4. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12(1)(f) and 12(1)(h)

Whether a suit for eviction is maintainable on two grounds, i.e. repair or new construction and *bonafide* requirement? Landlord contended to start his own business after carrying out new construction.

Held, Yes – A suit on both grounds is maintainable and both grounds are not destructive to each other.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) – धाराएं 12 (1) (च) एवं 12 (1) (ज)

क्या निष्कासन हेतु वाद दो आधारों पर प्रचलन योग्य है यथा, मरम्मत या नवीन निर्माण एवं सदभाविक आवष्यकता ? भू–स्वामी द्वारा नवीन निर्माण के बाद उसका स्वयं का व्यवसाय प्रारंभ करने का तर्क दिया गया।

अभिनिर्धारित, हाँ – दोनों आधारों पर वाद प्रचलन योग्य है एवं दोनों आधार एक दूसरे के लिये विध्वंसकारी नहीं है।

Rajesh v. Smt. Rajkunwar thougn CRS. and anr.

Order dated 05.08.2015 passed by the High Court of Madhya Pradesh in S.A. No. 470 of 2014, reported in ILR (2016) MP 1441

Relevant extracts from the order:

The appellant has mainly raised ground that a suit for ***bonafide*** requirement under section 12 (1) (f) and 12 (1) (h) of the Act was not maintainable nor could have decreed. In the present case, it is clear that the respondents have pleaded and proved that they shall be starting their business of lodging in the suit accommodation after making re–construction. The respondents have relied upon the judgments reported in ***Bhaiyalal v. Basantibai, 2001 (1) MPWN 56, Ghasiram v. Sharifa Bai and ors., 2006 (4) MPLJ 460,*** and ***Kusum Devi v. Mohanlal, (2009) 11 SCC 594.*** From the perusal of the above judgments it is clear that a suit on both grounds is maintainable and both grounds are not destructive to each other. This Court is of the considered opinion that if the landlord pleads that he will start his business after carrying out repairs or reconstruction, there is nothing wrong or illegal. Such a suit basically is suit on the ground of ***bonafide*** requirement. Hence, other conditions of section 12(7) are not required to be fulfilled. The substantial question sought to be raised by the appellant stands concluded by the Apex Court in the matter of ***Kusum Devi*** (supra) in which it has been told that once the need is proved, the landlord can occupy the accommodation after carrying out repairs or reconstruction and a ground for repairs or reconstruction can be added to the ground of ***bonafide*** requirement and such a suit filed on both grounds is maintainable and can be decreed.

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5. CIVIL PROCEDURE CODE, 1908 – Sections 2 (2), 11 and Order 14 Rule 1 Dismissal of the suit on the ground that same is barred by *res judicata* and absence of cause of action – Conclusive determination of rights of the parties with regard to one of the matters in the controversy – Requirement for "Decree" under section 2 (2) satisfied – Remedy against the order is appeal and not revision.

सिविल प्रक्रिया संहिता 1908 – धारा 2 (2), 11 एवं आदेष 14 नियम 1

वाद का पूर्व न्याय एवं वाद हेतुक अभाव के आधार पर खारिज किया जाना – यह पक्षकारों के मध्य एक विवादित मामले के संबंध में अधिकारों का निष्चायक रूप से अवधारित करना होता है – धारा 2 (2) "डिक्री" की आवष्यकता की पूर्ति करता है – आदेष के विरूद्ध उपचार अपील है, पुनरीक्षण नहीं।

Rishabh Chand Jain & anr. v. Ginesh Chandra Jain

Judgment dated 13.04.2016 passed by the Supreme Court in Civil Appeal No. 4543 of 2016, reported in 2017 (1) MPLJ 1

Relevant extracts from the judgment:

In terms of Section 2 (2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of decree is satisfied. Such determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2 (2) of the Code. Only two orders are

excluded – (i) any adjudication from which an appeal lies as an appeal from an order and (ii) any order of dismissal for default. Order XLIII of the Code has provided for appeals from orders.

The impugned order does not come under Order XLIII. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, viz., ***Res Judicata***. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by ***Res Judicata*** in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides. The impugned order dismissing the suit on the ground of ***Res Judicata*** does not cease to be a decree on account of a procedural irregularity of non framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-section (2) thereof. It is only appealable under Section 96 read with Order XLI of the Code.

The order passed by the trial court is a composite order on rejection of the plaint as there is no cause of action and dismissal of the suit as not maintainable on the ground of ***Res Judicata***. Both aspects are covered by the definition of decree under Section 2(2) of the Code and, therefore, the remedy is only appeal and not revision even if there is any irregularity in passing the order.

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6. CIVIL PROCEDURE CODE, 1908 – Section 96, Order 41 Rules 27, 31, Order 20 Rule 5 and Order 1 Rule 10
SPECIFIC RELIEF ACT, 1963 – Section 34

(i) Duty of First appellate court – The Court, in its judgment, must explicitly set out the points for determination, record its reasons thereon and give its reasonings based on evidence – Points for determination by a court of first appeal must cover all important questions and they should not be general and vague – First appellate court is the final court of facts – Its judgment must reflect application of mind by recording its findings supported by reasons – The first appellate court, while reversing the findings of the trial court, must record its findings in clear terms explaining how the reasonings of the trial court is erroneous – Further held that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties.

(ii) Impleading of a party at first appellate stage – If a party is impleaded, then the party be given an opportunity to adduce additional evidence and make its submission to substantiate its claim.

(iii) Suit for declaration of title without further relief for possession or injunction – Barred by Proviso of Section 34 of Specific Relief Act.

सिविल प्रक्रिया संहिता, 1908 – धारा 96, आदेष 41 नियम 27 एवं 31, एवं आदेष 20 नियम 5 एवं आदेष 1 नियम 10

विनिर्दिष्ट अधिनियम, 1963 – धारा 34

(i) प्रथम अपीलीय न्यायालय के कर्तव्य – न्यायालय द्वारा अपने निर्णय में स्पष्ट रूप से विचारणीय बिंदू बनाये जाने चाहिये, उन पर निष्कर्ष के कारण अभिलिखित करने चाहिए एवं उक्त कारण साक्ष्य पर आधारित होने चाहिये – प्रथम अपील न्यायालय द्वारा विरचित विचारणीय बिंदुओं में सभी महत्वपूर्ण प्रष्न सम्मिलित होना चाहिये एवं वह सामान्य व अस्पष्ट नहीं होना चाहिये – प्रथम अपील तथ्यों की अंतिम न्यायालय होती है – उनके निर्णय में निष्कर्ष कारण द्वारा समर्थित होना चाहिये जिससे कि विवेक का प्रयोग होना दर्षित हो – प्रथम अपीलीय न्यायालय द्वारा विचारण न्यायालय के निर्णय को पलटते समय आवष्यक रूप से साफ शब्दों में यह स्पष्ट करना चाहिये कि किस प्रकार विचारण न्यायालय के कारण त्रुटिपूर्ण है – आगे अभिनिर्धारित किया गया कि मात्र विचारणीय बिंदु विरचित न किया जाना, प्रथम अपीलीय न्यायालय के निर्णय को दूषित नहीं करता है यदि प्रथम अपीलीय न्यायालय द्वारा दोनों पक्षकारों द्वारा प्रस्तुत साक्ष्य के आधार पर कारण लेखबद्ध किये गये हो।

(ii) प्रथम अपील के प्रक्रम पर पक्षकार को जोड़ा जाना – यदि पक्षकार को जोड़ा जाता है तो पक्षकार को अतिरिक्त साक्ष्य प्रस्तुत करने एवं उनका दावा सिद्ध करने का अवसर देना चाहिए।

(iii) स्वत्व की घोषणा हेतु प्रस्तुत वाद, आधिपत्य अथवा व्यादेष की अग्रिम सहायता के बिना – धारा 34 विनिर्दिष्ट अनुतोष अधिनियम के परन्तुक से वर्जित।

Laliteshwar Prasad Singh and others v. S.P. Srivastava (Dead) through LRs.

Judgment dated 15.12.2016 passed by the Supreme Court in Civil Appeal No. 4426 of 2011, reported in (2017) 2 SCC 415

Relevant extracts from the judgment:

As per Order 41, Rule 31 CPC, the judgment of the first appellate court must explicitly set out the points for determination, record its reasons thereon and to give its reasonings based on evidence. It is well settled that the first appellate court shall state the points for determination, the decision thereon

and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties.

An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in ***Vinod Kumar v. Gangadhar, (2015) 1 SCC 391***, it was held as under:–

> "12. In ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179,*** this Court held as under:
>
> "... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
>
> The above view has been followed by a three-Judge Bench decision of this Court in ***Madhukar v. Sangram, (2001) 4 SCC 756,*** wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.
>
> 13. In ***H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243,*** this Court stated as under:
>
> "The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has

not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

14. Again in ***Jagannath v. Arulappa, (2005) 12 SCC 303,*** while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows:

'2. A court of first appeal can reappreciate the entire evidence and come is a different conclusion'

15. Again in ***B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530,*** this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:

"How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;
(b) the decision thereon;
(c) the reasons for the decision; and
(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues

> of law and fact and decide it by giving reasons in support of the findings. (Vide ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756.***)
>
> In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court is erroneous.

The appellants are the purchasers of various extent of plots in the suit property from the second respondent-Defendant under various sale deeds dated 22.11.19958, 29.09.1995, 29.03.1996, 07.08.1995, 20.11.2008 and 03.07.2007. The appellants moved I.A. No. 5250/2010 in F.A. No. 230/2007 before the High Court for their impleadment under Order I Rule 10 of CPC and the said application was allowed by the High Court vide order dated 02.08.2010. After the appellants were impleaded as parties in the appeal, the appellants were not given any opportunity to adduce any evidence or make their submission. The High Court has only referred to the evidence adduced by the first respondent-Plaintiff and simply held that failure on the part of second respondent-Defendant to establish his title over the suit properties precludes the appellants from claiming any title or interest over the suit scheduled properties, as they had derived the title from the defendants. We are of the view that having impleaded the appellants as

parties to the first appeal, it seems inappropriate to record such a finding without affording an opportunity to the appellants and without examining the claim of the present appellants. After impleading them as parties, without affording an opportunity to the appellants, the High Court skirted the claim of the appellants by observing that the appellants having purchased the suit property subsequent to filing of the suit and if the second respondent-Defendant had no title then there is no question of transferring any title or interest or possession by the second respondent-Defendant to the transferee arises. We find substance in the contention of the appellants that having been impleaded as parties in the High Court, they ought to have been given an opportunity to adduce additional evidence and make their submission to substantiate their claim that they are ***bonafide*** purchasers for value. In our view, having impleaded the appellants, in terms of Order 41, Rule 27 CPC, the High Court ought to have given an opportunity to the appellants to adduce additional evidence and make their submission.

Learned counsel for the appellants has submitted that yet another issue that arose for consideration was the maintainability of the suit in view of the proviso to Section 34 of the Specific Relief Act, 1963. Learned counsel for the appellants submitted that the suit had been filed by the first respondent–Plaintiff for declaration of title to the suit properties which belonged to Tarawati Devi without any further consequential relief for possession or injunction and the suit was barred in view of the proviso to Section 34 of the Specific Relief Act, 1963. Drawing our attention to the above proviso to Section 34 of the Specific Relief Act, 1963, the learned counsel for the appellants submitted that on this plea, issue No. 6 was specifically framed by the trial court and even though the trial court decided the issue in favour of the first respondent-Plaintiff and the same being raised in the first appellate court, the High Court should have considered the arguments advanced by the appellants on the maintainability of the suit.

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7. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 17 and Order 9 Rule 13

Process for service of the defendant was issued but the same was not effected and the notice was returned unserved – The summon was not affixed on the house – Trial Court did not examine the process server who effected the service – *Ex parte* decree set aside.

सिविल प्रक्रिया संहिता, 1908 – आदेष 5 नियम 17 एवं आदेष 9 नियम 13

प्रतिवादी को तामील हेतु समन जारी किया गया था, परंतु उसे निष्पादित नहीं किया गया एवं सूचना पत्र अनिर्वाहित लौटाया गया – समन को मकान पर चस्पा नहीं किया गया – विचारण न्यायालय द्वारा तामील करने वाले आदेषिका वाहक का परीक्षण नहीं किया गया – एक पक्षीय डिक्री खारिज की गयी।

Raghuveer v. Hari Prasad & ors.
Order dated 28.09.2016 passed by the High Court of Madhya Pradesh in Civil Revision No. 59 of 2011, reported in 2016 (IV) MPJR 155

Relevant extracts from the order:

Learned counsel for the applicant submitted that in the absence of such, service cannot be held to be valid, it is contrary to the provisions of Rules 17, 19 of Order 5 of Code. This Court in the case of ***Baijnath v. Harishankar, 2001(2) MPLJ 142*** has considered this question and held:–

> "In ***Kunja v. Lalaram and others, 1987 MPLJ 746,*** it has been laid down that the provisions of Rule 19 of Order 5 of the Code are mandatory and cast a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5 of the Code. It has further been observed that non-compliance of Order 5, Rule 19 will cause serious injustice to the defendant. Bombay High Court in ***Baburao Soma Bhoi v. Abdul Raheman Abdul Rajjak Khatik, 2000(1) Mh.L.J. 481 = (1991) All India High Court Cases 3725,*** has observed that the return of summon should be accompanied by the affidavit of the process server, which is in Form 11 of the First Schedule of the Appendix "B" of the code. If the return report of the process server is without an affidavit, the Court has to record the statement of process server and after making further enquiry, the Court should hold that the summons has been duly served or not."
>
> In the instant case as noticed above, the trial Court without examining the process server, directed that the appellant/defendant No.1 be proceeded against ex-parte; even though the report of the process server was not accompanied with his affidavit. Obviously such a course was not permissible.
>
> In the instant case, since the trial Court has not made any enquiry regarding the service of summons on the appellant as also regarding the refusal of summons reported by serving officer, the mandatory requirements of Order 5 Rule 19 of the Code have not been duly complied with. The approach of the trial Court during trial as also while holding the enquiry on the application of the appellant under Order 9 Rule 13, Civil Procedure Code, for setting aside ex-parte judgment and decree passed against him, appears to be rather casual and negligent, as has been pointed out above.

Moreover, the cause of delay shown by the appellant is belated filing of the said application under Order 9 Rule 13 read with Section 151 of the Code also deserves acceptance."

Learned counsel for the applicant further submits that, several infirmities and lapses on the part of the process-server as he did not affix a copy of the summons and the plaint on the wall of the shop. In this context, learned counsel relied on a decision of the Apex Court in the case of ***Sushil Kumar Sabharwal v. Gurpreet Singh and others, AIR 2002 SC 2370,*** in paras 8 & 12 as follows :–

"8. We find several infirmities and lapses on the part of the process–server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie." The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by process-server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt."

12. The provision contained in Order 9 Rule 6 of C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (i) when summons duly served; (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the

summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex–parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or causal approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial Court would have been conscious of its obligation cast on its by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant/appellant and a wasteful period of over eight years would not have been added to the life of this litigation."

xxx

From perusal of records and submissions putforth by learned counsel for the parties, it reveals that the process server tried to serve the summons on the applicant, but the same was allegedly returned unserved on account of rain fall. No witness had signed on the report of the Process Server. It is trite law that if summons was not served on the party concerned, the same should have been affixed on the house. Apart from this, when the service was seriously disputed by the defendant/applicant in the trial Court, it was obligatory on the part of respondents to examine process server who has affected the service. Learned trial Court on the basis of enquiry report made by Sale Ameen dated 20.7.2000, which was found to be proper on which applicant had put the signatures, has passed the ex-parte judgment and decree against the applicant.

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8. CONTRACT ACT, 1872 – Sections 73 and 74

Actionable Claim, arising from lost pay order and subsequent misuses – Held, Liability must assume legal shape of wrong such as negligence, malfeasance, misfeasance and non-feasance– Plaintiff was neither customer of appellant bank nor had a contractual agreement with the bank – Absence of contractual liability does not give raise to actionable claim.

संविदा अधिनियम, 1872 – धाराएं 73 एवं 74

खोये हुये भुगतान आदेष और बाद में दुरूपयोग से उत्पन्न अनुयोज्य दावा – अभिनिर्धारित किया गया कि दायित्व विधिक दोष यथा उपेक्षा, दुष्कृत्य, अपकृत्य और कृत्य पूरा न करने के रूप में उत्पन्न होना चाहिये – वादी अपीलार्थी बैंक का न तो ग्राहक था और न ही बैंक के साथ उसका संविदात्मक समझौता था – संविदात्मक दायित्व के अभाव में अनुयोज्य दावा उत्पन्न नहीं होता है।

Bank of Maharashtra v. ICO Jax India, Deedwana Oli, Lashkar
Judgment dated 01.09.2016 passed by the High Court of Madhya Pradesh in First Appeal No. 147 of 2000, reported in 2017 (1) MPLJ 295

Facts of the case:

Plaintiff/ Respondent no. 1 deals in trading of electronic items in Gwalior. On 27.1.91 respondent no. 2 visited respondent no. 1 shop and gave an offer of purchasing electronic merchandise and promised to give payment by way of pay order of Bank of Maharashtra under the Educated Unemployed Loan scheme of the Bank. Respondent no. 1 supplied the electronic merchandise to Respondent no. 2 and in response to order placed by him and in consideration got pay order of ` 34,200/–. When pay order was submitted by respondent no. 1 for encashment in his bank, found that pay order was forged and was not issued by the Appellant Bank.

Matter was brought in notice of police and it was found that pay order given by Respondent no. 2 to Respondent no.1 was earlier lost/stolen by somebody from Jabalpur branch of the said Bank & had affixed the forged seal of Gwalior Branch. During investigation, police could not trace out Respondent no. 2 Ramnaresh, due to which actual conspiracy could not came in to light. Respondent no. 1 filed a civil suit for recovery against appellant bank & Respondent no. 2 in lieu of supply of electronic merchandise on ground that due to carelessness/negligence of Bank & non publication of news of theft or loss of pay order in public, he suffered loss which should be compensated by the appellant Bank.

Relevant extracts of the judgment:

No contractual liability exists between the Bank and respondent No.1. Respondent No.1 had neither contractual agreement with it nor was the customer of the Bank, therefore, no contractual liability of appellant Bank existed in the present set of facts. Similarly, from the facts and evidence it is established that no tortuous liability of the appellant bank exists for suitably compensating respondent No.1.

In view of the aforesaid, no actionable claim can be raised against the Bank because to be actionable claim and get redress from Court, the liability must assume legal shape in any recognized category of wrong such as negligence, malfeasance, misfeasance and non–feasance etc.

'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to damage, undesired by the defendant, to the plaintiff. Thus its ingredients are

(a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;
(b) breach of that duty;

(c) consequential damage to B."

According to Dias,

"Liability in negligence is technically described as arising out of damage caused by the breach of a duty to take care."

The axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care. But concept of duty, its reasonableness, the standard of care required cannot be put in strait–jacket. It cannot be rigidly fixed. In Black's Law Dictionary the meaning of each of these expressions is explained as under:

> "***Malfeasance.–*** Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do. Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties.
>
> ***Misfeasance.***– The improper performance of some act which a man may lawfully do.
>
> ***Non-feasance.***– Non-performance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty."

The expressions 'malfeasance', 'misfeasance' and 'nonfeasance' would, therefore, apply in those limited cases where the State or its officers are liable not only for breach of care and duty but it must be actuated with malice or bad faith [See; ***Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat, (1994) 4 SCC 1***].

Here, in the present case from the pleadings and evidence of respondent No.1/plaintiff, negligence, misfeasance and non-feasance have not been established in any manner. Plaintiff could not establish the malice or bad faith, in the present case. On the other hand, correspondence available on the record suggested that the Bank has taken due care to inform all the branches, offices and the persons concerned regarding loss of pay order form, moment they come to know about the fraud. Respondent No.1 was neither customer of the appellant bank nor was in contractual agreement with the Bank. Therefore, on the count of absence of any contractual liability also, no liability could have been fastened over the Bank. The finding so arrived in the impugned judgment and decree are perverse and therefore, set aside.

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9. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Statutory right of the Police to investigate in matters relating to cognizable offences – Functions of judiciary and police are complimentary – Judiciary should not interefere.

If Information given *ex facie* discloses commission of cognizable offence – Police has no option and registration of an FIR is mandatory – If cognizable offence is not made out clearly – Police can conduct sort of preliminary verifcation or inquiry for limited purposes.

दंड प्रक्रिया संहिता, 1973 – धारा 154

संज्ञेय अपराधों से संबंधित मामलों में अनुसंधान करने का पुलिस का वैधानिक अधिकार – न्यायपालिका एवं पुलिस के कार्य एक दूसरे के पूरक है – न्यायपालिका द्वारा दखल नहीं दिया जाना चाहिए।

यदि दी गई सूचना प्रथम दृष्टया संज्ञेय अपराध बताती है – पुलिस के पास कोई विकल्प नहीं है एवं प्रथम सूचना रिर्पोट दर्ज करना अनिवार्य है – यदि संज्ञेय अपराध स्पष्ट रूप से नहीं बनता है – पुलिस सीमित उद्देष्य के लिये प्रारंभिक सत्यापन या जॉच कर सकती है।

State of Telangana v. Habib Abdullah Jeelani & ors.

Judgment dated 06.01.2017 passed by the Supreme Court in Criminal Appeal No. 1144 of 2016, reported in 2017 (1) Crimes 85 (SC)

Relevant extracts from the judgment:

The controversy compels one to visit the earlier decisions. In ***King Emperor v. Khwaja Nazir Ahmad, AIR 1945 PC 18*** while deliberating on the scope of right conferred on the police under Section 154 CrPC, Privy Council observed:–

> "... so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case

as the present, however, the Court's functions begin when a charge is preferred before it and not until then."

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The exceptions that were carved out pertain to medical negligence cases as has been stated in ***Jacob Mathew v. State of Punjab, (2005) 6 SCC 1.*** The Court also referred to the authorities ***in P. Sirajuddin v. State of Madras, (1970) 1 SCC 595*** and ***CBI v. Tapan Kumar Singh, (2003) 6 SCC 175*** and finally held that what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence.

Be it noted, certain directions were issued by the Constitution Bench, which we think, are apt to be extracted:–

"**120.5.** The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay."

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

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10. CRIMINAL PROCEDURE CODE, 1973 – Sections 207 and 208
Supply of copies to the accused – Supply of all the documents is not necessary – Only documents on which the prosecution proposes to rely has to be furnished to the accused – If the documents are voluminous, then the accused may be allowed to inspect them rather than to furnish the copies.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 207 एवं 208

अभियुक्त को प्रतियाँ प्रदान किया जाना – समस्त दस्तावेजों की प्रतियाँ दिया जाना आवष्यक नहीं है – मात्र वहीं दस्तावेज जिन पर अभियोजन निर्भर करने का प्रस्ताव करता हैं अभियुक्त को दिये जाने है – यदि दस्तावेज विपुल मात्रा में है, तो अभियुक्त को प्रति देने के स्थान पर उसे निरीक्षण करने की अनुमति दी जा सकती है।

K.K. Mishra v. State of M.P.
Order dated 12.09.2016 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 16361 of 2016, reported in 2016 (IV) MPJR 145

Relevant extracts from the order:

As per section 208 of Cr.P.C., it is not mandatory that all the documents/records produced by the prosecution before the Magistrate, the copies thereof has to be supplied to accused. The copies of documents on which the prosecution proposes to rely has to be furnished to the accused and in this case, this has been done. However, it is not incumbent upon the Court to supply the copies of other documents/papers enclosed in the file which the prosecution does not propose to rely. A further discretion has been given to the Magistrate in the proviso to section 208 Cr.P.C., as if he is satisfied that such document is voluminous then instead of supplying the copies thereof, the accused will be allowed to inspect it either personally or through pleader in Court. The similar provision has also been given in cases instituted on police report under section 207 of Cr.P.C.

The Hon'ble Supreme Court in the case of ***Sunita Devi v. State of Bihar, 2005 (2) MPLJ 406 (SC)*** held that "the documents in terms of section 207 and 208 of Cr.P.C., are supplied to make the accused aware of the materials which are sought by the prosecution to be utilized against him. The object is to enable the accused to defend him–self properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial".

In the present case, the prosecution relies upon the domicile certificates of the candidates and copies of these documents Ex.P-12 to P-70 and Ex.P-73 to P-327 have been supplied to petitioner/accused. There are about 316 files of various select candidates, in which large number of papers, documents are submitted by the candidates. Therefore, the trial Court has rightly observed that these files contain voluminous papers and documents and on exercising its discretion given under section 208 of Cr.P.C., after recording his satisfaction

the presiding officer has directed the petitioner/accused to inspect the records, either personally or through pleader in Court, instead of furnishing the petitioner with a copy thereof. The petitioner can inspect the records and thereafter cross examine the prosecution witnesses. The trial Court has given sufficient time for inspection of records. The prosecution has produced the entire file of selected candidates and provided opportunity of inspection of the same to petitioner. Therefore, it cannot be presumed that merely on denial of aforesaid copies of documents would prejudice the petitioner seriously. He can effectively cross examine the witnesses after inspection of the entire record/file of students.

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11. CRIMINAL PROCEDURE CODE, 1973 – Sections 216 and 217
Original charge under Section 306 IPC – At the fag end of the trial charge was amended and an alternative charge under Section 302 IPC was framed as well – No witnesses were recalled and accused were convicted under Section 302 IPC – Held, alteration or Adding of charge – If any prejudice is going to be caused to the accused – New charge must be treated as charge made for first time and trial has to proceed from that stage – Even if charge is of the same species then also trial must be adjourned and prosecutor as well as accused shall be allowed to recall witnessesd with reference to such alteration or addition – Conviction under Section 302 IPC set aside.

दंड प्रक्रिया संहिता, 1973 – धाराएं 216 एवं 217

धारा 306 भारतीय दंड संहिता के अंतर्गत मूल आरोप – विचारण की समाप्ति के समय आरोप संषोधित किये गये एवं धारा 302 भा.दं.सं. के अंतर्गत भी वैकल्पिक आरोप विरचित किये गये – किसी भी साक्षी को पुनः आहूत नहीं किया गया एवं अभियुक्तगण को धारा 302 भा.दं.सं. के अंतर्गत दोषसिद्ध किया गया – अभिनिर्धारित, आरोप में परिवर्तन या परिवर्धन – यदि अभियुक्त पर कोई प्रतिकूल प्रभाव हो रहा है तब नवीन आरोप को प्रथम बार विरचित किये गये आरोप के समान लिया जाना चाहिए एवं विचारण भी उसी प्रक्रम से प्रारंभ किया जाना चाहिए – यद्यपि आरोप समान प्रकार के हो तब भी विचारण को स्थगित किया जाना चाहिए एवं अभियोजन व अभियुक्त को ऐसे परिवर्तन एवं परिवर्धन के संबंध में साक्षीगण को पुनः आहूत करने की अनुमति दी जाना चाहिए – धारा 302 भा.दं.सं. के अंतर्गत दोषसिद्धी अपास्त की गयी।

R. Rachaiah v. Home Secretary, Bangalore
Judgment dated 04.05.2016 passed by the Supreme Court in Criminal Appeal No. 2379 of 2009, reported in 2016 (2) ANJ (SC) 224

Relevant extracts from the judgment:

The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person

who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and 4 of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section (4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.

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Now, the charge against the appellants was that they have committed murder of Dr. Shivakumar. In a case like this, addition and/or substitution of such a charge was bound to create prejudice to the appellants. Such a charge has to be treated as original charge. In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses, examine them in the context of the charge under Section 302 of IPC and allow the accused persons to cross-examine those witnesses. Nothing of that sort has happened. As mentioned above, only one witness i.e. official witness, namely, Deva Reddi, Deputy Superintendent of Police, was examined and even he was examined on the same date i.e. 30.09.2006 when the alternative charge was framed. The case was not even adjourned as mandatorily required under sub-Section (4) of Section 216 of the Code.

In a case like this, with the framing of alternative charge on 30.09.2006, testimony of those witnesses recorded prior to that date could even be taken into consideration. It hardly needs to be demonstrated that the provisions of Sections 216 and 217 are mandatory in nature as they not only sub-serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity. Cross-examination of the witnesses, in the process,

is an important facet of this right. Credibility of any witness can be established only after the said witness is put to cross-examination by the accused person.

In the instant case, there is no cross-examination of these witnesses insofar as charge under Section 302 IPC is concerned. The trial, therefore, stands vitiated and there could not have been any conviction under Section 302 of the IPC.

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12. CRIMINAL PROCEDURE CODE, 1973 – Section 311

Application after recording of accused statement under Section 313 Cr.P.C. for recalling of witnesses on the ground that the defence counsel was not competent – No prejudice shown to be caused – Mere change of counsel cannot be a ground to recall the witnesses.

दण्ड प्रक्रिया संहिता, 1973 – धारा 311

धारा 313 दं.प्र.सं. के कथन लेखबद्ध किये जाने के पष्चात् साक्षीगण को पुनः आहुत करने के लिये पूर्व बचाव अधिवक्ता के सक्षम न होने के आधार पर आवेदन – कोई प्रतिकूल प्रभाव होना दर्षित नहीं किया गया – मात्र अधिवक्ता का बदला जाना साक्षीगण को पुनः आहुत किये जाने का आधार नहीं हो सकता है।

State (NCT of Delhi) v. Shiv Kumar Yadav and anr.

Judgment dated 10.09.2015 passed by the Supreme Court in Criminal Appeal No. 1187 of 2015, reported in AIR 2015 SC 3501.

Relevant extracts from the judgment:

It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon

by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

In ***Hoffman Andreas v. Inspector of Customs, (2000) 10 SCC 430*** the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

> "Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

In ***State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600,*** this Court held:

> ".. . we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, Strickland v. Washington makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein: "Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. **[*Cf. Engle v. Isaac, 1982 456 US 107 at pp. 133–134*].** A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;. "

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13. CRIMINAL PROCEDURE CODE, 1973 – Section 320
INDIAN PENAL CODE, 1860 – Section 324
Offence under Section 324 made non-compoundable by the Amendment Act which came into force on 31.12.2009 – Prospective effect – Offence prior to 31.12.2009 will remain compoundable.

दण्ड प्रक्रिया संहिता, 1973 – धारा 320

भारतीय दण्ड संहिता, 1860 – धारा 324

धारा 324 भा.द.सं. के अंतर्गत अपराध को संषोधन अधिनियम के प्रभाव में आने की दिनांक 31.12.2009 से अषमनीय बनाया गया – भविष्यलक्षी प्रभाव – दिनांक 31.12.2009 के पूर्व के अपराध शमनीय रहेगें।

Suraj Dhanak v. State of Madhya Pradesh
Order dated 15.06.2016 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1074 of 2011, reported in 2017 (1) MPLJ 139

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14. CRIMINAL PROCEDURE CODE, 1973 – Sections 353 and 354
CRIMINAL TRIAL : Responsibility of a Trial Judge

(i) Judgment not signed, dated and pronounced in open court – Only result (acquittal) pronounced and stated in order sheet – Incomplete and unsigned judgment is no judgment – Grossly illegal – Trial to be treated as pending.

(ii) Responsibility of a trial judge to record the evidence in prescribed manner and pronounce judgment as per the Code – Pronouncement without complete judgment – Unbearable agony to the cause of justice – No one has right to do so.

दंड प्रक्रिया संहिता, 1973 – धाराएं 353 एवं 354

आपराधिक विचारण – विचारण न्यायाधीष के उत्तरदायित्व

(i) निर्णय खुले न्यायालय में हस्ताक्षरित, दिनांकित एवं सुनाया नहीं गया – मात्र परिणाम (दोषमुक्ति) घोषित किया गया एवं आदेष पत्रिका में उल्लेखित किया गया – अपूर्ण एवं अहस्ताक्षरित निर्णय कोई निर्णय नहीं है – अत्यधिक अवैधानिक – विचारण को लंबित माना जावेगा।

(ii) विचारण न्यायालय का यह दायित्व है कि वह निर्धारित तरीके से साक्ष्य अभिलिखित करे एवं संहिता के अनुसार निर्णय सुनाये – पूर्ण निर्णय के बिना ही सुनाया जाना – न्याय को असहनीय वेदना – किसी भी व्यक्ति को ऐसा करने का अधिकार नहीं है।

Ajay Singh and anr. Etc. v. State of Chhattisgarh and anr.
Judgment dated 06.01.2017 passed by the Supreme Court in Criminal Appeal No. 32 of 2017, reported in 2017 (1) Crimes 75 (SC)

Relevant extracts from the judgment:

It is apposite to note that though CrPC does not define the term "judgment", yet it has clearly laid down how the judgment is to be pronounced. The provisions clearly spell out that it is imperative on the part of the learned trial judge to pronounce the judgment in open court by delivering the whole of the judgment or by reading out the whole of the judgment or by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

We have already noted that the judgment was not dictated in open court. Code of Criminal Procedure provides reading of the operative part of the judgment. It means that the trial judge may not read the whole of the judgment and may read operative part of the judgment but it does not in any way suggest that the result of the case will be announced and the judgment would not be available on record. Non-availability of judgment, needless to say, can never be a judgment because there is no declaration by way of pronouncement in the open court that the accused has been convicted or acquitted. A judgment, as has been always understood, is the expression of an opinion after due consideration of the facts which deserve to be determined. Without pronouncement of a judgment in the open court, signed and dated, it is difficult to treat it as a judgment of conviction as has been held in Re. Athipalayan and ors., AIR 1960 Mad 507. As a matter of fact, on inquiry, the High Court in the administrative side had found there was no judgment available on record. Learned counsel for the appellants would submit that in the counter affidavit filed by the High Court it has been mentioned that an incomplete typed judgment of 14 pages till paragraph No. 19 was available. The affidavit also states that it was incomplete and no page had the signature of the presiding officer. If the judgment is not complete and signed, it cannot be a judgment in terms of Section 353 CrPC. It is unimaginable that a judgment is pronounced without there being a judgment. It is gross illegality.

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The case at hand constrains us to say that a trial Judge should remember that he has immense responsibility as he has a lawful duty to record the evidence in the prescribed manner keeping in mind the command postulated in Section 309 of the CrPC and pronounce the judgment as provided under the Code. A Judge in charge of the trial has to be extremely diligent so that no dent is created in the trial and in its eventual conclusion. Mistakes made or errors committed are to be rectified by the appellate court in exercise of "error jurisdiction". That is a different matter. But, when a situation like the present one crops up, it causes agony, an unbearable one, to the cause of justice and hits like a lightning in a cloudless sky. It hurts the justice dispensation system and no one, and we mean no one, has any right to do so. The High Court by rectifying the grave error has acted in furtherance of the cause of justice. The accused persons might have felt delighted in acquittal and affected by the order of rehearing, but they should bear in mind that they

are not the lone receivers of justice. There are victims of the crime. Law serves both and justice looks at them equally. It does not tolerate that the grievance of the victim should be comatosed in this manner.

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15. CRIMINAL PROCEDURE CODE, 1973 – Sections 200 and 482
PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Sections 23, 25 and 28

Whether public servant making complaint is required to be present personally before Magistrate or it may be presented by post or through any messenger?

Held, the requirements of law are satisfied when the complaint is forwarded and received in the Court charged with the duty of trying the offence – Complaint need not be presented personally and it may be presented through post, by any messenger or by any authorised person – No difference regarding presentation of complaint on the basis of the Act of 1994 – Appropriate Authority District Magistrate made complainant – CJM rightly taken cognizance against applicant.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 200 एवं 482

गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिशेध) अधिनियम, 1994 – धाराएं 23, 25 एवं 28

क्या परिवाद प्रस्तुत करने वाले लोक सेवक को व्यक्तिगत रूप से मजिस्ट्रेट के सामने उपस्थित होना आवष्यक है अथवा इसे डाक या किसी अन्य वाहक के द्वारा प्रस्तुत किया जा सकता है?

अभिनिर्धारित – विधि की आवष्यकता तब पूर्ण हो जाती है जब परिवाद अग्रेषित किया जाता है एवं अपराध का विचारण करने हेतु दायित्वाधीन न्यायालय के द्वारा प्राप्त कर लिया जाता है – परिवाद को व्यक्तिगत रूप से पेष किया जाना आवष्यक नहीं है और उसे डाक, किसी वाहक या अधिकृत व्यक्ति द्वारा प्रस्तुत किया जा सकता है – अधिनियम, 1994 के आधार पर प्रस्तुत परिवाद के संबंध में भी कोई भिन्नता नहीं है – उचित प्राधिकारी जिला मजिस्ट्रेट द्वारा प्रस्तुत परिवाद पर मुख्य न्यायिक मजिस्ट्रेट ने आवेदक के विरूद्ध सही रूप से संज्ञान लिया।

Raju Premchandani (Dr.) and anr. v. State of Madhya Pradesh
Order dated 01.09.2015 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 6027 of 2013, reported in ILR (2016) MP 1578

Relevant extracts from the order:

Now I have to consider that if a public servant acting or purporting to act in discharge of his official duties made the complaint, then is it necessary that such public servant should have present the complaint personally before the

Magistrate ? In clause (a) of first proviso of Section 200 of the Code, the words "has made the complaint" are used. In Section 28 of the Act of 1994 the same phraseology has been used "no Court shall take cognizance of an offence under this Act except on a complaint made by". Whether "complaint made by" means a public servant should have personally made the complaint or it may be presented through post or by any messenger. For this purpose, I would like to refer the judgment of Nagpur High Court in the case of ***State Government v. Rukhabsa Jinwarsa, AIR 1953 Nagpur 180*** in which it is held that :–

> "There is no provision in the Code of Criminal Procedure requiring personal presentation of the complaint by the District Magistrate or his representative under Section 105, Factories Act. In our opinion, the requirements of law are satisfied when the complaint is forwarded by the District Magistrate and received in the court charged with the duty of trying the offence. Here the reader was acting on behalf of the Court in receiving the complaint. It was not necessary that the Magistrate should have personally received the papers."

The above view was followed by the ***Patna High Court in the case of State v. Satnarain Bhuvania, AIR 1960 Patna 514***.

Allahabad High Court in the case of ***State v. S.D. Gupta, 1973 Cri.L.J. 999 (All)*** while dealing with the provisions of Factories Act, 1948 held that there is no provision in the Code of Criminal Procedure stating expressly or impliedly that the complaint must be presented to the Magistrate by the complainant personally. It cannot be held that a complaint sent by post is not valid and cannot be taken cognizance. Allahabad High Court has dealt with the provisions of Section 4 (1) (h) and Section 190 (1) (a) of the Code held as under:–

> "(13) Now, a complaint in writing sent to a Magistrate with a view to his taking action is very much a complaint within the meaning of Section 4 (1) (h) reproduced above. There is nothing in Section 4 (1) (h) which may even impliedly mean that the complaint must be made to the Magistrate personally.
>
> (14) The next relevant section in the Code of Criminal Procedure is Section 190 (1) (a) which reads as follows :–
>
> "Except as hereinafter provided, any Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence–
>
> (a) upon receiving a complaint of facts which constitute such offence :

(b) .....

(c) .....

It may be noticed that the words used in sub-clause (a), are "upon receiving a complaint". The word "receiving" should include receiving by post. It will thus appear that there is nothing even in Section 190 which may lead to the conclusion that a complaint must necessarily be presented to the Magistrate by the complainant himself or through his counsel."

With the aforesaid discussions, I am of the firm view that it is not the requirement of Code or the Act of 1994 that the Appropriate Authority should have personally present the complaint before the competent Magistrate.

Now I have to consider the authority of apex Court which is relied upon by the learned Senior Counsel. In the case of ***National Small Industries Corporation Limited v. State (NCT of Delhi), (2009) 1 SCC 407,*** Hon'ble Supreme Court dealt with the provisions of clause (a) of first proviso to Section 200 of the Code held that a Government company is not a public servant but every employee of the company is a public servant and where the complainant is a public servant or court, the Code raises an implied statutory presumption that the complaint has been made responsibly and ***bonafide*** and not falsely or vexatiously. In such cases the exemption under clause (a) of first proviso to Section 200 of the Code will be available. But such exemption is not available to Government company if complaint is made in the name of the company represented by the employee. This is not the question involved in this case. Thus, this judgment is not helpful to the applicants.

In the case of ***Dr. Manvinder Singh Gill v. State of Madhya Pradesh,*** Misc. Criminal Case No. 4393 of 2013 decided on 04.07.2013 nominee of the Appropriate Authority i.e. District Magistrate has made a complaint under the Act of 1994. Therefore, this Court held that the complaint is not made by Appropriate Authority. In the present case District Magistrate, who is Appropriate Authority, himself filed the complaint under his signature. Therefore, this precedent is also not helpful to the applicants.

With the aforesaid, I am of the view that the District Magistrate, who is Appropriate Authority under the Act of 1994, has made the complaint and on the basis of complaint CJM has rightly taken the cognizance on 05.09.2011 against the applicants. Thus, there is no merit in this application. This application is hereby dismissed. A copy of this order along with the Trial Court's record be sent immediately to the Trial Court to decide the complaint according to law.

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16. CRIMINAL TRIAL:

(i) Appreciation of evidence – Mere giving larger statements than previous statements not sufficient to disbelieve – There must be contradictions in the statements to raise suspicion.

(ii) Testimony of other witness about the genesis of the occurrence – Non-examination of witnesses, who might have been there when the deceased narrated the version – Non-examination is not fatal to prosecution.

दाणिक विचारण :

(i) साक्ष्य का मूल्यांकन – मात्र पूर्व के कथनों से विस्तार में कथन किया जाना अविष्वास करने हेतु पर्याप्त नहीं हैं – कथनों में शंका उत्पन्न करने हेतु विरोधाभास होना चाहिए।

(ii) अन्य साक्षीगण के घटना के बारे में कथन – ऐसे साक्षीगण जो कि मृतक द्वारा घटना के बारे में बताये जाते समय उपस्थित रहे होंगे, परीक्षित नहीं कराये गये – उनका परीक्षण न कराया जाना अभियोजन के लिए घातक नहीं है।

Sheikh Juman and anr. v. State of Bihar

Judgment dated 23.02.2017 passed by the Supreme Court in Criminal Appeal No. 484 of 2008, reported in AIR 2017 SC 1121

Relevant extracts from the judgment:

The learned senior counsel for appellants contented that both the Courts below have committed an error in convicting the appellants for the offence punishable under Section 302 IPC, along-with other accused. He submitted that there were material improvements made by PW14 in his deposition when compared to the fardbeyan given to the police on the date of the incident and no specific role has been attributed to the present appellants. But after careful analysis of the fardbeyan (Ext.7), we have an entirely different opinion. It is true that deposition is somewhere literally larger than the fardbeyan, however, it is no where contrary to it. It may rightly be said that the deposition of PW14 is merely elaborated form of statement recorded before the police, with minor contradictions. Oral evidence of a witness could be looked with suspicion only if it contradicts the previous statement.

xxxx

We have seen in the instant case that the witnesses have vividly deposed about the genesis of the occurrence, the participation and involvement of the accused persons in the crime. The non-examination of the witnesses, who might have been there on the way to hospital or the hospital itself when deceased narrated the incident, would not make the prosecution case unacceptable. Similarly, evidence of any witness cannot be rejected merely on the ground that interested witnesses admittedly had enmity with the persons implicated in the case. The purpose of recoding of the evidence, in any case, shall always be to unearth the truth of the case. Conviction can even be based on the testimony of

a sole eye-witness, if the same inspires confidence. Moreover, prosecution case has been proved by the testimony of the eye-witness since corroborated by the other witnesses of the occurrence. We are constrained to reject the submissions made on behalf of the appellants.

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17. CRIMINAL TRIAL: Contradictory Stand of the Accused – Previous Intention.

Contradiction between statements under Section 313 and arguments on behalf of the accused – Negative inference against the accused.

Accused came to the spot armed with deadly weapons – Long standing land dispute – Intention can be gathered – Argument that incident occurred in spur of the moment – Rejected.

आपराधिक विचारण : अभियुक्त द्वारा विरोधाभासी आधार लिया जाना – पूर्व आषय।

धारा 313 दं.प्र.सं. के अंतर्गत कथनों एवं अभियुक्त की ओर से दिये गये तर्कों के मध्य विरोधाभास – अभियुक्त के विरूद्ध नकारात्मक अनुमान।

अभियुक्त घटना स्थल पर घातक आयुधों को लेकर आया – लंबे समय से भूमि संबंधी विवाद था – आषय को अनुमानित किया जा सकता है – यह तर्क, कि घटना क्षणिक प्रेरणा से हुई – खारिज किया गया।

Baleshwar Mahto & anr. v. State of Bihar & anr.

Judgment dated 09.01.2017 passed by the Supreme Court in Criminal Appeal No. 513 of 2014, reported in 2017 (1) Crimes 26 (SC)

Relevant extracts from the judgment:

We may mention, in the first instance, that in the statement of the appellants recorded under Section 313 of the Criminal Procedure Code, 1973 the defence taken was that of the total denial of the occurrence. It was stated that because of the long standing land dispute they were falsely implicated in this case. On the contrary, according to these appellants, they were attacked by the complainant party for which the accused party had got P.S. Case No. 117/1982 registered against them and the case in–question was nothing but a counter blast. This defence is not only against the record but not even argued or pleaded by the counsel for the appellants. On the contrary, the entire focus of the appellants' argument is that on the basis that due to the land dispute, a sudden quarrel and scuffle took place between the two parties wherein both were injured. This is clearly contrary to the stand taken by the appellants in their statements given under Section 313 of Cr.P.C. where they completely denied the occurrence itself.

xxx

The aforesaid analysis of ours is sufficient to reject the other contentions advanced by the appellants. When the appellants had come to the place of

occurrence armed with deadly weapons, their intention and purpose would be more than apparent and, therefore, the appellants cannot argue that incident occurred at the spur of the moment. The argument that there was a longstanding land dispute between the two parties, in fact, goes against the appellants as it shows previous animosity due to the said dispute because of which the appellants in order to teach 'lesson' to the complainant party attacked them in the manner described by the prosecution. In view of the aforesaid discussion, various judgments cited by learned counsel for appellants will have no bearing or application to the facts of the instant case. It is, therefore, not even necessary to discuss them. We, therefore, do not find any error in convicting A-1 for the offence punishable under Section 302 IPC as well as Section 27 of the Arms Act and A-2 for the offence punishable under Section 307 IPC and Section 27 of the Arms Act.

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18. CRIMINAL TRIAL : Sentencing

CRIMINAL PROCEDURE CODE, 1973 – Section 357

Case relating to Acid attack – Conviction by the trial court under Section 326 I.P.C. and sentenced for one year of rigorous imprisonment and fine – High Court reduced the sentence as period undergone – Reduction of sentence as period undergone heavily criticised – Sentence awarded by the Trial Court restored – In addition to the sentence, accused directed to pay compensation of ` 50,000 and State directed to pay compensation of Rs. 3 lakh.

आपराधिक विचारण : दंडनीति

दंड प्रक्रिया संहिता, 1973 – धारा 357

अम्ल हमले से संबंधित मामला – विचारण न्यायालय द्वारा धारा 326 भारतीय दंड संहिता के अंतर्गत दोषसिद्धी एवं एक वर्ष का सश्रम कारावास व अर्थदंड से दंडित किया गया – उच्च न्यायालय द्वारा दंड को भुगते गये कारावास तक कम किये जाने की कठोर आलोचना – विचारण न्यायालय द्वारा दिया गया दंड बहाल किया गया – दंड के अतिरिक्त अभियुक्त को प्रतिकर के रूप में रूपये 50,000/– का प्रतिकर एवं राज्य को तीन लाख रूपये का प्रतिकर दिये जाने हेतु निर्देषित किया गया।

Ravada Sasikala v. State of Andhra Pradesh and anr.

Judgment dated 27.02.2017 passed by the Supreme Court in Criminal Appeal No. 406 of 2017, reported in 2017 (1) ANJ (SC) (Suppl.) 75

Relevant extracts from the judgment:

Recently, in ***Raj Bala v. State of Haryana and others, (2016) 1 SCC 463*** on reduction of sentence by the High Court to the period already undergone, the Court ruled thus:–

> "Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too" and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability."
>
> And again:–
>
> "A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamount to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

Though we have referred to the decisions covering a period of almost three decades, it does not necessarily convey that there had been no deliberation much prior to that. There had been. In ***B.G. Goswami v. Delhi Administration, (1974) 3 SCC 85,*** the Court while delving into the issue of punishment had observed that punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole.

Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentence.

The purpose of referring to the aforesaid precedents is that they are to be kept in mind and adequately weighed while exercising the discretion pertaining to awarding of sentence. Protection of society on the one hand and the reformation of an individual are the facets to be kept in view. In ***Shanti Lal Meena v. State (NCT of Delhi), (2015) 6 SCC 185,*** the Court has held that as far as

punishment for offence under the Prevention of Corruption Act, 1988 is concerned, there is no serious scope for reforming the convicted public servant. Therefore, it shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime committed by the respondent No. 2. It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The respondent No. 2 might have felt that his ego had been hurt by such a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done.

In view of what we have stated, the approach of the High Court shocks us and we have no hesitation in saying so. When there is medical evidence that there was an acid attack on the young girl and the circumstances having brought home by cogent evidence and the conviction is given the stamp of approval, there was no justification to reduce the sentence to the period already undergone. We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced the sentence. When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vânaprastha". It is wholly impermissible.

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19. CRIMINAL TRIAL: Test Identificaton

Test identification by chance witness – No disclosure as to any special feature for identification – Delay in holding of Test identification – Crime was not committed in their presence – Chance meeting only for fleeting moments – Held – Not reliable – Accused worthy of benefit of doubt.

आपराधिक विचारण : षिनाख्त परीक्षण

मौके के गवाह द्वारा षिनाख्त परेड – पहचान हेतु कोई विषेष लक्षण नहीं बताया गया – षिनाख्त परेड को आयोजित करने में विलम्ब – अपराध उनकी उपस्थिति में नहीं हुआ था – केवल क्षणिक रूप से इत्तेफाक से मुलाकात हुई – अभिनिर्धारित – विष्वसनीय नहीं – अभियुक्त संदेह का लाभ प्राप्त करने का अधिकारी है।

Md. Sajjad @Raju @ Salim v. State of West Bengal
Judgment dated 06.01.2017 passed by the Supreme Court in Criminal Appeal No. 1953 of 2010, reported in 2017 (1) Crimes 68 (SC)

Relevant extracts from the judgment:

In the instant case none of the witnesses had disclosed any features for identification which would lend some corroboration. The identification parade itself was held 25 days after the arrest. Their chance meeting was also in the night without there being any special occasion for them to notice the features of any of the accused which would then register in their minds so as to enable them to identify them on a future date. The chance meeting was also for few minutes. In the circumstances, in our considered view such identification simplicitor cannot form the basis or be taken as the fulcrum for the entire case of prosecution. The suspicion expressed by PW 8 Saraswati Singh was also not enough to record the finding of guilt against the appellant. We therefore grant benefit of doubt to the appellant and hold that the prosecution has failed to establish its case against the appellant.

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20. EVIDENCE ACT, 1872 – Section 44
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 4
Whether a decree can be set aside at any time on the ground that it is obtained by fraud? The decree passed in favour of respondent upheld by High Court and Supreme Court – Held, Yes – Issue of fraud can be raised at any time but every non-disclosure is not fraud – Fraud must be proved and not merely alleged and inferred – A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent.

भारतीय साक्ष्य अधिनियम, 1872 – धारा 44

सिविल प्रक्रिया संहिता, 1908 – आदेष 6 नियम 4

क्या किसी डिक्री को कपट से प्राप्त किये जाने के आधार पर उसे किसी भी समय खारिज किया जा सकता है? प्रत्यर्थी के पक्ष में पारित डिक्री को उच्च न्यायालय एवं सर्वोच्च न्यायालय द्वारा भी सही ठहराया गया है – अभिनिर्धारित, हाँ – कपट का प्रष्न कभी भी उठाया जा सकता है परंतु प्रत्येक अप्रकटीकरण कपट नहीं है – कपट को प्रमाणित किया जाना चाहिए एवं मात्र आक्षेपित/आरोपित एवं अनुमानित नहीं – धोखे के आषय के बिना मात्र किसी तथ्य को छुपाया जाना या प्रकट न करना या बिना किसी सबूत या धोखे के आषय के कपट का सामान्य आक्षेप पक्षकार द्वारा प्राप्त डिक्री को कपटपूर्ण नहीं बना देता है।

Harjas Rai Makhija (dead) through L.Rs. v. Pushparani Jain and another

Judgment dated 02.01.2017 by the Supreme Court of India in Civil Appeal No. 11491 of 2016, reported in (2017) 2 SCC 797

Relevant extracts from the judgment:

We have been taken through the plaint filed by Makhija in Suit No. 471-A of 2008 and find that he has nowhere made any specific allegation of a fraud having been played by Pushparani on the Trial Court while obtaining the decree dated 4th October, 1999. During the course of submissions, it was contended on behalf of Makhija that it is a settled proposition of law that a decree obtained by playing fraud on the court is a nullity and that such a decree could be challenged at any time in any proceedings. Reliance was placed on ***A.V. Papayya Sastry v. Government of A.P., (2007) 4 SCC 221*** This proposition is certainly not in dispute.

Learned counsel also placed reliance on ***Union of India v. Ramesh Gandhi, (2012) 1 SCC 476*** which reads as under:–

> "If a judgment obtained by playing fraud on the court is a nullity and is to be treated as non est by every court, superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the court by not disclosing the necessary facts relevant for the adjudication of the controversy before the court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest."

We agree that when there is an allegation of fraud by non–disclosure of necessary and relevant facts or concealment of material facts, it must be inquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent, is stretching the principle to a vanishing point.

What is fraud has been adequately discussed in ***Meghmala & ors. v.G. Narasimha Reddy & ors., (2010) 8 SCC 383*** (paragraphs 28 to 36) Unfortunately, this decision does not refer to earlier decisions where also there is an equally elaborate discussion on fraud. These two decisions are ***Bhaurao Dagdu Paralkar v. State of Maharashtra & ors., (2005) 7 SCC 605*** and ***State of Orissa & ors. v. Harapriya Bisoi, (2009) 12 SCC 378*** In view of the elaborate discussion in these and several other cases which have been referred to in these decisions, it is

clear that fraud has a definite meaning in law and it must be proved and not merely alleged and inferred.

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21. GUARDIANS AND WARDS ACT, 1890 – Section 17
HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 6
Custody of minor – Earlier interim order permitted the mother to take child during school holidays – That order was even confirmed by the High Court – Another application at later stage for modification of the order – Minor repeatedly stated that he does not want to stay with mother even during holidays – Court may exercise parens patriae jurisdiction to modify the order in light of new circumstances.

संरक्षक एवं प्रतिपाल्य अधिनियम, 1890 – धारा 17

हिन्दू अप्राप्तवयता एवं संरक्षकता अधिनियम, 1956 – धारा 6

अप्राप्तवय की अभिरक्षा – पूर्व में अंतरिम आदेष के द्वारा माता को बच्चे को विद्यालय के अवकाष के दौरान ले जाये जाने की अनुमति दी गयी – उक्त आदेष की उच्च न्यायालय के द्वारा भी पुष्टि की गई – पष्चात्वर्ती स्तर पर आदेष के परिवर्तन हेतु एक अन्य आवेदन प्रस्तुत किया गया – अप्राप्तवय द्वारा निरंतर यह उल्लेखित किया गया कि वह अवकाष के दौरान भी माता के साथ नहीं रहना चाहता – नवीन परिस्थितियों के आलोक में न्यायालय द्वारा को ***"parens patriae"*** क्षेत्राधिकार का उपयोग आदेष परिवर्तित करने हेतु किया जा सकता है।

Pulkit Dubey and anr. v. Shashank Dubey and anr.
Judgment dated 03.05.2016 passed by the High Court of Madhya Pradesh in Writ Petition No. 19469 of 2015, reported in 2016 (4) MPLJ 163

Relevant extracts from the judgment:

As held in ***Environmental and Consumer Protection Foundation v. Delhi Administration and others, (2011) 13 SCC 17*** and ***Sheshambal through L.Rs. v. Chelur Corporation Chelur Building and others, (2010) 3 SCC 470*** in certain circumstances subsequent events/documents can be examined by the Court. In my view, in the best interest of the minor, the order dated 20.05.2010 needs modification. Merely because as per circumstances prevailing earlier, the said order was not interfered with, this Court cannot shut its eyes and cannot prevent itself from exercising the jurisdiction which is in the best interest of the minor. At the cost of repetition, since there is nothing which can stand in the way of the Court, exercising itsparens patriae jurisdiction, the earlier order passed in different facts situation cannot foreclose the fate of the minor.

If circumstances so warrant, the Court can pass appropriate orders to ensure welfare of the minor. For example, if any particular order is passed as per the factual matrix prevailing at a particular time and it gets stamp of approval from

Higher Court but subsequent events warrant some modification in the best interest of child, the Court will act in the interest of the child and no technicality will come in the way of the Court in passing appropriate order for the welfare of minor.

As noticed above, after passing of order dated 20.05.10 which was unsuccessfully challenged before this Court, the minor (who is now aged about 11 years) repeatedly and specifically stated before the Court below that he does not want to stay with mother. In view of law laid down in ***Gaytri Bajaj v. Jiten Bhalla, AIR 2013 SC 102*** the desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

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22. HINDU MARRIAGE ACT, 1955 – Sections 13(1) (i-a) and 13(1)(i-b)

(i) Wife implicated husband and his family members in a criminal case for demand of dowry and also deserted him for more than 7-8 years depriving him of matrimonial relationship – Conduct of wife amounts to mental cruelty.

(ii) Desertion under Section 13(1)(i-b) of the Act – Essential Conditions – Desertion to be drawn from facts and circumstances of each case.

हिन्दू विवाह अधिनियम, 1955 – धाराएं 13 (1)(1–ए) और 13 (1)(1–बी)

(i) पत्नी के द्वारा पति एवं उसके परिवार के सदस्यों को दहेज माँगने के आपराधिक मामले में आलिप्त किया गया एवं 7–8 वर्षों से अधिक उसका त्यजन कर दांपत्तिक संबंधों से वंचित किया गया – पत्नी का आचरण क्रूरता गठित करता है।

(ii) अधिनियम की धारा 13 (1)(1–बी) के अंतर्गत परित्याग – आवष्यक शर्तें – परित्याग को प्रत्येक मामले की तथ्य एवं परिस्थितियों से निकाला जाना है।

Sheel Kumari v. Asharam

Judgment dated 29.07.2016 passed by the High Court of Madhya Pradesh (Gwalior Bench) in First Appeal No. 168 of 2002, reported in 2016 (4) MPLJ 421 (DB)

Relevant extracts from the judgment:

The concept of mental cruelty has been elaborately discussed in the celebrated judgment rendered by the Supreme Court in the case of ***Dr. N.G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534***.

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The said judgment still holds the field and is source of wisdom time and again in respect of mental cruelty.

The aforesaid decision was referred to with approval in ***Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582, Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, Manisha Tyagi v. Deepak Kumar, (2010) 4 SCC 339, Vishwanath Agrawal v. Sarla Vishwanath Agrawal, (2012)7 SCC 288*** and ***U. Sree v. U. Srinivas, (2013) 2 SCC 114.*** In all these cases, the judgment rendered in the case of ***Dr. N.G. Dastane*** (supra) is relied upon. In the case of ***Samar Ghosh*** (supra), the Supreme Court has enumerated the illustrative instances of human behaviour which may be relevant for dealing with the cases of mental cruelty:

> "No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) ** ** **
>
> (iii)** ** **
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> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.
>
> (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.
>
> (vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.
>
> (vii) ** ** **
>
> (viii) ** ** **
>
> (ix) ** ** **
>
> (x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent

for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) ** ** **

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) ** ** **

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

It is equally well settled in law that lodging of false complaint amounts to cruelty [See: ***Malathi v. B.B. Ravi, (2014) 7 SCC, K. Shrinivas Rao v. D.A. Deepa, (2013) 5 SCC 226, K. Shrinivas v. Ku. Sunita, (2014) 16 SCC 34*** and ***Johnson M. Joseph alias Shajoo v. Smt. Aneeta Jhonson, AIR 2003 MP 271)***]

We may now advert to legal principles with regard to desertion. In ***Bipinchandra Jaisinghbai Shah v. Prabhavati, AIR 1957 SC 176,*** the Supreme Court has explained that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus desired). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus desired.

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23. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 7, 13 and 17

Death of the parents of the minor – Legal battle for taking guardianship of minor between paternal grandparents and maternal grandparents – Welfare of the minor is paramount consideration – "Welfare" must be taken in its widest sense so as to embarrass the material and physical well being; the education and upbringing; happiness and moral welfare – Atmosphere of the house and availability of young person to look after may also be relevant factors.

हिन्दू अप्राप्तवयता एवं संरक्षकता अधिनियम, 1956 – धाराएं 7, 13 एवं 17

अप्राप्तवय के माता पिता की मृत्यु – अप्राप्तवय की संरक्षकता को लेकर दादा–दादी एवं नाना–नानी के बीच विधिक विवाद – अप्राप्तवय का कल्याण सर्वोपरी विचारणीय तथ्य है – ''कल्याण'' को व्यापक रूप में लिया जाना चाहिये ताकि उसमें भौतिक एवं शारीरिक सलामती, षिक्षा एवं पालन, आनंद एवं नैतिक कल्याण समाहित हो – घर का वातावरण एवं देखभाल के लिये युवा व्यक्ति की उपलब्धता भी सुसंगत कारक हो सकते हैं।

Rajendra Singh Parmar v. Smt. Rajendra Kumari

Order dated 17.08.2016 passed by the High Court of Madhya Pradesh in Misc. Appeal No. 1743 of 2015, reported in 2017 (I) MPJR 128 (DB)

Relevant extracts from the Order:

Section 7 of the Act and Section 13 of the Hindu Minority and Guardianship Act 1956 (for short 'the Act 1956') mandate the court while declaring/appointing any person as a guardian of minor, the welfare of the minor shall be paramount consideration. Section 17 of the Act provides that at the time of consideration of the welfare of minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and nearness of kin to the minor, the wishes if any of deceased parents and any existing or previous relations of the proposed guardian with the minor or his/her property. Further the Section clearly states that if there is a conflict between the personal law to which the minor is subject and the welfare of the minor, the latter must prevail. The Section also stipulates that if minor is old enough to form an intelligent preference the court may also consider that preference. It is worth mentioning here that on 17.08.2016, the applicants and the non-applicant as also minor Karnika were present in person before the court. First we made a conscious effort to settle the dispute through mediation. However, the mediation was unsuccessful. It is worthwhile to mention here that we have not inquired from minor Karnika personally as to her preference in this regard on the grounds of her tender age as she is presently aged about 5 years and she has been living in the company of the non-applicant and his family members before the death of her mother. Therefore, her preference would not be certainly free from

tutoring or prompting made by the non–applicant and his family members. Moreover, she is not able to decide her own welfare in residing with the applicants or the non-applicant because of her immaturity.

The expression "welfare of the minor" is not defined in the aforesaid Acts. However, there are some decisions in which the welfare of the minor is exposited in a great detail.

This court in ***Mohammed Mehboob Khan v. Rahmit Bi and others, 1977 V-II W.N. 79*** and ***Rajkumar v. Indrakumari, 1972 JLJ 1045*** has observed that the dominant factor for consideration of the court is the welfare of minor, 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 embrass the material and physical well-being; the education and upbringing; happiness and moral welfare. The court must consider every circumstance bearing upon these considerations.

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24. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Section 8 (1)

LIMITATION ACT, 1963 – Section 7 and Article 60

Alienation of the suit property by widowed mother – Challenged by quondam minor on the ground of non-existence of legal necessity – Article 60 of the Limitation Act will apply for determination of period of limitation – Suit must be filed within three years of ward attaining the majority.

हिन्दू अप्राप्तवयता एवं संरक्षकता अधिनियम, 1956 – धारा 8 (1)

परिसीमा अधिनियम, 1963 – धारा 7 एवं अनुच्छेद 60

विधवा माता के द्वारा वादग्रस्त सम्पत्ति का हस्तांतरण – विधिक आवष्यकता के अस्तित्व में न होने के आधार पर पूर्व अप्राप्तवय के द्वारा चुनौती – परिसीमा अवधि के अवधारण के लिए परिसीमा अधिनियम का अनुच्छेद 60 लागू होगा – अप्राप्तवय के वयस्कता प्राप्त करने के तीन वर्ष के भीतर वाद संस्थित/प्रस्तुत करना चाहिये।

Narayan v. Babasaheb and others

Judgment dated 05.04.2016 passed by the Supreme Court in Civil Appeal No. 3486 of 2016, reported in 2017 (1) MPLJ 62 (SC)

Relevant extracts from the judgment:

A close analysis of the language of Article 60 would indicate that it applies to suits by a minor who has attained majority and further by his legal representatives when he dies after attaining majority or from the death of the minor. The broad spectrum of the nature of the Suit is for setting aside the transfer of immovable property made by the guardian and consequently, a Suit for possession by avoiding the transfer by the guardian in violation of Section 8 (2) of the 1956 Act. In essence, it is nothing more than seeking to set aside the transfer and grant consequential relief of possession.

There cannot be any doubt that a Suit by quondam minor to set aside the alienation of his property by his guardian is governed by Article 60. To impeach the transfer of immovable property by the Guardian, the minor must file the Suit within the prescribed period of three years after attaining majority.

The Limitation Act neither confers a right nor an obligation to file a Suit, if no such right exists under the substantive law. It only provides a period of limitation for filing the Suit.

Hence, we are of the considered opinion that a quondam minor plaintiff challenging the transfer of an immovable property made by his guardian in contravention of Section 8(1)(2) of the 1956 Act and who seeks possession of property can file the Suit only within the limitation prescribed under Article 60 of the Act and Articles 109, 110 or 113 of the Act are not applicable to the facts of the case.

The High Court as well as the Trial Court erred in applying Article 109 of the Act, where Article 109 of the Act clearly speaks about alienation made by father governed by Mitakshara law and further Courts below proceeded in discussing about the long rope given under Article 109 of the Act and comparatively lesser time specified under Article 60 of the Act. It is well settled principle of interpretation that inconvenience and hardship to a person will not be the decisive factors while interpreting the provision. When bare reading of the provision makes it very clear and unequivocally gives a meaning it was to be interpreted in the same sense as the Latin maxim says "dulo lex sed lex", which means the law is hard but it is law and there cannot be any departure from the words of the law.

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25. HINDU SUCCESSION ACT, 1956 – Sections 6, 8, 19 and 30

Devolution of Mitakshara coparcenary property – Death of a hindu male in the year 1973 leaving a widow and 4 sons – Widow being female relative specified in Class I of the Schedule – Property will devolve by intestate succession under Section 8 and not by survivorship – Law relating to joint family property governed by Mitakshara School prior to amendment of 2005, summarised.

हिन्दू उत्तराधिकार अधिनियम, 1956 – धाराएं 6, 8, 19 एवं 30

मिताक्षरा के अंतर्गत सहदायिक संपत्ति का न्यागमन – एक हिन्दू पुरूष की वर्ष 1973 में मृत्यु के पष्चात् विधवा एवं चार पुत्र शेष – विधवा पत्नि अनुसूची 1 के स्त्री नातेदार है – संपत्ति का न्यागमन धारा 8 के निर्वसीयती उत्तराधिकार से होगा और उत्तरजीविता के आधार पर नहीं – वर्ष 2005 के संषोधन से पूर्व मिताक्षरा शाखा से संबंधित संयुक्त परिवार की संपत्ति की विधि को स्पष्ट किया गया।

Uttam v. Saubhag Singh and others

Judgment dated 02.03.2016 passed by the Supreme Court in Civil Appeal No. 2360 of 2016, reported in 2017 (1) MPLJ 6 (SC)

Relevant extracts from the judgment:

On application of the principles contained in the aforesaid decisions, it becomes clear that, on the death of Jagannath Singh in 1973, the proviso to Section 6 would apply inasmuch as Jagannath Singh had left behind his widow, who was a Class I female heir. Equally, upon the application of explanation 1 to the said Section, a partition must be said to have been effected by operation of law immediately before his death. This being the case, it is clear that the plaintiff would be entitled to a share on this partition taking place in 1973. We were informed, however, that the plaintiff was born only in 1977, and that, for this reason, (his birth being after his grandfather's death) obviously no such share could be allotted to him. Also, his case in the suit filed by him is not that he is entitled to this share but that he is entitled to a 1/8th share on dividing the joint family property between 8 co-sharers in 1998. What has therefore to be seen is whether the application of Section 8, in 1973, on the death of Jagannath Singh would make the joint family property in the hands of the father, uncles and the plaintiff no longer joint family property after the devolution of Jagannath Singh's share, by application of Section 8, among his Class I heirs. This question would have to be answered with reference to some of the judgments of this Court.

In ***Commissioner of Wealth Tax, Kanpur and others v. Chander Sen and others, (1986) 3 SCC 567***, a partial partition having taken place in 1961 between a father and his son, their business was divided and thereafter carried on by a partnership firm consisting of the two of them. The father died in 1965, leaving behind him his son and two grandsons, and a credit balance in the account of the firm. This Court had to answer as to whether credit balance left in the account of the firm could be said to be joint family property after the father's share had been distributed among his Class I heirs in accordance with Section 8 of the Act.

This Court examined the legal position and ultimately approved of the view of 4 High Courts, namely, Allahabad, Madras, Madhya Pradesh and Andhra Pradesh, while stating that the Gujarat High Court's view contrary to these High Courts would not be correct in law. After setting out the various views of the five High Courts mentioned, this Court held:

> "It is necessary to bear in mind the preamble to the Hindu Succession Act, 1956. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.
>
> In view of the preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would

mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc. Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu Law, 15th Edn. dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as Mayne's on Hindu Law, 12th Edn., pp. 918-19.

The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to "amend" the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored.

In the aforesaid light the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court, and the Andhra Pradesh High Court, appear to us to be correct. With respect we are unable to agree with the views of the Gujarat High Court noted hereinbefore." [at paras 21-25]

In ***Yudhishter v. Ashok Kumar, (1987) 1 SCC 204*** at page 210, this Court followed the law laid down in ***Chander Sen's case*** (supra).

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The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:–

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class ***who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.***

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

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

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

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***26. INDIAN PENAL CODE, 1860 – Sections 84 and 302**

Defence of unsoundness of mind – Accused committed offence of Murder – Some years back from the incident, accused was patient of schizophrenia and no evidence that the ailment elapsed – On the day of incident there were no signs of unsoundness of mind of the accused before or after the incidence – Evidence showed that immediately after the incident the accused performed Pooja and also prepared tea – The defence has not been successful in proving

that "at the crucial point of time" or "at the time of doing the act" by unsoundness of mind, the accused/appellant was incapable of knowing the nature of his act – Held, that the accused was not entitled to take th benefit of being unsoundness of mind under Section 84 of Indian Penal Code.

भारतीय दण्ड संहिता, 1860 – धाराएं 84 एवं 302

विकृत्त चित्त होने का बचाव – अभियुक्त द्वारा हत्या का अपराध कारित किया गया – घटना के कुछ वर्ष पूर्व अभियुक्त ***" schizophrenia"*** का मरीज था एवं ऐसी कोई साक्ष्य नहीं कि बीमारी समाप्त हो चुकी है – घटना की दिनांक को घटना के पूर्व या बाद विकृत्त चित्त होने के कोई संकेत नहीं थे – साक्ष्य ने यह दर्षित किया कि घटना के तुरंत पष्चात् अभियुक्त द्वारा पूजा की गई एवं चाय भी बनायी गई – बचाव यह प्रमाणित करने में असफल नहीं रहा है कि "महत्वपूर्ण समय पर " या "कृत्य करते समय" विकृत्त चित्त होने के कारण, अभियुक्त/ अपीलार्थी उसके कृत्य की प्रकृति जानने में असमर्थ था – अभिनिर्धारित किया गया कि अभियुक्त भा.दं.सं. की धारा 84 के अंतर्गत लाभ प्राप्त करने का अधिकारी नहीं है।

Uttam Nandram Somwanshi v. State of Maharashtra
Judgment dated 13.01.2016 passed by the Supreme Court in Criminal Appeal No. 2143 of 2009, reported in 2017 CriLJ 1103

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27. INDIAN PENAL CODE, 1860 – Section 182
CRIMINAL PROCEDURE CODE, 1973 – Section 195
Prosecution under Section 182 IPC – Procedure described under Section 195 CrPC is mandatory – Absence of such procedure makes the prosecution *void ab intio*.

भारतीय दंड संहिता, 1860 – धारा 182

दंड प्रक्रिया संहिता, 1973 – धारा 195

धारा 182 भा.दं.सं. के अंतर्गत अभियोजन – धारा 195 दं.प्र.सं. के अंतर्गत वर्णित प्रकिया अनिवार्य है – उक्त प्रक्रिया का अभाव अभियोजन को मूलतः शून्य बनाता है।

Saloni Arora v. State of NCT of Delhi
Judgment dated 10.01.2017 passed by the Supreme Court in Criminal Appeal No. 64 of 2017, reported in 2017 (1) Crimes 38 (SC)

Relevant extracts from the judgment:

As rightly pointed out by the learned counsel for the parties on the strength of law laid down by this Court in the case of ***Daulat Ram v. State of Punjab, AIR 1962 SC 1206*** that in order to prosecute an accused for an offence punishable under Section 182 IPC, it is mandatory to follow the procedure prescribed under Section 195 of the Code else such action is rendered void ab initio.

It is apposite to reproduce the law laid down by this Court in the case of ***Daulat Ram*** (supra) which reads as under:

> "There is an absolute bar against the Court taking seisin of the case under S.182 I.P.C. except in the manner provided by S.195 Cr.P.C. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. The offence under S.182 is complete when a person moves the public servant for action. Where a person reports to a Tehsildar to take action on averment of certain facts, believing that the Tehsildar would take some action upon it, and the facts alleged in the report are found to be false, it is incumbent, if the prosecution is to be launched, that the complaint in writing should be made by the Tehsildar, as the public servant concerned under S.182, and not leave it to the police to put a charge–sheet. The complaint must be in writing by the public servant concerned. The trial under S.182 without the Tehsildar's complaint in writing is, therefore, without jurisdiction ab initio."

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28. INDIAN PENAL CODE, 1860 – Sections 279 and 337

Degree of negligence to be established in civil law *vis-a-vis* criminal law – In criminal cases, the degree of negligence has to be "gross" – Also the standard of proof required is higher than in civil cases – Merely using the term "high speed" and "negligent" cannot be made basis for conviction – Prosecution must make attempt to indicate exact or approximate speed of the offending vehicle – Test for determination as to whether conduct was negligent or not, is a reasonable man test.

भारतीय दण्ड संहिता – धाराएं 279 एवं 337

सिविल विधि के मुकाबले आपराधिक विधि में उपेक्षा का स्तर को स्थापित किया जाना – आपराधिक प्रकरण में उपेक्षा का स्तर ''घोर'' होना चाहिये – प्रमाण का स्तर भी सिविल मामलों से अधिक होना आवष्यक है – मात्र ''तेज गति'' एवं ''उपेक्षा'' जैसे शब्दों का उपयोग दोषसिद्धी का आधार नहीं हो सकता है – अभियोजन द्वारा संलिप्त वाहन की सटीक या अनुमानित गति इंगित करने का प्रयास किया जाना चाहिए – इस निर्धारण का परीक्षण कि आचरण उपेक्षापूर्ण था अथवा नहीं, सामान्य प्रज्ञावान व्यक्ति का परीक्षण है।

Narayan Singh v. State of Madhya Pradesh

Order dated 04.11.2016 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1034 of 2014 (Gwalior Bench), reported in 2017 (I) MPJR 153

Relevant extracts from the order:

The first contention of the applicant that the prosecution has failed to establish the conduct of the applicant to be "gross", to some extent is worth consideration as the perusal of examination-in-chief of Kamal (PW.2) does not reveal extent of speed at which the offending vehicle was being plied. Further, the term "gross negligence" used by the Hon'ble Supreme Court in the case of ***Sushil Ansal v. State, (2014) 6 SCC 173*** does have applicability to the facts of the present case as merely by using the term "negligent" in the statement cannot be made basis for conviction. Moreso, the independent witnesses produced by the prosecution did not support the conclusion and did not point out that plying of vehicle was by the applicant and was at a high speed. Additionally the other two injured witnesses, Lala Khatik (PW.6) and Manoj Khatik (PW.7) have also put a dent in the prosecution story which, in my opinion, cannot be brushed aside.

This Court in the case of ***Arvind Singh Rajput v. State of MP, I.L.R. (2011) MP 2904,*** observed in the following manner: –

> "Before proceeding further I would like to mention here that in order to prove the speed of the alleged vehicle no technical and scientific investigation like the tyre makes or its photo graph were collected by the investigating agency otherwise in the light of such technical and scientific evidence considering the testimonies of aforesaid witnesses the exact or approximate speed and the factum of negligence on the part of the applicant could have been ascertained. In the lack of such evidence mere on the vague depositions of the above mentioned witnesses the speed of the vehicle could not be deemed to be rash and negligent. In fact in the lack of any specific evidence regarding speed in the deposition of said witnesses the same have lost their values and in such premises no inference could be drawn against the applicant to hold the alleged vehicle was driven by him in rash and negligent manner. My aforesaid view is also fortified by the principle laid down by the Apex Court in the matter of ***Nageshwar Shrikrishna Choubey v. State of Maharashtra, 1973 MPLJ 240***."

Now coming to consideration of the another question whether mere on the aforesaid deposition of the said witnesses, the speed of offending vehicle could be held to be high speed when none of the said examined witnesses has stated the exact or approximate speed of the auto.

On examining the case at hand, in view of the aforesaid principle laid down by the Apex Court, the same is applicable as in this case also the prosecution has not made any attempt to prove the exact speed from any of the witnesses. In such premises, mere on the basis of the version of the witnesses stating the

high speed or the allegation of negligent driving of the offending vehicle, the person like applicant cannot be convicted.

The above quoted portion of the judgment in Arvind Singh Rajput (supra), pronounced by a Coordinate Bench of this Court is squarely applicable to the facts of the present case, as in this case also the prosecution has not even attempted to indicate the exact or approximate speed of the offending vehicle. Moreover, no attempt has been made to collect scientific or technical evidence in the light of observations recorded in the case of ***Arvind Kumar Rajput*** (supra).

Further the test which has been applied by the Apex Court to arrive at a conclusion that the conduct was negligent or not is a reasonable men–test, which means that in the opinion of independent person in the same circumstances the conduct or the act was negligent, however due to hostile independent witnesses the test is not fulfilled.

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29. INDIAN PENAL CODE, 1860 – Section 300

Accused assaulting the deceased over cutting of trees – Altercation due to exchange of words without any pre-meditation – Act done in heat of passion and injuries suggest that the accused have not taken "undue advantage" or acted in cruel manner – Case falls under exception (4) of Section 300 IPC – Conviction under Section 302 set aside and accused convicted under Section 304 Part-I IPC.

भारतीय दण्ड संहिता, 1860 – धारा 300

अभियुक्त द्वारा मृतक पर पेड़ काटे जाने को लेकर हमला किया गया – वाद–विवाद पर बिना किसी पूर्व विचार के विवाद – गर्म जोष में कृत्य किया गया एवं उपहति यह दर्षित करती है कि अभियुक्त द्वारा "असम्यक् लाभ" नहीं लिया गया अथवा क्रूरता पूर्वक कार्य नहीं किया गया – मामला धारा 300 भा.दं.सं. के अपवाद (4) में आता है – धारा 302 के अंतर्गत दोषसिद्धि अपास्त की गई एवं अभियुक्त को धारा 304 भाग–प भा.दं.सं. के अंतर्गत दोषसिद्ध किया गया।

Arjun and anr. etc. v. State of Chhattisgarh

Judgment dated 14.02.2017 passed by the Supreme Court in Criminal Appeal No. 206 of 2017, reported in AIR 2017 SC 1150

Relevant extracts from the judgment:

The point falling for consideration is whether the conviction of the appellants under Section 302 IPC is sustainable. As discussed earlier, the evidence clearly establishes that while Ayodhya Prasad and other witnesses were cutting the trees, there was exchange of words which resulted in altercation and during the said altercation, the appellants attacked the deceased. Thus, the incident occurred due to a sudden fight which, in our view, falls under exception (4) of Section 300 IPC.

To invoke this exception (4), the requirements that are to be fulfilled have been laid down by this Court in ***Surinder Kumar v. Union Territory of Chandigarh, (1989) 2 SCC 217,*** it has been explained as under:–

> "To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly……."

Further in the case of ***Arumugam v. State, Rrepresented by Inspector of Police, Tamil Nadu, (2008) 15 SCC 590,*** in support of the proposition of law that under what circumstances exception (4) to Section 300 IPC can be invoked if death is caused, it has been explained as under:–

> "The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender

has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

The accused, as per the version of PW-6 and eye witness account of other witnesses, had weapons in their hands, but the sequence of events that have been narrated by the witnesses only show that the weapons were used during altercation in a sudden fight and there was no pre–meditation. Injuries as reflected in the post–mortem report also suggest that appellants have not taken "undue advantage" or acted in a cruel manner. Therefore, in the fact situation, exception (4) under Section 300 IPC is attracted. The incident took place in a sudden fight as such the appellants are entitled to the benefit under Section 300 exception (4) IPC.

When and if there is intent and knowledge, then the same would be a case of Section 304 Part I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II IPC. Injuries/incised wound caused on the head i.e. right parietal region and right temporal region and also occipital region, the injuries indicate that the appellants had intention and knowledge to cause the injuries and thus it would be a case falling under Section 304 Part I IPC. The conviction of the appellants under Section 302 read with Section 34 IPC is modified under Section 304 Part I IPC. As per the Jail Custody Certificates on record, the appellants have served 9 years 3 months and 13 days as on 2nd March, 2016, which means as on date the appellants have served 9 years 11 months. Taking into account the facts and circumstances in which the offence has been committed, for the modified conviction under Section 304 Part I IPC, the sentence is modified to that of the period already undergone.

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***30. INDIAN PENAL CODE, 1860 – Sections 302 and 97 to 100**

(I) Right of private defence of the body – Principles laid down by Supreme Court in *Darshan Singh v. State of Punjab, (2010) 2 SCC 333* reiterated :–

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries – All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation – In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence – It is enough if the accused apprehended that such an offence is

contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

(II) Appreciation of evidence – Accused alleged to have fired from his licensed revolver – Bullets recovered from the bodies not matching with revolver of the accused – Ballistic report not determinative as to which weapon the accused used – Benefit of doubt must be given to accused.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 97 से 100

शरीर की प्रायवेट प्रतिरक्षा का अधिकार – सर्वोच्च न्यायालय के न्यायदृष्टांत दर्षन सिंह विरूद्ध पंजाब राज्य, (2010) 2 एस.सी.सी. 333 में अभिनिर्धारित सिद्धांत दोहराये गये।

साक्ष्य का मूल्यांकन – अभियुक्त के विरूद्ध अनुज्ञप्ति प्राप्त रिवाल्वर को चलाये जाने का आक्षेप – शव से प्राप्त बुलेट का अभियुक्त की रिवाल्वर से मेल न होना – बैलिस्टिक प्रतिवेदन में अभियुक्त द्वारा किस आयुध को इस्तेमाल किया इस संबंध में विनिष्चित अभिमत नहीं – अभियुक्त को संदेह का लाभ दिया जाना चाहिये।

Suresh Singhal v. State (Delhi Administration)
Judgment dated 02.02.2017 by the Supreme Court in Criminal Appeal No. 1548 of 2011, reported in (2017) 2 SCC 737

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***31. INDIAN PENAL CODE, 1860 – Sections 302, 306 and 498-A**
DOWRY PROHIBITION ACT, 1961 – Section 4

(i) Offences under sections 306 and 498-A IPC, proof of – Mere fact that the husband has developed some intimacy with another woman during the subsistence of marriage and failing to discharge his marital obligations, would not amount to cruelty, but it must be of such a nature as is likely to drive a spouse to commit suicide to fall within the explanation of section 498-A IPC – Some other acceptable evidence must be on record that can establish such high degree of mental cruelty.

(ii) To constitute an offence under section 306 IPC, the prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the accused abated its commission i.e. that the accused had provoked, incited or induced the spouse to commit suicide.

(iii) Solely because the husband is involved in an extra marital relationship and there is some suspicion in the mind of the wife, cannot be regarded as mental cruelty for satisfying the ingredients of section 306 IPC.

भारतीय दंड संहिता, 1860 – धाराएं 302, 306 एवं 498–क

दहेज प्रतिषेध अधिनियम, 1961 – धारा 4

(i) धारा 306 एवं 498–क भा.दं.सं. के अंतर्गत अपराधों का सबूत – पति द्वारा वैवाहिक संबंधों के निर्वहन के दौरान किसी अन्य महिला से कुछ घनिष्टता बना लिया जाना एवं वैवाहिक दायित्वों का निर्वहन करने में असफल रहने मात्र का तथ्य क्रूरता कारित नहीं करेगा, बल्कि उसे ऐसी प्रकृति का होना चाहिये जो कि पत्नी को आत्महत्या करने के लिये प्रेरित कर धारा 498–क के स्पष्टीकरण के अधीन आये – अभिलेख पर कोई अन्य स्वीकार योग्य साक्ष्य होनी चाहिये जो कि उच्च स्तर की मानसिक क्रूरता दर्षित कर सके।

(ii) धारा 306 भा.दं.सं. के अंतर्गत अपराध गठित करने के लिये अभियोजन को यह युक्तियुक्त संदेह से परे स्थापित करना होगा कि मृतक द्वारा आत्महत्या की गई एवं अभियुक्त द्वारा उसका दुष्प्रेरण किया गया अर्थात अभियुक्त द्वारा पत्नी को आत्महत्या करने हेतु उकसाया, प्रकोपित या उत्प्रेरित किया गया।

(iii) मात्र यह कि पति के गैर विवाह संबंध थे एवं पत्नी के दिमाग में कोई शंका थी, धारा 306 भा.दं.सं. के मानसिक क्रूरता के घटकों की संतुष्टी नहीं करता है।

K.V. Prakash Babu v. State of Karnataka

Judgment dated 22.11.2016 passed by the Supreme Court in Criminal Appeal No. 1138 of 2016, reported in 2017 (1) ANJ (SC) 15

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32. INDIAN PENAL CODE, 1860 – Sections 324, 325 and 326
CRIMINAL PROCEDURE CODE, 1973 – Section 228
Whether iron rod is considered to be a dangerous weapon for the purpose of framing charge under Sections 324, 325 or 326 of IPC? Held, it may or may not be a dangerous weapon – What would constitute a "dangerous weapon" would depend upon the facts of each case and no generalisation can be made – The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not.

भारतीय दण्ड संहिता, 1860 – धाराएं 324, 325 एवं 326
दण्ड प्रक्रिया संहिता, 1973 – धारा 228
क्या लोहे के सरिये को धारा 324, 325 या 326 भा.दं.सं. के अंतर्गत आरोप विरचित करने हेतु खतरनाक आयुध मान सकते है ? अभिनिर्धारित, वह खतरनाक आयुध हो सकता है या नहीं भी – क्या "खतरनाक आयुध" होगा यह प्रत्येक मामले के तथ्य पर निर्भर करेगा एवं सामान्यकरण नहीं किया जा सकता – किसी मामले में सम्मिलित तथ्य, अन्य कारक जैसे कि आकार, धारदार होना किसी आयुध के खतरनाक या घातक होने के प्रष्न पर प्रकाष डाल सकेगें।

Rishin Paul v. State of Madhya Pradesh
Order dated 19.10.2015 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1247 of 2015, reported in ILR (2016) MP 1514

Relevant extracts from the order:

In the case of ***Mathai v. State of Kerala, AIR 2005 SC 710,*** the Supreme Court has observed as here under:

> "The expression "any instrument which, used as a weapon of offence, is likely to cause death" has to be gauged taking note of the heading of the section. What would constitute a "dangerous weapon" would depend upon the fact of each case and no generalisation can be made.
>
> It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. At this juncture, it would be relevant to note that in some provision e.g. Section 324 and 326 the "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g. Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or

deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable."

Aforesaid principle has been reiterated in the case of ***Prabhu v. State of M.P., AIR 2009 SC 745***.

Likewise, in the case of ***Anand Swaroop v. State of U.P., 2005 CrLJ 2602***, the Apex Court with reference to Section 324 of the IPC has held, that expression "An Instrument which, used as a weapon of offence, is likely to cause death", should be construed with reference to the nature of the instrument and not the manner of its use.

In aforesaid circumstances, it would be appropriate for Learned Magistrate to physically inspect the iron rod seized in the case and after giving both the parties an opportunity of being heard to record a finding by a reasoned order as to whether or not he consider the same to be a dangerous weapon, keeping in view the aforesaid principles and; thereafter, to frame appropriate charge accordingly and proceed further in the case in accordance with law.

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33. INDIAN PENAL CODE, 1860 – Sections 376, 420/34, 366-A, 370, 370-A, 212 and 120-B

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 – Sections 4, 6 and 8

CRIMINAL PROCEDURE CODE, 1973 – Section 439

(i) Bail, cancellation of – If cancellation of bail is sought on the ground that the accused mis-conducted himself after the grant of bail or new facts have emerged which warrant cancellation of bail, then conduct or events based grant of bail are to be examined and considered – On the other hand, when order of grant of bail is challenged on the ground that grant of bail itself is given contrary to principles of law, while undertaking the judicial review of such an order, it needs to be examined as to whether there was arbitrary or wrong exercise of jurisdiction by the Court granting bail – If that be so, higher Court has power to correct the same.

(ii) While cancelling bail under section 439 (2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice – The High Court or the Sessions Court may cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice – If the Court granting bail ignores relevant materials indicating *prima facie* involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bailsto the accused, the High Court or the

Sessions Court would be justified in cancelling the bail – The High Court or the Sessions Court is bound to cancel such orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society.

(iii) The accused allegedly involved in commission of offence of rape upon the minor girl, the trial Court initiated proceedings under sections 82 and 83 of the CrPC as the accused had avoided his arrest, there were several complaints of intimidation of witness made on behalf of the prosecutrix and her family members as well as the presumption of offence under section 29 of POCSO Act – Held – The High Court erred in granting bail.

भारतीय दंड संहिता, 1860 – धाराएं 376, 402/34, 366–क, 370, 370–क, 212 एवं 120–ख
लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 – धाराएं 4, 6 एवं 8
दण्ड प्रक्रिया संहिता, 1973 – धारा 439

(i) प्रतिभूति का निरस्त किया जाना – यदि प्रतिभूति का अभियुक्त को प्रतिभूति पर मुक्त किये जाने के पष्चात् उसके अवचार अथवा नवीन तथ्यों के आने के आधार पर निरस्त कराया जाना चाहा गया है तो उसके आचरण या घटना क्रम के आधार पर प्रतिभूति का परीक्षण या विचार किया जाना है – वहीं दूसरी ओर यदि प्रतिभूति दिये जाने के आदेष को इस आधार पर चुनौती दी जाती है कि वह स्वयं विधि के सिद्धांतों के विपरीत था, तो उक्त आदेष पर न्यायिक विचार करते समय, यह परीक्षित किया जाना आवष्यक है कि क्या न्यायालय द्वारा प्रतिभूति देते समय क्षेत्राधिकार का मनमाना या गलत प्रयोग किया गया था।

(ii) धारा 439 (2) दं.प्र.सं. के अंतर्गत प्रतिभूति निरस्त करते समय, न्यायालय के साथ मूल्यांकन हेतु मुख्य विचार यह रहता है कि क्या अभियुक्त द्वारा साक्ष्य में छेड़छाड़ किया जाना या न्याय की सम्यक् प्रक्रिया में हस्तक्षेप किया जाना या न्याय की सम्यक् प्रक्रिया से बचना संभाव्य है – उच्च न्यायालय या सत्र न्यायालय द्वारा ऐसे मामलों में जबकि प्रतिभूति दिये जाने का आदेष गंभीर त्रुटियों के परिणामस्वरूप न्याय की हानि करना हो, प्रतिभूति निरस्त की जा सकती है – यदि न्यायालय द्वारा अभियुक्त के प्रथम दृष्टया संलिप्त होने को इंगित करने वाले सुसंगत दस्तावेजों को अनदेखा किया जाता है या असंगत दस्तावेजों को विचार में लिया जाता है जिनका अभियुक्त को प्रतिभूति दिये जाने के प्रष्न से कोई संबंध नहीं हैं, उच्च न्यायालय या सत्र न्यायालय प्रतिभूति निरस्त करने में

उचित होंगे – उच्च न्यायालय या सत्र न्यायालय ऐसे में प्रतिभूति आदेष निरस्त करने हेतु आबद्ध हैं, विषेष रूप से जबकि उनके द्वारा जघन्य अपराधों में संलिप्त अभियुक्त को रिहा किया गया है क्योंकि वे अंततः अभियोजन के मामले को कमजोर करते है एवं समाज पर विपरीत प्रभाव कारित करते है।

(iii) जहाँ अभियुक्त के विरूद्ध बलात्संग के अपराध में सम्मिलित होने का आक्षेप था, विचारण न्यायालय द्वारा धारा 82 एवं 83 दं.प्र.सं. के अंतर्गत कार्यवाही अग्रेषित की गई थी, क्योंकि अभियुक्त गिरफ्तारी से बच रहा था, अभियोक्त्री की तरफ से साक्षीगण एवं उसके परिवार के सदस्यों को धमकाये जाने की कई षिकायतें एवं धारा 29 पोक्सो अधिनियम की उपधारणा भी थी – अभिनिर्धारित – उच्च न्यायालय द्वारा प्रतिभूति का लाभ दिये जाने में त्रुटि की गयी।

State of Bihar v. Rajballav Prasad @ Rajballav Pd. Yadav @ Rajballabh Yadav

Judgment dated 24.11.2016 passed by the Supreme Court in Criminal Appeal No. 1141 of 2016, reported in 2017 (1) ANJ (SC) (Suppl.) 10

Relevant extracts from the judgment:

It is a matter of record that when FIR was registered against the respondent and on the basis of investigation he was sought to be arrested, the respondent had avoided the said arrest. So much so, the prosecution was compelled to file an application under Section 82 of Cr.P.C. before the trial court and the trial court even initiated the process under Section 83 of Cr.P.C. At that stage only that the respondent surrendered before the trial court and was arrested.

The respondent's application was dismissed by the Additional Sessions Judge vide orders dated 30.05.2016. While passing this order of rejection, the trial court was persuaded by the submission of the Prosecutor that direct and specific allegations had been levelled against the respondent of committing rape upon the victim minor girl and he was identified by the victim during the course of investigation while he was walking in the P.O. House. It was also noted that prayer for bail of co-accused Sandeep Suman @ Pushpanjay had already been rejected and the case of the respondent was on graver footing and also that the respondent had a long criminal diary, as would be evident from the Case Diary produced before the Court.

It has also come on record that the prosecutrix had her family members made representations claiming that the respondent is threatening the family members of the prosecutrix. So much so, having regard to several complaints of intimidation of witnesses made on behalf of the prosecutrix and her family members, the State administration has deputed a force of 1+4 for the safety and security of the prosecutrix and her family.

In spite of the aforesaid material on record, the High Court has made casual and cryptic remarks that there is no material showing that the accused had interfered with the trial by tampering evidence. On the other hand, it has discussed the merits of the case/evidence which was not called for at this stage. No doubt, in a particular case if it appears to the court that the case foisted against the accused is totally false, that may become a relevant factor while considering the bail application. However, it can be said at this stage that the present case falls in this category.

That would be a matter of trial. Therefore, the paramount consideration should have been as is pointed out above, whether there are any chances of the accused person fleeing from justice or reasonable apprehension that the accused person would tamper with the evidence/trial if released on bail. These aspects are not dealt with by the High Court appropriately and with the seriousness they deserved. This constitutes a sufficient reason for interfering with the exercise of discretion by the High Court.

The High Court also ignored another vital aspect, namely, while rejecting the bail application of co-accused, the High Court had ordered expeditious, nay, day-to-day trial to ensure that the trial comes to an end most expeditiously. When order had already been passed to fast-track the trial, and the application for bail by co-accused Sandeep Suman @ Pushpanjay was also rejected, the High Court, while considering the bail application of the respondent, was supposed to take into consideration this material fact as well. Further, while making a general statement of law that the accused is innocent, till proved guilty, the provisions of Section 29 of POCSO Act have not been taken into consideration.

Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf. We would like to reproduce following discussion from the judgment in the case of ***Kanwar Singh Meena v. State of Rajasthan & anr., (2012) 12 SCC 180***.

> "...While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such

orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.

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Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody..."

As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in ***Panchanan Mishra v. Digambar Mishra & ors., (2005) 3 SCC 143*** while setting aside the order of the High Court granting bail in the following terms:

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

Such sentiments were expressed much earlier as well by the Court in ***Talab Haji Hussain v. Madhukar Purshottam Mondkar & ors., 1958 SCR 1226*** in the following manner:

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

We are conscious of the fact that the respondent is only an under–trial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trail of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in ***Masroor v. State of Uttar Pradesh & anr., (2009) 14 SCC 286*** in the following words:

"There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in ***Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684*** are quite apposite:

"... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.""

This very aspect of balancing of two interests has again been discussed lucidly in ***Neeru Yadav v. State of Uttar Pradesh & anr., (2014) 16 SCC 598*** in the following words:

"The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual

liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.

> Coming to the case at hand, it is found that when a stand was taken that the second respondent was a history-sheeter, it was imperative on the part of the High Court to scrutinise every aspect and not capriciously record that the second respondent is entitled to be admitted to bail on the ground of parity. It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order [***Mitthan Yadav v. State of U.P., Criminal Misc. Bail Application No. 31078 of 2014, decided on 22–9–2014 (All)***] clearly exposes the non–application of mind. That apart, as a matter of fact it has been brought on record that the second respondent has been charge–sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this Court would tantamount to travesty of justice, and accordingly we set it aside."

No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.

For the foregoing reasons, we allow this appeal thereby setting aside the order of the High Court. In case the respondent is already released, he shall surrender and/or taken into custody forthwith. In case he is still in jail, he will continue to remain in jail as a consequence of this judgment.

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34. INDIAN PENAL CODE, 1860 – Sections 420, 467 and 468

Allegation that two power of attorneys were got executed in favour of the accused persons by keeping the complainant in dark – Power of attorneys were registered – No transfer effected by accused persons on the basis of power of attorney – Held – For offence of cheating deception and any harm or likelihood of such harm is necessary – Execution before Sub-Registrar clearly indicate that procedural formalities required under Registration Act were complied with – *Prima facie* offence of "cheating" not made out – Dispute of civil nature should not be allowed to be given shape of criminal dispute.

भारतीय दंड संहिता, 1860 – धाराएं 420, 467 एवं 468

परिवादी को अंधेरे में रख अभियुक्तों द्वारा उनके पक्ष में दो मुख्त्यारनामा निष्पादित कराये जाने के आक्षेप – उक्त मुख्त्यारनामा पंजीकृत थे – मुख्त्यारनामा के आधार पर अभियुक्तों द्वारा कोई अंतरण नहीं किये गये – अभिनिर्धारित – छल के अपराध हेतु, धोखा एवं क्षति या ऐसी क्षति होने की संभावना आवष्यक है – उप–पंजीयक के समक्ष निष्पादन यह स्पष्ट रूप से इंगित करता है कि पंजीकरण अधिनियम के अंतर्गत वांछित प्रक्रियात्मक औपचारिकताओं की पूर्ति की गई थी – प्रथम दृष्टया ''छल'' का अपराध निर्मित नहीं होता है – सिविल प्रकृति के विवाद को आपराधिक विवाद का स्वरूप नहीं दिया जाना चाहिए।

Rajesh and ors. v. Daulat

Order dated 16.06.2016 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Revision No. 939 of 2015, reported in 2016 (2) ANJ (MP) 366

Relevant extracts from the order:

As provided in Section 415, two classes of acts may constitute cheating; Firstly, a person deceived is induced to deliver any property to any person or to consent that any person shall retain such property and that the act is done dishonestly or fraudulently; Secondly, doing or omitting to do anything which the person so deceived would not do or omit to do if he is not so deceived and that such an act or omission is caused or was likely to cause damage or harm to the person induced in body, mind, reputation or property.

Thus, not only there should be an act or omission, pursuant to deception, but also that such an act has caused or that it was likely to cause harm in body, mind, reputation or property to the person induced.

In the instant case, it has nowhere been averred in the complaint that the respondent suffered any harm in body, mind, reputation or property or that there was likelihood of such harm being caused. Therefore, one of the necessary ingredients to constitute 'cheating' being totally absent, the charge for offence under Section 420 IPC is not made out against the petitioners.

Further, allegedly, the respondent was made to execute with nine other persons two power of attorneys. The executants of power of attorney are at liberty to cancel it at any time after its execution. Nine other persons, who were also executants of the alleged power of attorney, alongwith the Respondent–Daulat, have not joined the respondent as complainant. The documents were executed before the Sub-Registrar. The endorsement made by the Sub–Registrar on these documents clearly indicates that all the procedural formalities, as required under the provisions, contained in Section 33, 34(3), 35 and 52 of the Registration Act were complied with.

Therefore, even after accepting all the allegations made in the complaint, the offence of 'cheating' as defined in Section 415 is not made out against the petitioners, hence, charge for offence under Section 420 IPC is not sustainable

In ***Mohd. Ibrahim and others v. State of Bihar and another, (2009) 8 SCC 751,*** the Apex Court has elaborately dealt with the issue as to what amounts to 'forgery'. It has been held that to constitute forgery, an act should involve making of false document as defined in Section 464, IPC which runs as under:

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Thus, as regards offences under Section 467 and 468, IPC, as explained by the apex Court in the Case of ***Mohd. Ibraham*** (supra), there must be making of false document within the meaning of Section 464, IPC. Of-course, class thirdly of Section 463 contemplates 'making of false document' when a person dishonestly or fraudulently causes any person to sign, seal, execute or alter a document knowing that such person by reason of unsoundness of mind or intoxication or "by reason of deception practice upon him'' does not know the contents of the document.

In the instant case, there is no specific averment that any deception was practiced by the petitioners upon respondent. Here, it is pertinent to state that the alleged power of attorneys were executed by ten persons including respondent. Remaining nine persons have never complained about any deception being practiced upon them. Apart this, the power of attorneys were only for a period of one year which was over just one month prior to the filing of the criminal complaint. Further, no transfer has been effected by the petitioners in exercise of the power which they acquired on the basis of power of attorneys. Both the documents are registered documents which were executed before the Sub-Registrar.

Sections 33, 34 (3) and 35 of the Registration Act provides elaborate procedure with regard to registration of a document. The procedure contemplates that the document will be read over and explained to the executants. Prima-facie, it cannot be said that the formalities prescribed under the law were not performed by the Sub-Registrar. All the aforesaid factors have not been taken into consideration by the learned Additional Sessions Judge, while framing charges under Sections 467 and 468 of the IPC, which have a close bearing on the issue.

If the entire matter is examined in the light of aforesaid factors, it cannot, prima–facie, be said that an offence under Sections 467 or 468 is made out against the petitioners. Thus, the learned Additional Sessions Judge has committed a serious error of law by framing charges for offence under Sections 420, 467 and 468, IPC against the petitioners in a mechanical manner without duly and properly examining the record and considering that basically a civil dispute is being given the shape of a criminal dispute.

In ***Mohd.Ibrahim and others v. State of Bihar and another, (2009) 8 SCC 751*** it is held that disputes which are essentially and purely of civil nature, should not be allowed to be given the shape of criminal disputes so as to settle scores or to harass the opposite party to settle civil disputes. Relevant observation made in para 7 of the Judgment Are as under:

> "This Court has time and again drawn attention to the growing tendency of complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurise parties to settle civil disputes. But at the same, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. [See: ***G. Sagar Suri v. State of U.P., (2000) 2 SCC 636*** and ***Indian Oil Corporation v. NEPC India Ltd., (2006) 6 SCC 736***."]

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35. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 7
JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007 – Rule 12
Determination of age – Trial court rejected the mark sheet on the ground that the source of information for recording the date of birth is not proved – Held – Mark sheet of High School was issued by Board of Secondary Education, M.P. which is an instrumentality of State – Mark sheet Produced by applicant was not challenged as being forged or fabricated – The date of birth recorded in the mark sheet was further corroborated by the Scholar Register – Medical opinion for the purpose of determination of age can be sought only when the documents as mentioned in Rule 12(3) are not available – Courts below wrongly disbelieved the Matriculation mark sheet

किषोर न्याय (बालकों की देख रेख और संरक्षण) अधिनियम, 2000 – धारा 7

किषोर न्याय (बालकों की देख रेख और संरक्षण) नियम, 2007 – नियम 12

आयु का निर्धारण – विचारण न्यायालय द्वारा इस आधार पर अंकसूची खारिज कर दी गई कि जन्म तिथि दर्ज करने की सूचना का स्त्रोत प्रमाणित नहीं है – अभिनिर्धारित – हाई स्कूल की अंक सूची माध्यमिक षिक्षा मंडल, म. प्र. द्वारा जारी की गई है जो कि राज्य की एक ईकाई है – आवेदक द्वारा प्रस्तुत अंकसूची को फर्जी या कूटरचित होने के आधार पर चुनौती नहीं दी गई थी – अंक सूची में दर्ज जन्म तिथि की संपुष्टी स्कॉलर रजिस्टर से भी होती है – आयु निर्धारण हेतु चिकित्सीय राय मात्र उस दषा में ली जा सकती है जबकि नियम 12 (3) के अंतर्गत उल्लेखित दस्तावेज उपलब्ध न हो – अधीनस्थ न्यायालयों द्वारा गलत रूप से अंकसूची पर अविष्वास किया गया।

Chhotu @ Ranvijay v. State of M.P.

Order dated 28.10.2015 passed by the High Court of Madhya Pradesh in Misc. Criminal Case No. 7091 of 2014, reported in ILR (2016) MP 1601

Relevant extracts from the order:

A Division Bench of this Court has held in paragraph nos. 12 and 13 of the judgment dated 06.01.2015 rendered in Criminal Appeal No.356/2014 (***Ramesh Yadav v. State of Madhya Pradesh***) as follows:

> "The argument advanced by learned counsel for the appellant is not acceptable in view of Rule 12 of Juvenile Justice [Care and Protection of Children] Rules 2007, which lays down the procedure for determination of the age of Juvenile in conflict with law. At the outset, applicability of Juvenile Justice [Care and Protection of Children] Rules, 2007 to the present case has been assailed on behalf of the appellant. It has been contended that State Government has framed Juvenile Justice [Care and Protection of Children] Rules, 2003 which would be applicable to the present case. There is no provision corresponding to Rule 12 of 2007 Rules in 2003 Rules.
>
> It may be noted here that the State Government had framed 2003 Rules pursuant to Juvenile Justice [Care and Protection of Children] Rules, 2001 framed by the Central Government. By virtue of Section 100 of the 2007 Rules, the 2001 Rules have been repealed. Moreover, Rule 96 of the 2007 Rules declares in no uncertain terms that until Rules conforming to the 2007 Rules under section 68 of the Juvenile Justice (Care and Protection of Children) Act,

2000, are framed by the State Government concerned, 2007 Rules shall mutatis mutandis apply in that State. No rules conforming to 2007 Rules have been framed by the Government of Madhya Pradesh. As such, there is no doubt that 2003 Rules framed by the State Government are impliedly repealed by virtue of section 100 of 2007 Rules and until and unless the Rules in conformity with 2007 Central Rules, are framed by the Government of Madhya Pradesh, 2007 Rules framed by the Centre Government, shall prevail in the State of Madhya Pradesh."

Thus, the inquiry for determination of the age of the applicant is required to be held in accordance with the provisions of the 2000 Act and the 2007 Rules.

With regard to the nature and scope of the enquiry, the Supreme Court had observed in the case of ***Ashwani Kumar Saxena v. State of Madhya Pradesh, (2012) 9 SCC 750*** that:

"Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an "inquiry" and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7–A has used the expressions "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence."

It has also been held in the case of ***Ashwani Kumar Saxena*** (supra) at page 763 that:

"Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than

a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

Under what conditions opinion from a duly constituted Medical Board should be sought, has been clarified by Supreme Court in the case of ***Shanawaz v. State of U. P. and Another, 2011 AIR (SC) 3107.*** Paragraph No.19 of the judgment reads as follows:

"Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules."

In the backdrop of aforesaid legal position, when the Court reverts back to the facts of the case at hand, it is found that the mandate of sub-rules (3) (4) of rule 12 of the 2007 Rules, has been completely overlooked by learned CJM. In this case, the copy of the marks–sheet of High School Certificate Examination (10^{th}) for the year 2011 issued by the Board of Secondary Education Madhya Pradesh, Bhopal, which is an instrumentality of the state, was filed on behalf of the applicant. In the marks-sheet the date of birth of applicant was recorded as 16.06.1994. The date of birth recorded in the marks-sheet was further corroborated by the Scholar Register maintained by the principal of Shanti Niketan High School, Panna. It was duly proved by him in the Court. In that register also, the date of birth of the applicant Ranvijay Singh was mentioned as 16.06.1994. It is not the case of the prosecution that the marks–sheet of the High School Certificate Examination or the Scholar Register maintained by Shanti Niketan High School are forged or

fabricated or in any manner interpolated. Even learned CJM has not held that aforesaid documents are forged or fabricated. Thus, there was no reason for learned CJM to enter into a roving enquiry as to the source of information on the basis of which the entry was made in the scholar register, on the basis of which the date of birth was recorded in the marks-sheet of High School Certificate Examination.

Once matriculation certificate was produced in the Court and it was not challenged as being forged or fabricated, there was no occasion for learned CJM to travel any further as sub-section (3) explicitly mandates that the Date of Birth Certificate from the school (other than play school) first attended; shall be sought only where Matriculation or equivalent certificate is not available. Likewise, the Birth Certificate given by a Corporation or a Municipal Authority or a Panchayat shall be sought only where the date of birth certificate from the school first attended, is not available and only where either of the aforesaid three documents is not available; medical opinion will be sought from a duly constituted Medical Board.

In the instant case, the matriculation certificate was available, authenticity whereof was not under challenge. Thus, there was no reason for learned CJM to call for and examine the medical report for the purpose of determination of the age of the applicant. The fact that on the date of the offence, the applicant fell short of the age of majority only by six days, was no reason to call for and press into service, the medical examination report. Even if the accused fell short of the date of majority by a single day, he is entitled to be treated as the juvenile in conflict with law.

In aforesaid view of the matter, it is clear that learned CJM fell in an error by entering into a roving enquiry with regard to reliability of the accused Ranvijay, as certified in matriculation mark-sheet. The order passed by learned CJM was challenged before learned Additional Sessions Judge in the criminal revision. The judgment in the case of ***Ashwani Kumar Saxena*** (supra) was cited and has been referred to by learned Additional Sessions Judge; however, it appears that without considering the principles laid down in aforesaid case, learned Additional Sessions Judge has merely reproduced the placitum of the case in a perfunctory manner and brushed aside the judgment with the observation that learned CJM had impliedly considered the principles laid down in that case. Needless to say, this observation does not bare scrutiny because none of the principle enunciated in the case of ***Ashwani Kumar Saxena*** (supra) have been followed in the judgment of learned CJM.

On the basis of aforesaid discussion, this Court is of the view that on the date of the offence i.e. 10.06.2012, the age of applicant Ranvijay was 17 years 11 months and 24 days. Thus, Learned Courts below erred in holding that he was not a juvenile in conflict with law.

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36. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 7A and 49(1)
JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007– Rule 12

(i) Determination of Age – Ossification Test – Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

(ii) Standard of proof for age determination – It is the degree of probability and not proof beyond reasonable doubt – Further held that hyper technical view should not be taken, when two views are possible, the one leaning towards accused should be taken.

(Reiterated law laid down in *Arnit Das v. State of Bihar, (2000) 5 SCC 488* and *Rajindra Chandra v. State of Chhattisgarh and another, (2002) 2 SCC 287*)

(iii) Ossification test for age determination, accuracy of – Ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years as in the present case – Object of the Act is not to give shelter to accused of grave and heinous offences.

(iv) Proper approach to be taken in determination of age – A blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination after the age of 30 years – Medical evidence, though a very useful guiding factor, is not conclusive and has to be considered along with other circumstances.

किषोर न्याय (बालकों की देख रेख और संरक्षण) अधिनियम, 2000 – धाराएं 7 क एवं 49 (1)

किषोर न्याय (बालकों की देख रेख और संरक्षण) नियम, 2007 – नियम 12

(i) आयु का निर्धारण – ओसिफिकेषन (अस्थि) परीक्षण – चिकित्सीय परीक्षण द्वारा हड्डियों के जोड़ का परीक्षण करने के पष्चात् भी दोनों तरफ दो वर्षों का अंतर छोड़ा जाता है।

(ii) आयु निर्धारण की साक्ष्य स्तर – संभावना का स्तर हैं एवं युक्तियुक्त संदेह से परे नहीं हैं – जब दो दृष्टिकोण संभव है तब अत्यंत तकनीकी दृष्टिकोण न लेकर अभियुक्त की ओर झुकाव वाला दृष्टिकोण लेना चाहिए।

(न्यायदृष्टांत अर्नित दास विरूद्ध बिहार राज्य, (2000) 5 एससीसी 488 एवं राजीन्दर चन्द्रा विरूद्ध छत्तीसगढ़ राज्य, (2002) 2 एससीसी 287 की विधि दोहराई गयी।)

(iii) आयु निर्धारण हेतु ओसिफिकेषन (अस्थि) परीक्षण की परिषुद्धता – वर्तमान मामले के समान जबकि परीक्षार्थी द्वारा तीस वर्ष की आयु पार कर ली गई हो, ओसिफिकेषन (अस्थि) परीक्षण सटीक एवं यथार्थ निष्कर्ष नहीं देता है, –अधिनियम का उद्देष्य अभियुक्त के गंभीर एवं जघन्य अपराधों को आश्रय देना नहीं है।

(iv) आयु निर्धारण हेतु उचित दृष्टिकोण – किसी 30 वर्ष के व्यक्ति की आयु निर्धारण हेतु रेडियोलॉजिस्ट के परीक्षण द्वारा दिये गये चिकित्सीय अभिमत को अंधवत् एवं यांत्रिक रूप से अपनाया नहीं जा सकता है –चिकित्सीय प्रमाण पत्र हालांकि बहुत उपयोगी मार्गदर्षक कारक है परंतु निष्कर्षकारी नहीं है एवं परिस्थितियों के साथ विचार किया जाना है।

Mukarrab and others v. State of U.P.
Judgment dated 30.11.2016 passed by the Supreme Court in Criminal Appeal No. 1119 of 2016, reported in (2017) 2 SCC 210

Relevant extracts from the judgment :

Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the concerned authority, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused.

This Court in ***Arnit Das v. State of Bihar, (2000) 5 SCC 488,*** clarified that the review of judicial opinion shows that the Court should not take a hyper–technical approach while appreciating evidence for determination of age of the accused. If two views are possible, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. This approach was further reiterated by this Court in ***Rajindra Chandra v. State of Chhattisgarh and another,(2002) 2 SCC 287,*** in which it laid down that the standard of proof for age determination is the degree of probability and not proof beyond reasonable doubt.

It is well-accepted fact that age determination using ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years, which is true in the present case. After referring to Bhola Bhagat's case and other decisions, in Babloo Pasi's case, this Court held as under:–

> "Nevertheless, in ***Jitendra Ram v. State of Jharkhand, (2006) 9 SCC 428*** the Court sounded a note of caution that the afore stated observations in ***Bhola Bhagat and ors. v. State of Bihar, (1997) 8 SCC 720*** would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record.
>
> It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.
>
> It is true that in ***Arnit Das v. State of Bihar, (2000) 5 SCC 488*** this Court has, on a review of judicial opinion, observed that while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper–technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. We are also not oblivious of the fact that being a welfare legislation, the courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences."

In Criminal Appeal No. 486 of 2016 dated 12.05.2016, ***Parag Bhati (Juvenile) through Legal Guardian-Mother-Smt. Rajni Bhati v. State of Uttar Pradesh and anr.,*** after referring to ***Abuzar Hossain alias Gulam Hossain v. State of West Bengal, (2012) 10 SCC 489*** case and other decisions of this Court, this Court held as under:–

> "It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.
>
> The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well–planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue."

From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences.

Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At page 31 of Modi's Text Book of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

> "In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following table, but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development."

Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence

as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.

In a recent judgment, ***State of Madhya Pradesh v. Anoop Singh, (2015) 7 SCC 773,*** it was held that the ossification test is not the sole criteria for age determination. Following ***Babloo Pasi v. State of Jharkhand & anr, (2008) 13 SCC 113*** and ***Anoop Singh's*** (Supra) cases, we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.

At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in pediatric group in central Rajasthan", which reads as under:–

> "There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification along with epiphyseal fusion.
> [Ref: Gray H. Gray's Anatomy. 37th ed. Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];
> A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.
> [Ref: Parikh CK. Parikh's Textbook of Medical Jurisprudence and Toxicology. 5th edn.: Mumbai Medico-Legal Centre Colaba:1990;44-45];
>
> .....
>
> Variations in the appearance of center of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of Wrist Ossification for age estimation in pediatric group in Central Rajasthan" by Dr. Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971–0973].

In the present case, their physical, dental and radiological examinations were carried out. Radiological examination of Skull (AP and lateral view), Sternum (AP and lateral view) and Sacrum (lateral view) was advised and performed. As

per the medical report, there was no indication for dental x-rays since both the accused were much beyond 25 years of age. Therefore, the age determination based on ossification test though may be useful is not conclusive. An X-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a person's life.

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***37. LAND ACQUISITION ACT, 1984 – Sections 18, 23, 28, 31(2) and 34**

(i) Market value of the acquired land – Reference court enhanced market value of acquired land from ` 42,250/– per acre to ` 52,000/– per acre on the basis of land sold by adjacent owner – Enhancement of market value on that basis found to be proper.

(ii) Reference – Compensation amount received without protest – No particular form of protest prescribed – Protest has to be implied from the conduct – Filing of application for seeking reference is sufficient to show protest – Mere acceptance of the compensation does not deprive the appellant to lodge protest.

(iii) Award of Interest – No cross-objection or cross appeal filed by the respondent – Separate filing of appeal/cross objection for claiming Interest under sections 28 and 34 is not necessary – Can claim interest in State appeal – Cost and Interest under the Act, if not awarded by trial court can always be awarded by the Higher Court.

(iv) Award of Interest – Trial Court awarded enhanced compensation without assigning reason from date of judgment – Impugned judgment modified – Held, that respondent is entitled to interest on enhanced compensation from date of taking possession of land.

भूमि अधिग्रहण अधिनियम, 1984 – धाराएं 18, 23, 28, 31 (2) एवं 34

(i) अधिग्रहीत भूमि का बाजार मूल्य – रेफरेन्स न्यायालय द्वारा अधिग्रहीत भूमि के बाजार मूल्य में 42,250/– रूपये प्रति एकड़ से 52,000/– रूपये प्रति एकड़ की वृद्धि साथ में लगी हुई भूमि के स्वामी द्वारा किये विक्रय के आधार पर की गई – उक्त आधार पर बाजार मूल्य को बढ़ाया जाना उचित पाया गया है।

(ii) रेफरेन्स – प्रतिकर राषि को बिना किसी विरोध के प्राप्त किया गया – विरोध का कोई प्रारूप निर्धारित नहीं है – विरोध आचरण से अनुमानित किया जा सकता है – रेफरेन्स हेतु आवेदन प्रस्तुत किया जाना विरोध दर्षित करने हेतु पर्याप्त है – मात्र प्रतिकर को प्राप्त करना, अपीलार्थी को विरोध दर्ज करने से वंचित नहीं करता है।

(iii) ब्याज का पंचाट – प्रत्यर्थी द्वारा कोई क्रॉस आपत्ति या क्रॉस अपील प्रस्तुत नहीं की गई – ब्याज का दावा करने हेतु पृथक से धारा 28 एवं 34 के अंतर्गत अपील या क्रास आपत्ति प्रस्तुत किया जाना आवष्यक नहीं है – राज्य की अपील में ब्याज का दावा कराया जा सकता है – यदि विचारण न्यायालय के द्वारा अधिनियम के अनुरूप खर्चे एवं ब्याज नहीं दिलाया गया है तो उच्चतर न्यायालय के द्वारा दिलाया जा सकता है।

(iv) ब्याज का पंचाट – विचारण न्यायालय के द्वारा कोई कारण दिये बिना गुरूत्तर प्रतिकर निर्णय दिनांक से दिलाया गया – संबंधित निर्णय परिवर्तित किया गया – अभिनिर्धारित प्रत्यर्थी आधिपत्य लिये जाने की दिनांक से गुरूत्तर प्रतिकर पर ब्याज पाने का अधिकारी है।

M.P. Housing Board v. Jabbar and others

Order dated 08.09.2016 passed by the High Court of Madhya Pradesh in First Appeal No. 22 of 2002, reported in 2017 (1) MPLJ 412

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38. LAND ACQUISITION ACT, 1894 – Section 30

Compensation amount of acquired land – Claim of the appellant on the basis of name in revenue records – Recording of the name of the appellant by the Tehsildar on the basis of an affidavit in relation to gift – Gift can be made only by Registered deed, not by oral expression – Tehsildar has no right to consider the land as transferred – Such revenue record cannot be considered and must be ignored.

भूमि अधिग्रहण अधिनियम, 1894 – धारा 30

अधिग्रहीत भूमि हेतु मुआवजा राषि – अपीलार्थी द्वारा राजस्व अभिलेखों में नाम के आधार पर दावा – तहसीलदार द्वारा अपीलार्थी का नाम दान के संबंध में शपथ पत्र के आधार पर प्रविष्ट किया गया था – दान मात्र पंजीकृत अभिलेख के द्वारा किया जा सकता है न कि मौखिक अभिव्यक्ति द्वारा – तहसीलदार को भूमि को अंतरित के रूप मान्य करने का कोई अधिकार नहीं है – ऐसे राजस्व अभिलेख पर विचार नहीं किया जा सकता एवं उसे अनदेखा करना चाहिए।

Anjani Prasad (dead) through L.Rs Shriomani Tiwari and anr. v. State of Madhya Pradesh and others

Judgment dated 20.09.2016 passed by the High Court of Madhya Pradesh in First Appeal No. 238 of 2002, reported in 2016 (4) MPLJ 458

Relevant extracts from the judgment:

In this appeal a short question involved is whether the appellants have a legal right to get compensation of the land of share of respondent No.4 on the basis of affidavit given by them before the Naib Tahsildar, who declared the appellants the owner of the land of share of the respondent No.4?

On perusal of record, it is found that the appellants have submitted a certified copy of the order dated 28.10.1992 Ex. D–3 passed by the Naib Tahsildar, Rampur Baghelan in Revenue Case No.105A/6/85–86. On perusal of the aforesaid order, it appears that it is passed behind the respondent No.4 as they are not party in the case and on the basis of their affidavit and the affidavit of their mother submitted by Ramsharan Appellant No.1 the share of Shiv Balak was deemed to be transferred in favour of appellants and recorded their name on the share of Shiv Balak. This order is ***non–est*** in the eye of law as under the Transfer of Property Act, gift can be made by the owner of the land by only Registered deed not by oral expression. Therefore, Tehsildar has no right to consider the land transferred orally and recorded appellant's name as the owner of the land on the share of the Shiv Balak, therefore, learned lower Court has not committed any error by ignoring the aforesaid document. Apart from it, there is no other document which may be considered to establish the fact that the appellants are also entitled to get the share of Shiv Balak in accordance with law.

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39. MEDICAL NEGLIGENCE :

Medical Negligence – Plaintiff underwent sterilization operation on the advice of the defendant doctor due to already having two sons and husband's low income – Despite of sterilization operation plaintiff gave birth to male child – Trial court granted six thousand rupees compensation to plaintiff – Held, prior to the operation, plaintiff was acquainted about possibility of failure of operation – No specific act of negligence on part of doctor established by the plaintiff – Failure of tubal sterilization is not necessarily on account of negligence of the doctor – Trial court judgment set aside.

चिकित्सीय उपेक्षा :

चिकित्सीय उपेक्षा – पूर्व से दो पुत्र होने एवं पति की कम आय होने से प्रतिवादी चिकित्सक की सलाह पर वादी ने नसबन्दी कराई – नसबन्दी कराये जाने के बावजूद वादी द्वारा पुत्र को जन्म दिया गया – विचारण न्यायालय द्वारा वादी को छः हजार रूपये का प्रतिकर दिया गया – अभिनिर्धारित, ऑपरेषन के पूर्व वादी को ऑपरेषन की विफलता की संभावना के बारे में बताया गया था – वादी की ओर से चिकित्सक की उपेक्षा के विनिर्दिष्ट कृत्य को नहीं बनाया गया – ट्यूबल तकनीक की नसबन्दी की विफलता चिकित्सक की उपेक्षा के फलस्वरूप होना आवष्यक नहीं है – विचारण न्यायालय के निर्णय को अपास्त किया गया।

State of M.P. v. Pushpa

Judgment dated 08.09.2016 passed by the High Court of Madhya Pradesh in First Appeal No. 209 of 2003, reported in 2017 (1) MPLJ 362

Relevant extracts from the judgment:

Prior to operation, it was explained to the respondent/plaintiff that there is some ossibility of failure of operation and for the failure, the concerning doctor shall not be held responsible.

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A doctor does not give a contractual warranty. He is not an insurer against all possible risks. He or she does not provide insurance that there would be no pregnancy after sterilization operation. As demonstrated above there is a chance of sterile being turned into fertile even after the operation has been done with due care and caution. A doctor is not liable in negligence because someone of grater skill and knowledge would have prescribed different treatment or "operated in a different way". She has to show only a reasonable standard of care. She cannot be held guilty for error of judgment. Considerable deference is paid to the practices of the professions (particularly medical profession) as established by expert evidence and the Court should not attempt to put itself in the shoes of the surgeon or other professional man.

As regards sterilization A William's Obstetrics 21st Edition Pages 1556 to 1560 deal with "sterilization". It is stated at page 1559 of 1997 Edition : "No method of tubal sterilization is without failure". "Soderstrom (1985) concluded that most sterilization failures were not preventable. A similar conclusion was reached by the American College of Obstetricians and Gynecologists (1996), which stated, "pregnancies after sterilization may occur without any technical errors. Finally, the lifetime increased cumulative failure rates overtime are supportive that failure after one year are not likely due to technical errors". Thus, according to this authoritative book the failure of tubal sterilization is not necessarily on account of negligence of the doctor.

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In the instant case, no specific act of negligence on the part of the lady doctor has been pointed out. Therefore,in the facts and circumstances of this case the decision in the ***State of Hariyana v. Smt. Santaram, 2000 (5) SCC 182*** is not applicable in the present case. The lady doctor who operated the respondent/plaintiff cannot be held negligent.

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40. N.D.P.S. ACT, 1985 – Re-Testing of Sampels

Application for re-testing of the contraband after recording of evidence of prosecution witness – Application can be allowed only in exceptional circumstances, after recording of cogent reasons – Any application of re-testing or re-sampling must be filed immediately within fifteen days of the receipt of the test report – Application held to be rightly dismissed.

Relied upon *Thana Singh v. Central Bureau of Narcotics, 2013 Cri.L.J. 1262*

एन.डी.पी.एस. अधिनियम, 1985 – नमूनों की पुनः जाँच

अभियोजन साक्षियों की साक्ष्य अभिलिखित करने के पष्चात् निषिद्ध पदार्थ के पुनः परीक्षण हेतु आवेदन – आवेदन ठोस कारण अभिलिखित करने के पष्चात् आपवादिक परिस्थितियों में ही स्वीकार किया जा सकता है – पुनः परीक्षण अथवा पुनः नमूना लिये जाने हेतु कोई आवेदन, परीक्षण प्रतिवेदन प्राप्त होने के 15 दिवस के भीतर अविलंब अनिवार्य रूप से प्रस्तुत किया जाना चाहिए – आवेदन का निरस्त किया जाना सही ठहराया गया।

थाना सिंह वि. सेंट्रल ब्यूरो ऑफ नारकोटिक्स, 2013 सी.आर.एल.जे.1262 का आधार लिया गया।

Suresh Kumar v. State through NCB, Indore

Judgment dated 24.06.2015 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Revision No. 136 of 2014, reported in 2016 (2) ANJ (MP) 50

Relevant extracts from the judgment:

Learned counsel for the applicant places reliance on the judgment of Delhi High Court in the case of ***Nihal Khan v. State (Govt. of NCT of Delhi) 2007 Cri.L.J. 2074*** in which, Delhi High Court enumerated certain circumstances in which retesting of the sample may be ordered. Firstly, when no percentage of the substance is shown in the testing report, secondly, when tempering is alleged and thirdly, when there exists possibility based on the facts of the case that sample sent for testing did not match the case property. This can be done when there is a marked differences in colour and other appearance of both the samples. Learned counsel for the applicant also places reliance on the judgment of this Court in the case of ***Dinesh Kumar Yadav v. Union of India, 2014 Cri.L.J. 366*** in which, this Court placing reliance on the direction issued by Hon'ble the Supreme Court in the case of ***Thana Singh v. Central Bureau of Narcotics, 2013 Cri.L.J. 1262*** observing that the application for retesting was filed within 15 days as specified in the case of ***Thana Singh*** (supra) and, therefore, the Court allowed retesting. However, in this case, no exceptional circumstance were specified.

This apart, both the counsels placed reliance on the direction issued by Hon'ble the Supreme Court in the case of ***Thana Singh*** (supra). The Supreme Court issued direction to expedite trial of the cases under the NDPS Act and in para 25 of the judgment, specifically issued direction for re-testing. Para 25 of the judgment is reproduced as under:–

> 25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to re–testing/re–sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for retesting/re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.''

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***41. N.D.P.S. ACT, 1985 – Sections 8(c) and 20(b)**

Seizure of five kilograms of ganja from the house during the sole presence of the accused – Mere fact that accused was not in ownership of the said house does not itself disprove the prosecution's case – Sole presence in absence of any explanation sufficient to show exclusive possession – Conviction upheld.

एन.डी.पी.एस. अधिनियम, 1985 – धाराएं 8 (सी) एवं 20 (बी)

अभियुक्त के एकांकी उपस्थिति के दौरान घर से 5 किलोग्राम गाँजा की जप्ती – मात्र अभियुक्त के स्वामी न होने का तथ्य स्वयं में अभियोजन पक्ष को नासाबित नहीं कर देता है – किसी स्पष्टीकरण के अभाव में एकल उपस्थिति एकांकी आधिपत्य दर्षित करती है – दोषसिद्धी सही हरायी गयी।

Arutla Shankaraiah v. State of A.P.

Judgment dated 18.08.2015 passed by the Supreme Court in Criminal Appeal No. 1117 of 2008, reported in 2017 (1) Crimes 94 (SC)

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42. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141

Booking of flat developed by the company of the accused – As flat could not be developed, booking amount was returned through cheque – Cheque was drawn by the accused in individual capacity and not as Director of the company – Complaint was filed without naming Company as an accused after the dishonour of cheque – Held – Accused being drawer of the cheque in personal capacity – Also Managing Director and incharge of the affairs by virtue of the position he held – Liable under Section 138 even though the Company had not been named in the notice or the complaint.

परक्राम्य लिखित अधिनियम, 1881 – धाराएं 138 एवं 141

अभियुक्त की कंपनी द्वारा विकसित फ्लेट की बुकिंग करवायी गयी – फ्लेट विकसित न हो पाने के कारण बुकिंग राषि चैक के माध्यम से लौटाई गई – अभियुक्त द्वारा चैक व्यक्तिगत हैसियत से लेख किया गया न कि कंपनी के डायरेक्टर के रूप में – चैक अनादरित होने के पष्चात् कंपनी को अभियुक्त बनाये बिना परिवाद प्रस्तुत किया गया – अभिनिर्धारित – अभियुक्त द्वारा चैक व्यक्तिगत हैसियत में जारी किया गया था – साथ ही मैनेजिंग डायरेक्टर एवं धारित पद से कार्यकलाप का प्रभारी था – कंपनी का नाम सूचना पत्र या परिवाद में न होने के बावजूद धारा 138 के अंतर्गत दायी होना पाया गया।

Mainuddin Abdul Sattar Shaikh v. Vijay D. Salvi

Judgment dated 06.07.2015 passed by the Supreme Court in Criminal Appeal No. 1472 of 2009, reported in 2016 (2) ANJ (SC) 240

Relevant extracts from the judgment:

About the liability under Section 138 of the NI Act, where the cheque drawn by the employee of the appellant company on his personal account, even if it be

for discharging dues of the appellant-company and its Directors, the appellant-company and its Directors cannot be made liable under Section 138. Thus, we observe that in the abovementioned case [***P.J. Agro Tech Limited v. Water Base Limited, (2010) 12 SCC 146***], the personal liability was upheld and the Company and its Directors were absolved of the liability. The logic applied was that the Section itself makes the drawer liable and no other person. This Court in ***P.J. Agro Tech Limited*** (supra) noted as under:

> "An action in respect of a criminal or a quasi–criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personal and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence."

Going by the strict interpretation of the provision the drawer which in the present case is the respondent is liable under Section 138 of the N.I. Act.

The Respondent has adduced the argument that in the complaint the appellant has not taken the averment that the accused was the person incharge of and responsible for the affairs of the Company. However, as the respondent was the Managing Director of M/s. Salvi Infrastructure Pvt. Ltd. and sole proprietor of M/s. Salvi Builders and Developers, there is no need of specific averment on the point. This Court has held in ***National Small Industries Corporation Ltd. v. Harmeet Singh Paintal and anr., (2010) 12 SCC 146*** as follows:

> "If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with."

Thus, in the light of the position which the respondent in the present case held, we are of the view that the respondent be made liable under Section 138 of the NI Act, even though the Company had not been named in the notice or the complaint. There was no necessity for the appellant to prove that the said respondent was incharge of the affairs of the company, by virtue of the position he held. Thus, we hold that the respondent Vijay D Salvi is liable for the offence under Section 138 of the N.I. Act.

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43. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147 CRIMINAL PROCEDURE CODE, 1973 – Section 320

(i) Compounding of offence in cases relating to dishonour of cheque – Levy of compounding cost – As per the guidelines formulated by the Supreme Court in *Damodar S. Prabhu Case,* compounding of cases can be allowed at different stages of the proceedings on payment of specified compounding cost – Fact that the cheque is issued prior to 3rd May, 2010, date on which the Supreme Court formulated the guidelines, will make

no difference and the guidelines should be given effect prospectively.

(ii) The relevant fact to be kept in mind is that on which date the compounding application is made and is being considered and not the date on which the cheque is issued.

(iii) Compounding cost, reduction of – Amount towards compounding cost specified in the guidelines framed by the Supreme Court can be reduced by the Court, on case to case basis, after recording reasons therefor – That is the discretion of the concerned Court which has to be exercised judiciously.

परक्राम्य लिखित अधिनियम, 1881 – धाराएं 138 एवं 147

दण्ड प्रक्रिया संहिता, 1973 – धारा 320

(i) चैक अनादरण से संबंधित मामलों में अपराध का शमन – शमन शुल्क का अधिरोपित किया जाना – सर्वोच्च न्यायालय द्वारा दामोदर एस. प्रभु वाले मामले में दिये गये दिषा निर्देष के अनुसार, मामलों में शमन विभिन्न प्रक्रम पर शमन शुल्क अदा किये जाने पर अनुज्ञेय किया जा सकता है – यह तथ्य कि चैक दिनांक 03.05.2010 के पूर्व जारी किया गया था, जिस दिनांक को सर्वोच्च न्यायालय द्वारा दिषा निर्देष दिये गये थे, कोई अंतर नहीं करेगा एवं दिषा निर्देषों को भविष्यलक्षी रूप से प्रभाव दिया जाना चाहिये।

(ii) ध्यान रखे जाने योग्य सुसंगत दिनांक, वह दिनांक है, जिस दिनांक को शमन हेतु आवेदन किया गया है एवं विचार किया जा रहा है एवं न कि वह दिनांक जब चैक जारी किया गया था।

(iii) शमन शुल्क का कम किया जाना – सर्वोच्च न्यायालय द्वारा बनाये गये दिषा निर्देषों के अनुसार उल्लेखित शमन शुल्क न्यायालय द्वारा मामले दर मामले में कारण लेखबद्ध कर कम किया जा सकता है – यह संबंधित न्यायालय का विवेक है, जिसे न्यायसंगत रूप से प्रयोग किया जाना है।

Veerendra v. Shri Ram Transport Finance Company Limited

Order dated 17.11.2015 passed by the High Court of Madhya Pradesh in Criminal Revision No. 2404 of 2015, reported in ILR (2016) MP 1518 (DB)

Relevant extracts from the order:

Two questions have been formulated by the learned Single Judge for consideration by the Larger Bench, having found that the view taken by another learned Single Judge on the said issues was not correct. The same read thus:–

(i) Whether, the compounding fee as applicable in Negotiable Instruments cases pursuant to the judgment of ***Damodar S. Prabhu v. Sayed Babalal H., 2010 (4) MPLJ 257*** is applicable to cases which are compounded after 3.5.2010 retrospectively irrespective of the date on which the cheque is executed?

(ii) Whether cases of compounding of cases under Negotiable Instruments Act, if the cheque dated is prior to pronouncement of judgment in ***Damodar S. Prabhu*** (supra) i.e. 3.5.2010, the compounding fee is not leviable?

As regards the first question, the same is answered in paragraph 16 of the decision of the Supreme Court in the case of ***Damodar S.Prabhu*** (supra). From the last sentence of paragraph 16, it is amply clear that the directions given by the Supreme Court (as noted in paragraph 15), should be given effect prospectively.

As per the guidelines formulated by the Supreme Court, compounding of such cases can be allowed at different stages of the proceedings – pending before the Trial Court or Appellate Court or for that matter Revisional Court, as the case may be. Depending on the stage during which the compounding application is made, the amount towards compounding cost has been specified. That, however, can be and ought to be levied on case to case basis. Thus, the fact that the cheque is issued prior to 3rd May, 2010 – on which date the Supreme Court formulated the guidelines, will make no difference. Accordingly, the first question formulated by the learned Single Judge does not require any further elaboration and is answered accordingly.

Reverting to the second question, the same is another shade of the first question. As aforesaid, even if the date of cheque is prior to pronouncement of the judgment in ***Damodar S. Prabhu's case*** (supra), that will make no difference. The relevant fact to be kept in mind is: when the compounding application is made and is being considered. Not the date on which cheque is issued.

Whether the Court has discretion to reduce the amount towards compounding cost has also been answered by the Supreme Court in its recent decision in the case of ***Madhya Pradesh State Legal Services Authority v. Prateek Jain & anr., 2015 (1) SCC (Cri) 211***. In paragraphs 25 and 26 of said decision, the Supreme Court observed thus:–

> "25. What follows from the above is that normally costs as specified in the guidelines laid down in the said judgment has to be imposed on the accused persons while permitting compounding. There can be departure therefrom in a particular case, for good reasons to be recorded in writing by the concerned Court. It is for this reason that the Court mentioned three objectives which were sought to be achieved by framing those guidelines, as taken note of above. It is thus manifestly the framing of "Guidelines" in this judgment was also to achieve a particular public purpose. Here comes issue for consideration as to whether these guidelines are to be given a go by when a case is decided/settled in the Lok Adalat? Our answer is that it may not be necessarily so and a proper balance can be struck taking care of both the situations.

26. Having regard thereto, we are of the opinion that even when a case is decided in Lok Adalat, the requirement of following the guidelines contained in ***Damodar S. Prabhu*** (supra) should normally not be dispensed with. However, if there is a special/specific reason to deviate therefrom, the Court is not remediless as ***Damodar S. Prabhu*** (supra) itself has given discretion to the concerned Court to reduce the costs with regard to specific facts and circumstances of the case, while recording reasons in writing about such variance. Therefore, in those matters where the case has to be decided/settled in the Lok Adalat, if the Court finds that it is a result of positive attitude of the parties, in such appropriate cases, the Court can always reduce the costs by imposing minimal costs or even waive the same. For that, it would be for the parties, particularly the accused person, to make out a plausible case for the waiver/reduction of costs and to convince the concerned Court about the same. This course of action, according to us, would strike a balance between the two competing but equally important interests, namely, achieving the objectives delineated in ***Damodar S. Prabhu*** (supra) on the one hand and the public interest which is sought to be achieved by encouraging settlements/resolution of case through Lok Adalats."

Suffice it to observe that the amount towards compounding cost specified in the guidelines framed by the Supreme Court in the case of ***Damodar S.Prabhu*** (supra) can be reduced by the Court, on case to case basis, after recording reasons therefor. That is the discretion of the concerned Court which will have to be exercised judiciously.

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44. PARTNERSHIP ACT, 1932 – Section 69 (2)
CIVIL PROCEDURE CODE, 1908 – Order 30 Rule 1
Suit by partnership firm or partners against a third party – Under Section 69 (2) word "persons" shows that plaintiff partner should be more than one in number – Partnership Firm must be represented by atleast two qualified partners – Order 30 Rule 1 of C.P.C. also furthers the intent of Section 69 (2) by stating that two or more partners may sue or be sued in the name of the firm – Institution of suit only by one partner – Not maintainable.

भागीदारी अधिनियम, 1932 – धारा 69 (2)
सिविल प्रक्रिया संहिता, 1908 – आदेष 30 नियम 1
भागीदारी फर्म या भागीदारों द्वारा एक तृतीय पक्षकार के विरूद्ध वाद – धारा 69 (2) के अंतर्गत ''व्यक्तियों'' शब्द यह दर्षित करता है कि वादी भागीदार संख्या में एक से

अधिक होना चाहिये – भागीदारी फर्म का कम से कम दो अर्हित भागीदारों द्वारा प्रतिनिधित्व होना चाहिये – आदेष 30 नियम 1 सिविल प्रक्रिया संहिता भी धारा 69 (2) के आषय को आगे बढ़ाते हुये यह उल्लेखित करती है कि दो या दो से अधिक भागीदार के द्वारा या उनके विरूद्ध फर्म के नाम से वाद प्रस्तुत हो सकता है – मात्र एक भागीदार द्वारा वाद का संस्थित किया जाना – प्रचलन योग्य नहीं।

Vijay Kumar and anr. v. Shriram Industries and others

Order dated 30.08.2016 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Civil Revision No. 50 of 2006, reported in 2016 (4) MPLJ 397

Relevant extracts from the Order:

A close scrutiny of section 69(2) of the Act further reveals that while making it mandatory for the plaintiff partnership firm and the partners representing the said firm to be registered, the term "persons" and not 'person' has been employed. This reveals the legislative intent that the plaintiff-partner should be more than one in number. Meaning thereby that the plaintiff firm should be represented by at least two or more partners and both the said partners should be registered partners.

The object behind using the term "persons" in plural is explicitly clear. A partnership comes into being only when two or more persons agree to share profits of business carrying on by them or any of them under the Act. Thus, the very genesis of partnership is based on plurality and not singularity.

The object behind this use of plural term of "persons" is to ensure that at least two persons, which is the bare minimum requirement for formation of partnership firm to become plaintiffs to enable institution of a suit by them or through them and thereby save the suit from being hit by the prohibitory mandatory provisions of section 69 (2) of the Act.

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Learned counsel for the respondents after placing reliance on the Division Bench decision of this court in the case of Firm ***Gopal Company Ltd. Bhopal & another v. Firm Hazarilal Company, Bhopal, AIR 1963 MP 37*** contends that even a single registered partner (Mahila Krishnakumamari as in the present case) representing the firm can save the suit from being dismissed under Section 69 (2) of the Act.

A perusal of the said Division Bench decision of this court reveals that though this court took into account provisions of Order XXX Rule 1 of C.P.C., but the provisions of section 69 of the Act were not taken into consideration. Thus, this decision is of no avail herein.

The maintainability of the suit filed by partner or partnership firm against another partner or partnership firm or against a third party, can be tested only on the anvil of section 69 (2) of the Act, which is substantive law relating to

partnership firm. The provision of order XXX of C.P.C., merely lays down procedure and cannot override the substantive special enactment on the subject which is the Partnership Act. This emanates out of the maxim generalia specialibus non derogant, which has been reiterated in various decisions of the Apex court in the cases of ***Damji Valji Shah v. LIC of India, AIR 1966 SC 135, Gobind Sugar Mills Ltd. v. State of Bihar, (1999) 7 SCC 76, Belsund Sugar Co.Ltd. v. State of Bihar, (1999) 9 SCC 620*** including the case of ***Suresh Nanda v. Central Bureau of Investigation, (2008) 3 SCC 674***.

Anything contained in the C.P.C. on the issue which is contrary to the provision of the special law i.e., Partnership Act shall stand superseded and the said enactment will prevail upon general law which is C.P.C. It is settled principle of law that special enactment prevails upon the general law and also that the law relating to procedure gives way to substantive provisions of law.

Testing the factual matrix attending the present case on the anvil of the law laid down in various decisions supra, it is crystal clear that Section 69 of the Act prohibits institution of a suit filed by a partnership firm or the partners against a third party (as in the case herein) unless at least two qualified partners represent the plaintiff partnership firm. Qualified partners would means partners whose names are mentioned in the registration certificate of the partnership firm.

Before concluding it would be appropriate to mention that provisions of Order XXX of C.P.C., in fact furthers the intent and object of section 69(2) of the Act. Section 69 (2) in mandatory term requires at least two or more qualified partners to represent the partnership firm instituting the suit against a third party. While in similar tenor, the provision of Order XXX Rule 1 of C.P.C., which is enabling in nature provides that two or more partners may sue or be sued in the name of the firm provided they are partners of the firm in question at the time of accruing of the cause of action. Thus, there is no occasion of any clash or contradiction between the provisions of section 69(2) of the Act and Order XXX of C.P.C.

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45. PERSONAL LAWS : Hindu Marriages

ARYA MARRIAGE VALIDATION ACT, 1937

(i) Hindu marriages – Nature and concept – 'Panigrahana' and 'Saptapadi' are essential elements – "Doctrine of factum valet" does not validate the non-observance of essential ceremonies.

(ii) Marriages in Arya Samaj – No provision under the relevant Act for issuance of certificate – Mandatory directions issued.

व्यक्तिगत विधि : हिन्दू विवाह

आर्य विवाह मान्यता अधिनियम, 1937

(i) हिन्दू विवाह – प्रकृति एवं संकल्पना – 'पाणिग्रहण' एवं 'सप्तपदी' विवाह के आवष्यक तत्व है – **"Doctrine of factum valet"** ''डाक्टराइन ऑफ फेक्टम वेलेट'' द्वारा आवष्यक समारोहों का अपालन विधिमान्य नहीं हो जाता है।

(ii) आर्य समाज में विवाह – सम्बन्धित अधिनियम में प्रमाण–पत्र जारी करने का कोई प्रावधान नहीं है – आवष्यक दिषा निर्देष जारी किये गये।

Naresh Soni v. Stae of M.P. & ors.
Order dated 13.10.2016 passed by the High Court of Madhya Pradesh in Writ Petition No. 4424 of 2016 (Gwalior Bench), reported in 2017 (I) MPJR 194

Relevant extracts from the Order :

The origin of marriage amongst Aryans in India as amongst other ancient peoples is a matter for the science of anthropology. Since the time of Rig Vedic age marriage was a well established institution and the Aryan ideal of marriage was very high. Monogamy was the rule and the approved rule, though polygamy existed to some extent. Marriage is one of the necessary SAMSKARAS or religious rites for all Hindus whatever the caste, who did not desire to adopt a life of perpetual Brahmchari or Sanyasi. According to the Hindu Law, marriage is a sacrament. It is also a civil contract which takes a form of gift in Brahma, sale in Asura and an agreement in Gandharva. The status of husband and wife is constituted by the performance of marriage rites whether prescribed by the Shastras or by customs. According to Shastras, there are two essential elements necessary to constitute a valid marriage; one a secular element, viz., gift of the bride or 'Kanya Daan' in the four approved forms, the transference of dominion for consideration in the 'Asura' form and mutual consent or agreement between the maiden and the bridegroom in the 'Gandharva' form. These must be supplemented by going through the form prescribed by the 'Grihyasutras' of which the essential elements are 'Panigrahana' and 'Saptpadi'. This is the religious element. Both the secular and the religious elements are essential for the validity of a marriage. Ceremonies are essential in the case of all the eight forms of marriages. The doctrine of "factum valet" does not validate the marriage under the Hindu Law, as it only enables to cure the violation of directory provision or a mere matter of form, but does not cure the violation of the fundamental principles or the essence of the transaction. The Privy Council explained this doctrine in the case of ***Balusu v. Balusu, 22 Mad. 398 at p.423*** (W), which reads as under:–

> "If there are certain essential ceremonies, which are necessary for a marriage, the non-observance of those ceremonies or religious rites cannot be overlooked by applying the doctrine of 'factum valet'. The doctrine applies only where there is no initial want of authority or where there is no positive interdiction. If, according to Manu's text, certain essential rites are necessary for a valid marriage, unless it is shown by custom that those ceremonies have been modified, it is imperative upon the parties concerned to observe the formalities laid down by law. Non-observance of those rites cannot be cured by applying the doctrine of 'factum valet'. There are very many

ceremonies connected with the marriage, which are more or less non–obligatory or directory. If those ceremonies are not performed at the marriage, the omission may be cured by the doctrine of 'factum valet".

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After taking into consideration the sacredness attached to the Hindu marriages and the provisions contained under the Arya Marriage Validation Act, 1937, the Special Marriage Act, 1954 and Hindu Marriage Act, 1955 as well as social & statutory recognition, credibility & authenticity of Arya Samaj marriages and further to ensure that such marriages do not suffer the wrath of social indignation, bitterness in families, unethical and illegal relationship in the eyes of society, this Court is of the view that comprehensive directions are required to be issued. Besides, Arya Marriage Validation Act, 1937 does not contemplate issuance of marriage certificate, therefore, if sanctity is required to be attached to such marriage certificates, the provisions of the various Acts referred to above are required to be followed in the matter of solemnization of marriage. Thus, following mandatory directions are issued:–

i. In the event bride and bridegroom present themselves before the management of the Arya Samaj Mandir with applications for solemnization of marriage as per Arya Samaj rites and rituals, it shall be the duty of the management to first issue notice affixing photographs of the bride and bridegroom to the parents/families of both at the declared address and also affix such notice in that behalf on the notice board of the Mandir inviting objections, if any, to ensure that; (i) neither party has a spouse living, (ii) neither party is incapable of giving a valid consent to it in consequence of unsoundness of mind or though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children or has been subject to recurrent attacks of insanity, (iii) declarations must contain that the marriage is not performed by fear, threat or coercion; (iv) the male has completed the age of twenty one years and the female the age of eighteen years, and (v) the parties are not within the degrees of prohibited relationship, provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship. A reasonable time of at least seven days be prescribed in the notice.

ii. If objection is received, the same shall be dealt with by the Mandir management, with due verification of facts. If need be, assistance of local police may also be taken.
iii. Declarations from the bride and bridegroom shall be obtained not on a cyclostyle format on a piece of paper, but on a non–judicial stamp paper of the value of ` 100/– or more purchased in their names for marriage purpose that they are aware of the noble ideals, objects, rituals, traditions of Arya Samaj and endorse faith & belief, practices & follows the same, duly notarized by a licensed Notary with due identification by an Advocate and Mandir Management shall also verify the credibility of such declaration from known sources, viz. Arya Samaj Temples mentioned by them and/or the community of Arya Samajists known to them, in writing.
iv. The date of birth of bride and bridegroom shall be verified through the original 10th class mark-sheet of each one of them.
v. In the event the bride and bridegroom are not educated, verification of fact of their age shall be done from the respective families or through the medical ossification at the Government Hospital or Government recognized Medical Practitioner with affixation of seal.
vi. The original residential address of bride and bridegroom shall also be verified either through documentary evidence or through an enquiry and, if required, with the help of local police.
vii. Upon verification of aforesaid facts and ascertainment of ***bona fide*** intention of bride and bridegroom for solemnization of marriage, the mandir management shall ensure solemnization of marriage with due observance of Saptpadi and all customary rites, rituals and ceremonies depending upon the social and economic status of bride and bridegroom in presence of two witnesses of each side with their identity and residential proof with a separate notarized affidavit, by each of them stating on oath that the bride and/or bridegroom are personally known to them, on a non-judicial stamp paper of the value of ` 100/– or more.
viii. The process of Saptapadi with rituals and solemnization of marriage shall be recorded through video graphy by the Mandir Management.
ix. Thereafter, marriage certificate may be issued to the bride and bridegroom by authorized signatory of the Mandir Management.

x. The management shall maintain and keep a record of complete documentation and visuals of the entire process of solemnization of marriage and

xi. The District Heads of Police shall issue necessary instructions to the Station House Officers of various police stations to conduct enquiry and verify from Arya Samaj Mandirs within the jurisdiction of their police stations in the event complaints are made of missing girls or of fraud, manipulation, etc., in the matter of solemnization of marriages, in the police stations.

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46. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 13 (2)

Use of word "pure" on packaged drinking water – Prosecution for Misbranding – Held – Mere use of word "pure" on packaged drinking water does not fall within the ambit of misbranding.

Filing of complaint after the shelf life of the product due to administrative delay – Administrative delay cannot mitigate the valuable right of accused to have a sample reanalyzed or retested.

खाद्य अपमिश्रण निवारण अधिनियम, 1954 – धारा 13 (2)

पैकेज्ड पेय जल पर "षुद्ध" शब्द का प्रयोग – मिथ्या छाप हेतु अभियोजन – अभिनिर्धारित – मात्र "षुद्ध" शब्द का पैकेज्ड पेय जल पर उपयोग किया जाना मिथ्याछाप की परिधि में नहीं आता है।

प्रषासकीय विलंब के कारण परिवाद का उत्पाद की जीवनावधि के उपरांत प्रस्तुत किया जाना – प्रषासकीय विलंब अभियुक्त के नमूने के पुनः परीक्षण अथवा पुनः विष्लेषण के मूल्यवान अधिकार का न्यूनीकरण नहीं कर सकता है।

Prakash Desai and anr v. State of Madhya Pradesh

Judgment dated 21.09.2015 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Misc. Criminal Case No. 629 of 2012, reported in 2016 (2) ANJ (MP) 323

Relevant extracts from the judgment:

Delhi High Court in ***Pepsico India Holdings Pvt. Ltd. v. The Bureau of Indian Standards and others, 129 (2006) DLT 522,*** considered the question whether use of words "pure", "crisp", "refreshing", "purified" and "purity guaranteed" contravene any provision of law ? Hon'ble Vikramajit Sen, J. (as His Lordship then was) considered the dictionary meaning of said words and opined that use of the words "pure", "crisp", "refreshing", "purified" and "purity guaranteed" on a label pertaining to packaged drinking water does not offend any provision of law. The said judgment of Delhi High Court is followed by this Court in ***Shri Prakash Desai v. State of MP, 2012 (4) MPHT 26.*** Interestingly, the said case (M.Cr.C. No.11475/2011) was filed by the present petitioner and was pertaining

to same product, i.e., Kinsley Pure Drinking Water. After considering the judgment of Delhi High Court, this Court opined that even if allegations made against the petitioner in the complaint are taken at their face value and accepted in their entirety, no offence under the PFA Act would be made out. Thus, by applying the ratio of ***State of Haryana v. Bhajanlal, AIR 1992 SC 604,*** this Court set aside the complaint proceedings.

As per the judgment of ***Pepsico India Holdings Pvt. Ltd.*** (supra), followed by this Court in ***Shri Prakash Desai*** (supra), it is clear that use of word "pure", by no stretch of imagination, can amount to "misbranding". Thus, in my judgment, the petitioner should not be compelled to undergo the rigmarole of criminal proceedings. Apart from this, the letter dated 20.9.2001 of Directorate General of Health Service makes it clear that the petitioner was even otherwise entitled to use the word "pure" till 31.12.2001. Admittedly, the sample was taken before the said date on 16.5.2001. For this reason also, the complaint has no basis.

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The court below opined that if the petitioner was not satisfied with the report of public analyst, he should have invoked Section 13 (2) of the PFA Act. This point is no more res integral. The Bombay High Court in ***Shivkumar alias Shiwalamal Narumal Chugwani Proprietor of Kanhaiya General Stores v. State of Maharashtra,*** (Criminal Application No.3439/2006, decided on 21.6.2010) dealt with this aspect. In the said case, the complaint was instituted by Food Inspector after a reasonable period from the date of taking sample. Pertinently, the complaint was filed after the shelf life of the product. When this action was challenged by contending that valuable right under Section 13 (2) of the PFA Act was lost and prosecution has become worthless, the complainant urged that the delay was for administrative reason. This administrative delay cannot at all mitigate the valuable right of accused to have a sample reanalyzed or retested from the Central Food Laboratory. The Bombay High Court after considering ***Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970, State of Haryana v. Unique Farmaid (P) Ltd., (1999) 8 SCC 190*** and ***Medicamen Biotech Ltd. v. Rubina Bose, 2008 (3) Scale 563,*** opined that the valuable right of accused persons under Section 13(2) of the PFA Act is violated because the complaint was filed after shelf life of the product. The justification of delay on the basis of administrative reasons and limitation of three years for filing complaint was not accepted by the High Court. For this reason also, the impugned order cannot sustain judicial scrutiny. This judgment of Bombay High Court was put to test before Supreme Court in ***State of Maharashtra v. Shivkumar @ Shiwalamal N. Chugwani, 2011 (1) FAC 41*** (Special Leave to Appeal (Cri) No. 6332/2010). The said SLP was dismissed on merits by Supreme Court on 13th September, 2010. Suffice it to say that after shelf life of a product is over, remedy under Section 13(2) of the PFA Act is of no use to the accused. Even if by order dated 11.8.2011, the court below rejected similar contention of the petitioner, it is of no help to the respondent. In view of the law laid

down in ***Shivkumar @ Shiwalamal N. Chugwani*** (supra) and affirmed by Supreme Court, the said objection pales into insignificance.

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47. REGISTRATION ACT, 1908 – Sections 17 and 49

PERSONAL LAW : Family Arrangements

Family arrangements – Can be made orally, but if reduced into writing with the purpose that terms should be evidenced by it – Registration is compulsory – Unregistered document can be used only as corroborative piece of evidence for showing or explaining conduct of the parties.

रजिस्ट्रेषन एक्ट, 1908 – धाराएं 17 एवं 49

व्यक्तिगत विधि – कौटुम्बिक समझौता

कौटुम्बिक समझौता – मौखिक रूप से भी किया जा सकता है परन्तु यदि शर्तों को साक्ष्यित करने के उद्देष्य से लेखबद्व किया जाता है – पंजीकरण अनिवार्य है – अपंजीकृत दस्तावेज मात्र संपोषक साक्ष्य के रूप में पक्षकारों के आचरण को दर्षित करने या स्पष्ट करने हेतु उपयोग किया जा सकता है।

Subraya M. N. v. Vittala M.N. and others

Judgment dated 05.07.2016 passed by the Supreme Court in Civil Appeal No. 5805 of 2016, reported in 2017 (1) MPLJ 17

Relevant extracts from the judgment:

Even though recitals in the Ex.D22 is to the effect of relinquishment of right in items No.1 and 2, Ex.D22 could be taken as family arrangements/ settlements. There is no provision of law requiring family settlements to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If, however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is inadmissible; but the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct of the parties. In the present case, Ex.D22 panchayat resolution reduced into writing, though not registered can be used as a piece of evidence explaining the settlement arrived at and the conduct of the parties in receiving the money from the defendant in lieu of relinquishing their interest in items No.1 and 2.

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48. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 14-A
CRIMINAL PROCEDURE CODE, 1973 – Section 439
Amendment of Section 14-A of the Act came into force on 26.01.2017 – Appeal to the High Court in case of granting or refusing the bail – Provision under Section 14-A is not a procedural law – Prospective effect – Incidents prior to 26.01.2016 – High Court shall continue to hear bail applications and not appeal.

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 – धारा 14–ए
दण्ड प्रक्रिया संहिता, 1973 – धारा 439
अधिनियम की धारा 14–क का संषोधन दिनांक 26.01.2017 को प्रभाव में आया – उच्च न्यायालय के समक्ष प्रतिभूति दिये जाने या अस्वीकार किये जाने के विरूद्ध अपील – धारा 14–क के अंतर्गत प्रावधान प्रक्रियात्मक नहीं है – भविष्यलक्षी प्रभाव – दिनांक 26.01.2016 में पूर्व की घटना – उच्च न्यायालय प्रतिभूति आवेदन श्रवण करना जारी रखेगी न कि अपील ।

Mohar Singh v. State of M.P.
Order dated 06.09.2016 by High Court of Madhya Pradesh (Gwalior Bench) in Misc. Criminal Case No. 6468 of 2016, reported in 2016 (IV) MPJR 76

Relevant extracts from the Order :

It would be appropriate to refer the judgment passed by the Apex Court in case of ***Ramesh Kumar Soni v. State of Madhya Pradesh, AIR 2013 SC 1896,*** in which the Apex Court by referring its various judgments overruled the full Bench decision of this Court given in case of ***"In Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007,*** in which it is held that amendment in procedural law shall be retrospective if no vested right of litigant is involved.

In the light of the aforesaid decisions, the position of the present amendment is to be assessed to find out that the provision under Section 14-A of the Special Act is only a procedural provision or not. Before enactment of this provision, when bail application of a litigant was accepted or dismissed then the litigant had a right to file a bail application before the High Court. With the present amendment, the litigant cannot file an appeal under Section 14-A of the Special Act relating to that order of the trial Court which is already considered by the High Court while considering the bail application. Also as per the principles of judicial discipline when bail application was rejected by the High Court, the trial Court cannot entertain the same, it cannot act as a superior authority than the High Court. If the provision under Section 14-A of the Special Act is applied retrospectively then the litigant cannot file an appeal against the order passed by the trial Court which was already considered by the

High Court as bail application and he would be deprived of the right to file a fresh bail application. Under these circumstances, the situation shall arise that the litigant had no remedy for grant of bail in such repeat applications. Under these circumstances, the provision under Section 14-A of the Special Act is not a procedural law. It affects the right of the litigant to file a repeat bail application before the High court. Therefore, it cannot be considered as a provision of procedural law only. Hence, the provision under Section 14-A of the Special Act shall not have any retrospective effect and High Court shall continue to hear the bail applications for cases in which the incident took place prior to the date of enforcement of the new amendment, i.e., 26.01.2016.

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49. SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Sections 13 and 34

CIVIL PROCEDURE CODE, 1908 – Section 9 and Order 7 Rule 11

Term loan of Rs. 8,00,000/- granted to the plaintiff by Nationalized Bank – Proceedings for recovery initiated under the Act after default in re-payment – Civil suit filed challenging notice under Section 13(2) and further proceedings – Held – Concerned debtor can approach Tribunal under Section 17 of the Act – Section 34 bars jurisdiction of the civil courts.

प्रतिभूतिकरण और वित्तीय आस्तियों का पुनर्गठन और प्रतिभूति हितों को प्रभावी करने का अधिनियम, 2002 – धाराएं 13 एवं 14

सिविल प्रक्रिया संहिता, 1908 – धारा 9 एवं आदेष 7 नियम 11

राष्ट्रीयकृत बैंक द्वारा वादी को रूपये 8,00,000/– का सावधि ऋण प्रदान किया गया – अदायगी में चूक होने पर अधिनियम के अंतर्गत वसूली हेतु कार्यवाही प्रारंभ की गई – धारा 13 (2) के दिये गये सूचना पत्र एवं अन्य कार्यवाही को चुनौती देते हुये सिविल वाद प्रस्तुत किया गया – अभिनिर्धारित – संबंधित ऋणी अधिनियम की धारा 17 के अन्तर्गत प्राधिकरण के समक्ष जा सकता है – धारा 34 सिविल न्यायालय के क्षेत्राधिकार को वर्जित करता है।

State Bank of Patiala v. Mukesh Jain and anr.

Judgment dated 08.11.2016 passed by the Supreme Court in Civil Appeal No. 210 of 2007, reported in 2016 (4) MPLJ 531

Relevant extracts from the judgment:

Upon perusal of Section 34 of the Act, it is very clear that no Civil Court is having jurisdiction to entertain any suit or proceeding in respect of any matter which a Debt Recovery Tribunal or the appellate Tribunal is empowered by or under the Act to determine the dispute. Further, the Civil Court has no right to

issue any injunction in pursuance of any action taken under the Act or under the provisions of the DRT Act.

In view of a specific bar, no Civil Court can entertain any suit wherein the proceedings initiated under Section 13 of the Act are challenged. The Act had been enacted in 2002, whereas the DRT Act had been enacted in 1993. The legislature is presumed to be aware of the fact that the Tribunal constituted under the DRT Act would not have any jurisdiction to entertain any matter, wherein the subject matter of the suit is less than Rs.10 lakh.

In the forestasted circumstances, one will have to make an effort to harmonize both the statutory provisions. According to Section 17 of the Act, any person who is aggrieved by any of the actions taken under Section 13 of the Act can approach the Tribunal under the provisions of the DRT Act.

In normal circumstances, there cannot be any action of any authority which cannot be challenged before a Civil Court unless there is a statutory bar with regard to challenging such an action. Section 34 specifically provides the bar of jurisdiction and therefore, the order passed under Section 13 of the Act could not have been challenged by respondent no.1 debtor before any Civil Court.

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***50. SPECIAL COURTS ACT, 2011 (M.P.) – Section 17**
LIMITATION ACT, 1963 – Sections 3 and 29
Presentation of an appeal against any order under the Special Courts Act – Section 17 of the Act provides for limitation of thirty days for preparing an appeal but does not provide for condonation in case of delay – In absence of express exclusion of provisions of Limitation Act, general provisions would apply – Delay being *bona fide*, delay condoned.

मध्यप्रदेष विषेष न्यायालय अधिनियम, 2011 – धारा 17
परिसीमा अधिनियम, 1963 – धाराएं 3 एवं 29
विषेष न्यायालय अधिनियम के अंतर्गत किसी आदेष के विरूद्ध अपील प्रस्तुत किया जाना – अधिनियम की धारा 17 अपील प्रस्तुत करने की तीस दिवस की परिसीमा प्रदान करती है परन्तु विलंब की दषा में क्षमा के लिये प्रावधान नहीं है – परिसीमा अधिनियम के प्रावधानों का अभिव्यक्त रूप से वर्जन न किये जाने पर सामान्य विधि लागू होगी – विलंब के सद्भाविक होने से क्षमा किया गया।

State of M.P. v. Radheshyam and others
Order dated 14.09.2015 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Appeal No. 357 of 2015, reported in 2016 (4) MPLJ 294

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PART - II A
"GUIDE LINES"

LAW RELATING TO VIDEO CONFERENCING AND GUIDELINES

The law must keep pace with scientific developments and other contemporary changes in the society. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you. In judicial proceedings the concept as a tool is being utilized majorly in two ways i.e. firstly for producing the under-trials before the Court for the purposes of extension remand or otherwise from the prison itself and secondly for taking evidences in special circumstances. Other than these two sistuations the personal physical presence of the accused may be dispensed with and statements under Section 313 Cr.P.C. may be recorded through video conferencing. Recording of evidence through video conferencing is permissible in criminal as well as civil cases both.

In civil cases Order 18 Rule 4(3) C.P.C. provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual. [See: ***Salem Advocate Bar Association v. Union of India & ors., 2003 (1) SCC 49***]

In relation to production of the accused at the pre trial cognizance stage i.e. for remand purposes a Madhya Pradesh amendment has been made in Section 167(2) Cr.P.C. by the Amendment Act of 2007. It states:

> "No Magistrate shall authorise detention in any custody under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage."

The amended Section clearly suggests that while other authorisation as to the custody of the accused may be done through the medium of electronic video linkage, first time the accused must be produced physically before the Magistrate.

As far as the requirement of the presence of accused from jail during the recording of evidence in Court is concerned, the same can also be complied by way of video conferencing in light of the judgment of Apex Court in ***Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another, (2005) 3 SCC 284***.

By the amendment Act of 2009 proviso were inserted in Section 164(1) and 275(1) of Cr.P.C. to recognise the recording of statements and evidence through audio-video electronic means. Although Section 275 only applies to warrant cases but the evidence in other cases may also be recorded through video conferencing in light of the judgment of the Apex Court in ***State of***

Maharashtra v. Dr. Praful B. Desai, AIR 2003 SC 2053. In this case the Court observed that so long as the accused or his pleader are present when evidence is recorded by video conferencing, that evidence is being recorded in the "presence" of the accused and would thus fully satisfy the requirements of Section 273 of the Code. Recording of such evidence would be as per "procedure established by law". It was held that "presence" of the accused under Section 273 does not necessarily mean actual physical presence in the Court.

Recently the Supreme Court in the case of ***Krishna Veni Nagam v. Harish Nagam, 2017 (4) SCC 150*** gave directions for the use of video conferencing and other technological advanced measures in matrimonial cases. The court observed that:

> "It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video conferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of video conference, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person."

As far as allowing of recording of evidence through video conferencing is concerned, an application for recording of evidence through video conferencing must be decided liberally keeping in mind the purpose of expediting the trial. The Delhi High Court in the case of ***International Planned Parenthood Federation v. Madhu Bala Nath, AIR 2016 Del. 71,*** has held that procedures have been laid down to facilitate dispensation of justice. Dispensation of justice entails speedy justice and justice rendered with the least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the parties as well as to the witnesses, such facilities should be resorted to. Merely because a witness is travelling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court. Where a witness or a party requests that the evidence of a witness may be recorded through video conferencing, the Court should be liberal in granting such a prayer. There may be situations where a witness even though within the city may still want the evidence to be recorded through video conferencing in order to save time or avoid inconvenience, then the Court should take a pragmatic view.

The evidence of Medical Experts may also be recorded through video conferencing so that the Medical Experts are able to devote their time in the hospitals in attending patients rather than commuting to Court for recording of their evidence. Hon'ble Justice Hemant Gupta (As he then was) writing for the bench in the case of ***State of Punjab v. Mohinder Singh, (High Court of Punjab & Haryana), C.R.M. 18934 of 2013,*** Judgment dated 21/08/2013 directed recording of the evidence of medical experts through video conferencing.

Guidelines regarding Procedure and safeguards for recording of evidence video conferencing:

The Supreme Court in ***Praful Desai case*** (supra) also laid down the procedure to be followed when recording evidence through video conferencing as under-

> "In this case we are not required to consider this aspect and therefore express no opinion thereon. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether evidence can be recorded by Video-Conferencing. Normally when a Commission is issued, the recording would have to be at the place where the witness is. Section 285 provides to whom the Commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a Judicial Officer) would be required to record the evidence and to ensure/compel attendance. However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus, where a witness is willing to give evidence an official of the Court can be deported to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The Court in Mumbai would be issuing commission to record evidence by video conferencing in Mumbai. Therefore, the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a Judicial Officer) to proceed to the office of VSNL and record the evidence of Dr. Greenberg in the presence of the respondent. The officer shall ensure that the respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officers shall also ensure that the respondent has full opportunity to cross-examine Dr. Greenberg. It must be clarified that adopting

such a procedure may not be possible if the witness is out of India and not willing to give evidence.

To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus, the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruption they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has left the country. There also have been cases where foreign witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the

evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr. Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State."

The Supreme Court in the case of ***Sujoy Mitra v. State of West Bengal, 2015 (16) SCC 615,*** while dealing with the issue of recording of evidence of a witness residing in Ireland gave following further directions:

"1. The State of West Bengal shall make provision for recording the testimony of PW5 in the trial Court by seeking the services of the National Informatic Centre (NIC) for installing the appropriate equipment for video conferencing, by using "VC Solution" software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the concerned Sessions Judge, within four weeks from today. The NIC will ensure, that the equipment installed in the premises of the trial Court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.

2. Before recording the statement of the prosecutrix-PW5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of recording of the said testimony.

3. The officer deputed to have the statement recorded shall also ensure, that there is no other person besides the concerned witness, in the room, in which the testimony of

PW5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.

4. The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial Court.
5. The officer concerned will affirm to the trial Court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and documents in possession of the prosecutrix-PW5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial Court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned counsel for the accused shall assist the trial Court,to ensure, that the above procedure is adopted, by placing reliance on the instant order.
6. The statement of the witness shall be recorded by the trial Court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance,or to his pleader). If the witness denies the correctness of any part of the evidence, when the same is read over to her, the trial Court may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.
7. The transcript of the statement of the witness recorded through video conferencing(as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed by the embassy. It shall be scanned and returned to the trial Court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.

8. The statement received by the trial Court through email shall be re- endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix-PW5, for all intents and purposes."

The Karnataka High Court in the case of ***Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd., AIR 2003 Kar. 148,*** provided for sufficient safeguards for the purpose of recording evidence through Audio-Video Link as follows :

1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification affidavit).
2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.
3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.
4. The witness should not plead any inconvenience on account of time different between India and USA.
5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge is to record such remarks as is material regarding the demur of the witness while on the screen.
7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.
8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.
9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.
10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.
11. The expenses and the arrangements are to be borne by the applicant who wants this facility.

In another case of ***Sirangai Shoba @ Shoba Munnuri, Civil Revision Petition, Judgment dated 19/10/2016 Case No: 337 of 2016,*** the Andhra Pradesh High Court discussed law relating to recording of video conferencing and allowed recording of evidence through Skype with directions. Following directions were issued by the High Court:

"1. The audio and visual shall be recorded at both the ends through the Skype technology/audio and video conferencing that is from Khammam Town of the Telangana State, India at the premises of NIC in the Collectorate, Khammam Town and from the New Jersey of USA in the venue to be fixed by the officer to be nominated for the same Indian High Commissioner.
2. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA in the venue to be fixed for said recording shall be paid a lumpsum amount of Rs. 20,000/- as honorarium by the petitioner.
3. The petitioner by virtue of this order approach the Indian High Commissioner from USA for said purposes and fix the venue and date for recording the evidence.
4. The parties are to be permitted in the course of recording evidence to be represented by legal practitioners at the premises of NIC in the Collectorate, Khammam Town, who can bring mobile device or other gadgets and make available the Skype facility for the Court/its officer-the Advocate Commissioner to interact with the Petitioner/witness staying abroadand record the consent to proceed with the matter of recording evidence thereafter as expeditiously as possible and only after taking of oath through media as per the provisions of the Oaths Act,1969.
5. Before the witness is being examined in terms of the Skype technology, the witness has to file an affidavit with an undertaking of not using any pre-recorded versions to prompt him therefrom or taking any assistance of another for prompting while giving evidence, got the pleadings and documents of the case with him to refer if other side require or Court/Advocate Commissioner permit during evidence and wont allow any other person during course of deposition but for the one to operate the phone or other electronic device/gadgets with internet facility of Skype technology duly verified before a notary or the officer of the Indian High Commission to

be nominated by the Indian High Commissioner from USA that the person who is shown as the witness is the same person who is going to depose on the screen without any prompting. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA at the venue of recording evidence shall also ensure the above during course of recording evidence and not to allow any device or person to prompt the witness.

6. By using the Skype technology, the Petitioner/witness staying abroad can not only be easily identified by the Court/its officer-the Advocate Commissioner from the above, but also be ascertained by enquiring about the identity with proof with reference to the affidavit of identity that to be filedand can verify the same from assistance of opposite party or the Counsel or representative of opposite party present.
7. The witness has to be examined preferably during working hours of Indian Courts. Oath is to be administered through the media.
8. The Court/its officer-the Advocate Commissioner is to record such remarks as is material regarding the demur of the witness while on the screen and during course of evidence of the witness, including to note any objections raised during recording evidence of witness and to decide the same later.
9. After recording the evidence, the witness has to state that the contents are true and he authorises his representative or Advocate on his behalf to sign on the deposition and he is not going to dispute its correctness or authenticity at any time later to make it forms part of the record of the proceedings. Besides that he shall retrieve copy of deposition from other end recording device and sign and submit to the trial Court later through his counsel.
10. The Court/its officer-the Advocate Commissioner may also impose such other conditions as are necessary in a given set of facts and circumstances.
11. For any further difficulty, the Advocate Commissioner and the parties may approach the trial Court.
12. The trial Court shall fix the final fees of the Advocate Commissioner after filing of report on completion of recording of evidence and for that purpose, the petitioner shall deposit tentatively before the trial Court ` 10,000/- to refund whatever remained or to pay further as the case may be."

Keeping in mind the law laid down in various cases and general practices, the High Court of Delhi has issued Video conferencing Guidelines for the conduct of Court Proceedings between Courts and Remote Sites. These guidelines were also circulated by the High Court of Madhya Pradesh by ***Memorandum No. B/3595/III-2-15/04 Jabalpur, dated 26.07.2016***. These guidelines may be used for ensuring proper recording of evidence through video conferencing and for other purposes.

VIDEO CONFERENCING GUIDELINES ISSUED BY THE HIGH COURT OF DELHI

1 General

1.1 In these guidelines, reference to the 'Court point means the Courtroom or other place where the Court is sitting or the place where Commissioner appointed by the Court to record the evidence by video conference is sitting and the 'remote point' is the place where person to be examined via video conference is located, for example, a prison.

1.2 Person to be examined includes a person whose deposition or statement is required to be recorded or in whose presence certain proceedings are to be recorded.

1.3 Wherever possible, proceedings by way of video conference shall be conducted as judicial proceedings and (he same courtesies and protocols will be observed. All relevant statutory provisions applicable to judicial proceedings including the provisions of the Information Technology Act, 2000 and the Indian Evidence Act, 1872 shall apply to the recording of evidence by video conference.

1.4 Video conferencing facilities can be used in all matters including remands, bail applications and in civil and criminal trials where a witness is located intrastate, interstate, or overseas.

1.5 The guidelines applicable to a Court will mutatis mutandis apply to a Local Commissioner appointed by the Court to record the evidence.

2. Appearance by video conference

A Court may either suo moto to or on application of a party or a witness, direct by reasoned order that any person shall appear before it or give evidence or make a submission to the Court through video conference.

3. Preparatory arrangements For video conference

3.1 There shall be Co-coordinators both at the court point as well as at the remote point.

3.2 In the High Court, Registrar (Computers) shall be the co-ordinator at the court point.

3.3 In the District Courts, official-in-charge of the Video Conferencing Facility (holding the post of Senior Judicial Assistant/Senior Personal Assistant or above) nominated by the District Judge shall be the co-ordinator at the court point.

3.4 The Co-ordinator at the remote point may be any of the following:-

(i) Where the person to be examined is overseas, the Court may specify the co¬ordinator out of (he folio wing:-

(a) the official of Consulate/Embassy of India,

(b) duly certified Notary Public/ Oath Commissioner,

(ii) Where the person to be examined is in another State/U.T, a judicial Magistrate or any other responsible official as may be deputed by the District Judge concerned or Sub-Divisional Magistrate or any other responsible official as may be deputed by the District Collector concerned,

(ii) Where the person to be examined is in custody, the concerned Jail Superintendent or any other responsible official deputed by him,

(iii) Where the person to be examined is in a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, the Medical Superintendent or In-charge of the said hospital or any other responsible official deputed by him.

(iv) Where the person to be examined is a juvenile or a child who is an inmate of an Observation Home/Special Home/Children's Home/ Shelter Home, the Superintendent/Officer In-charge of that Home or any other responsible official deputed by him,

(v) Where the person to be examined is in Nirmal Chhaya, the Superintendent/Officer In-Charge of the Nirmal Chhaya or any other responsible official deputed by him,

(vi) Wherever co-ordinator is to be appointed at the remote point under Clause 3.4 sub-Clause (ii), (iii), (iv), (v) & (vi), the Court concerned will make formal request through District Judge concerned to concerned official.

(vii) In case of any other person, as may be ordered by the Court.

3.5 The co-ordinators at both the points shall ensure that the minimum requirements as mentioned in the Guideline No.4 are in position at court point and remote point and shall conduct a test between both the points well in advance, to resolve any technical problem so that the proceedings are conducted without interruption.

3.6 It shall be ensured by the co-ordinator at the remote point that:-

(i) the person to be examined or heard is available and ready at the room earmarked for the video conference at. least 30 minutes before the scheduled time.

(ii) No other recording device is permitted except the one installed in the video conferencing room.

(iii) Entry into the video conference room is regulated.

3.7 It shall be ensured by the co-ordinator at the court point that die co-ordinator at the remote point has certified copies or the soft copies of all or any part of court record in a sealed cover directed by the Court sufficiently in advance of the scheduled video conference.

3.8 The Court shall order the co-ordinator at the remote point or at the court point wherever it is more convenient, to provide: -

(i) a translator in case the person to be examined is not conversant with Court language;
(ii) an expert in sign languages in case the person to be examined is speech and/or hearing impaired;
(iii) for reading of documents in case the person to be examined is visually challenged;
(iv) an interpreter or special educator, as the case may be, in case the person to be examined is temporarily or permanently mentally or physically disabled.

4. Minimum requisites for video conference

(i) A desktop or laptop with internet connectivity and printer
(ii) Device ensuring uninterrupted power supply
(iii) Video Camera
(iv) Microphones and speakers
(v) Display unit
(vi) Document visualizer
(vii) Comfortable sitting arrangements ensuring privacy
(viii) Adequate lighting
(ix) Insulations as far as possible/proper acoustics
(x) Digital signatures for the co-ordinators at the court point and at the remote point

5. Cost of video conferencing

5.1 In criminal cases, the expenses of the video conference facility including expenses of preparing soft copies/certified copies of the Court record for sending to the co-ordinator at the remote point and fee payable to translator/interpreter/special educator, as the case may be, and to the co-ordinator at the remote point shall be borne by such party as the Court directs taking into account the Delhi Criminal Courts (Payment of Expenses to Complainant and Witnesses) Rules, 2015.

5.2 In civil cases, as a general rule, the party making the request for recording evidence by video conference shall bear the expenses.

5.3 In other cases, the court may make an order as to expenses as it considers appropriate taking into account rules/instructions regarding payment of expenses to complainant and witnesses as may be prevalent from time to time.

6. Procedures generally

6.1 The identity of the person to be examined shall be confirmed by the court with the assistance of the co-ordinator at remote point at the time of recording of the evidence.

6.2 In civil cases, party requesting for recording statement of the person to be examined by video conferencing shall confirm to the Court location of die person, his willingness to be examined by video conferencing, place and facility of such video conferencing.

6.3 In criminal cases, where the person to be examined is a prosecution witness or court witness, the prosecution and where person to be examined is a defence witness, the defence counsel will confirm to the Court his location, willingness to be examined by video conferencing, place and facility of such video conferencing.

6.4 In case person to be examined is an accused, prosecution will confirm his location at remote point.

6.5 Video conference shall ordinarily lake place during the court hours. However, the Court may pass suitable directions with regard to timings of the video conferencing as the circumstances may dictate.

6.6 The record of proceedings including transcription of statement shall be prepared at the court point under supervision of the Court and accordingly authenticated. The soft copy of transcript digitally signed by the co-ordinator at the court point shall be sent by e-mail through NIC or any other Indian service provider to the remote point where printout of the same will be taken and signed by the deponent. Scanned copy of the statement digitally signed by co-ordinator at the remote point would be sent by e-mail to the court point. The hard copy would also be sent subsequently by the co-ordinator at the remote point to the court point by courier/mail.

6.7 The Court may, at; the request of a person to be examined, or on its own motion, taking into account the best interests of the person to be examined, direct appropriate measures to protect his privacy keeping in mind his age, gender and physical condition.

6.8 Where a party or a lawyer requests that in the course of video-conferencing some privileged communication may have to take place, Court will pass appropriate directions in that regard

6.9 The audio-visual shall be recorded at Ihe court point. An encrypted master copy with hash value shall be retained in the Court as part of the record. Another copy shall also be stored at any other safe location for backup in the event of any emergency. Transcript of the evidence recorded by the Court shall be given to the parties as per applicable rules. A party may be allowed to view the master copy of the audio video recording retained in the Court on application which shall be decided by the Court consistent with furthering the interests of justice.

6.10 The co-ordinator at the remote point shall be paid such amount as honorarium as may be decided by the Court in consultation with the parties

6.11 In case any party or his/her authorized person is desirous of being physically present at the remote point at the time of recording of the evidence, it shall be open for such party to make arrangements at party's own costs including for appearance/representation at the remote point subject to orders to the contrary by the Court.

7. Putting documents to a person af remote point

If in the course of examination of a person at remote point by video conference, it is necessary to put a document to him, the Court may permit the document to be put in the following manner:-

(a) if the document is at the court point, by transmitting a copy of it to the remote point electronically including through a document visualizer and the copy so transmitted being then put to the person,

(b) if the document is at the remote point, by putting it to the person and transmitting a copy of it to the court point electronically including through a document visualizer. The hard copy would also be sent subsequently to the court point by courier/mail.

8. Persons unconnected with the case

8.1 Third parties may be allowed to be present during video conferencing subject to orders to the contrary, if any, by the Court.

8.2 Where, for any reason, a person unconnected with the case is present at the remote point, then that person shall be identified by the co-ordinator at the remote point at the start of the proceedings and the purpose for his being present explained to the Court.

9. Conduct of proceedings

9.1 Establishment and disconnection of links between the court point and the remote point would be regulated by orders of the Court..

9.2 The Court shall satisfy itself that the person to be examined at the remote point can be seen and heard clearly and similarly that the person to be examined at the remote point can clearly see and hear the Court.

10. Cameras

10.1 The Court shall, at all times have the ability to control the camera view at remote point so that there is an unobstructed view of all the persons present in the room.

10.2 The Court shall have a clear image of each deponent to the extent possible so that the demeanour of such person may be observed.

11 Residuary Clause

Such matters with respect: to which no express provision has been made in these guidelines shall be decided by the Court consistent with furthering the interests of justice.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

SPECIFIED BANK NOTES (CESSATION OF LIABILITIES) ACT, 2017
No. 2 of 2017

[27th February, 2017]

An Act to provide in the public interest for the cessation of liabilities on the specified bank notes and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows: –

1. Short title and commencement : – (1) This Act may be called the **Specified Bank Notes (Cessation of Liabilities) Act, 2017**.

(2) It shall be deemed to have come into force on the 31st day of December, 2016.

2. Definitions : – (1) In this Act, unless the context otherwise requires,-

(a) **"appointed day"** means the 31st day of December, 2016;

(b) **"grace period"** means the period to be specified by the Central Government, by notification, during which the specified bank notes can be deposited in accordance with this Act;

(c) **"notification"** means a notification published in the Official Gazette;

(d) **"Reserve Bank"** means the Reserve Bank of India constituted by the Central Government under section 3 of the Reserve Bank of India Act, 1934;

(e) **"specified bank note"** means a bank note of the denominational value of five hundred rupees or one thousand rupees of the series existing on or before the 8th day of November, 2016.

(2) The words and expressions used and not defined in this Act but defined in the Reserve Bank of India Act, 1934 or the Banking Regulation Act, 1949 shall have the meanings respectively assigned to them in those Acts.

3. Specified bank notes to cease to be liability of Reserve Bank or Central Government :– On and from the appointed day, notwithstanding anything contained in the Reserve Bank of India Act, 1934 or any other law for the time being in force, the specified bank notes which have ceased to be legal tender, in view of the notification of the Government of India in the Ministry of Finance, number S.O. 3407 (E), dated the 8th November, 2016, issued under sub-section (2) of section 26 of the Reserve Bank of India Act, 1934, shall cease to be liabilities of the Reserve Bank under section 34 and shall cease to have

the guarantee of the Central Government under sub-section (1) of section 26 of the said Act.

4. Exchange of specified bank notes :– (1) Notwithstanding anything contained in section 3, the following persons holding specified bank notes on or before the 8th day of November, 2016 shall be entitled to tender within the grace period with such declarations or statements, at such offices of the Reserve Bank or in such other manner as may be specified by it, namely:-

(i) a citizen of India who makes a declaration that he was outside India between the 9th November, 2016 to 30th December, 2016, subject to such conditions as may be specified, by notification, by the Central Government; or

(ii) such class of persons and for such reasons as may be specified by notification, by the Central Government.

(2) The Reserve Bank may, if satisfied, after making such verifications as it may consider necessary that the reasons for failure to deposit the notes within the period specified in the notification referred to in section 3, are genuine, credit the value of the notes in his Know Your Customer compliant bank account in such manner as may be specified by it.

(3) Any person, aggrieved by the refusal of the Reserve Bank to credit the value of the notes under sub-section (2), may make a representation to the Central Board of the Reserve Bank within fourteen days of the communication of such refusal to him.

Explanation **–** For the purposes of this section, the expression ***"Know Your Customer compliant bank account"*** means the account which complies with the conditions specified in the regulations made by the Reserve Bank under the Banking Regulation Act, 1949.

5. Prohibition on holding transferring or receiving specified bank notes :– On and from the appointed day, no person shall, knowingly or voluntarily, hold, transfer or receive any specified bank note:

Provided that nothing contained in this section shall prohibit the holding of specified bank notes –

(a) by any person-

(i) up to the expiry of the grace period; or

(ii) after the expiry of the grace period,-

(A) not more than ten notes in total, irrespective of the denomination;

or

(B) not more than twenty-five notes for the purposes of study, research or numismatics;

(b) by the Reserve Bank or its agencies, or any other person authorised by the Reserve Bank;
(c) by any person on the direction of a court in relation to any case pending in the court.

6. Penalty for contravention of section 4 :– Whoever knowingly and wilfully makes any declaration or statement specified under sub-section (1) of section 4, which is false in material particulars, or omits to make a material statement, or makes a statement which he does not believe to be true, shall be punishable with fine which may extend to fifty thousand rupees or five times the amount of the face value of the specified bank notes tendered, whichever is higher.

7. Penalty for contravention of section 5 :– Whoever contravenes the provisions of section 5 shall be punishable with fine which may extend to ten thousand rupees or five times the amount of the face value of the specified bank notes involved in the contravention, whichever is higher.

8. Offences by companies :– (1) Where a person committing a contravention or default referred to in section 6 or section 7 is a company, every person who, at the time the contravention or default was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention or default 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 or default was committed without his knowledge or that he had exercised all due diligence to prevent the contravention or default.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the same was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other officer or employee of the company, such director, manager, secretary, other officer or employee shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation **–** For the purpose of this section,-

(a) “a company” means any body corporate and includes a firm, a trust, a cooperative society and other association of individuals;
(b) “director”, in relation to a firm or trust, means a partner in the firm or a beneficiary in the trust.

9. Special provisions relating to offences :– Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973, the court of a Magistrate of the First Class or the court of a Metropolitan Magistrate may impose a fine, for contravention of the provisions of this Act.

10. Protection of action taken in good faith :– No suit, prosecution or other legal proceeding shall lie against the Government, the Reserve Bank or any of their officers for anything done or intended to be done in good faith under this Act.

11. Power to make rules : – (1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

12. Power to remove difficulties :– (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

13. Repeal and savings :– (1) The Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

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