JOTI JOURNAL

JUNE 2016 (BI-MONTHLY)

मध्य प्रदेश राज्य न्यायिक अकादमी
मध्यप्रदेश उच्च न्यायालय, जबलपुर – 482 007

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

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(iii) न्यायिकेत्तर संस्वीकृति का साक्ष्यिक मूल्य – यह एक कमजोर साक्ष्य होती है और न्यायालय को इसे अधिक सावधानी से देखना चाहिए।

(iv) जप्ती की साक्ष्य का मूल्यांकन। **146 (i) to (iv) 260**

Sections 3, 9, 24 and 32 – (i) Major contradictions, omission and improvement in statements, effect of.

(ii) Identification of accused by voice, evidentiary value of.

(iii) Dying declaration – Absence of certification by medical expert as to the mental fitness, effect of.

(iv) Extra-judicial confession, evidentiary value of – Principles for determining its admissibility in evidence, explained.

धाराएं 3, 9, 24 और 32 – (i) कथनों में बड़े विरोधाभास लोप और सुधार का प्रभाव।

(ii) आवाज द्वारा अभियुक्त की पहचान का साक्ष्यिक मूल्य।

(iii) मृत्यु कालिक कथन – चिकित्सा विषेषज्ञ द्वारा मानसिक रूप से स्वस्थ्य होने संबंध प्रमाण पत्र के अभाव का प्रभाव।

(iv) न्यायिकेत्तर संस्वीकृति का साक्षिक मूल्य – ऐसी साक्ष्य के ग्राह्य होने का निर्धारण करने के सिद्धांत बतलाये गये। **164* 301**

Sections 3 and 32 – Recording of dying declaration, requirement of and certificate of fitness by medical expert, necessity of.

धाराएं 3 और 32 – मृत्यु कालिक कथन के लेखबद्ध करने में चिकित्सा विषेषज्ञ द्वारा सही दषा या फिटनेस के प्रमाण पत्र की अनिवार्यता और आवष्यकता। **147 266**

Sections 3 and 134 – Evidence of sole eye witness, credibility of.

धाराएं 3 और 134 – एक मात्र चक्षु साक्षी की साक्ष्य की विष्वसनीयता। **148 (i) 267**

Section 14 – See sections 10 (iv), 11 (vi), 15 and 16 of the Hindu Adoption and Maintenance Act, 1956.

धारा 14 – देखें हिन्दू दत्तक और भरण–पोषण अधिनियम, 1956 की धाराएं 10 (iv), 11 (vi), 15 और 16। **149* 269**

Sections 32 and 45 – (i) Dying declaration, reliability of.

(ii) Plea of alibi, tenability of.

धाराएं 32 और 45 – (i) मृत्युकालिन कथन की विष्वसनीयता।

(ii) अन्यत्र होने के अभिवाक की प्रचलनषीलता। **150 270**

Sections 32 and 113-B – Multiple (two) dying declarations, evidentiary value of – Presumption under section 113-B of the Evidence Act, when can be drawn?

धाराएं 32 और 113–बी – कई (दो) मृत्युकालिन कथन का साक्ष्यिक मूल्य।

धारा 113 – बी साक्ष्य अधिनियम की उपधारणा कब ली जा सकती है? **166 (ii) 304 & (iii)***

Section 45 – Complaint with regard to perjury against expert, maintainability of.

धारा 45 – विषेषज्ञ के विरूद्ध झूठी साक्ष्य देने से संबंधी परिवाद की प्रचलनषीलता।

156 (i) 286

Section 45 – Opinion of handwriting expert, necessity of.

धारा 45 – हस्तलेख विषेषज्ञ की राय की आवष्यकता। **151 274**

Section 56 – See section 47 of the Civil Procedure Code, 1908.

धारा 56 – देखें सिविल प्रक्रिया संहिता, 1908 की धारा 47। **121 203**

Section 67 – See sections 61 to 63, 70, 73 and 372 of the Succession Act, 1925.

धारा 67 – देखें उत्तराधिकार अधिनियम, 1925 की धाराएं 61 से 63, 70, 73 और 372।

178 328

Section 113-B – 'Shall presume', effect of – Court is left with no option but to presume guilt of the accused – Presumption is, however, rebuttable.

धारा 113–बी – ''उपधारणा करेगा'' का प्रभाव – न्यायालय के पास अभियुक्त के दोषी होने की उपधारणा करने के अतिरिक्त अन्य कोई विकल्प नहीं है – यद्यपि उपधारणा खण्डन योग्य है।

167 (iii) 305

EXCISE ACT, 1915 (M.P.)

आबकारी अधिनियम, 1915 (म.प्र.)

Unamended Sections 46 and 47 and Section 47-A – See section 452 of the Criminal Procedure Code, 1973.

असंषोधित धाराएं 46 और 47 तथा धारा 47–ए – देखें दण्ड प्रक्रिया संहिता, 1973 की धारा 452। **152* 276**

HINDU MARRIAGE ACT, 1955

हिन्दू विवाह अधिनियम, 1955

Sections 13-B and 23 (1) (bb) – (i) Doctrine of 'pre-existing duty', applicability of.

(ii) Hindu marriage, nature of – Explained.

धाराएं 13–बी और 23 (1)(बीबी) – (i) 'पूर्व से अस्तित्व में रहे कर्तव्य' के सिद्धांत का लागू होना।

(ii) हिन्दू विवाह की प्रकृति – समझाई गई। **153 277**

HINDU ADOPTION AND MAINTENANCE ACT, 1956

हिन्दू दत्तक और भरण–पोषण अधिनियम, 1956

Sections 10(iv), 11(vi), 15 and 16 – (i) Adoption, proof and validity of.

(ii) Absence of evidence in support of pleading, effect of – Unless the evidence is adduced on record in support of the pleadings, no inference can be drawn in favour of the party who has taken the defence in the pleading and has not proved the same. (***Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 MP 225*** relied on)

धाराएं 10(iv), 11(vi), 15 और 16 – (i) दत्तक ग्रहण का प्रमाण और वैधानिकता।

(ii) अभिवचन के समर्थन में साक्ष्य के अभाव का प्रभाव – जब तक अभिवचन के समर्थन में अभिलेख पर साक्ष्य प्रस्तुत नहीं होती है, उस पक्षकार के पक्ष में कोई अनुमान नहीं निकाला जा सकता जो अभिवचन होने का बचाव लेता है लेकिन उसे प्रमाणित नहीं करता है। (गुल्ला खरगजीत कारपेन्टर विरूद्ध नरसिन्ह नंद किषोर रावत, एआईआर 1970 एमपी 225 पर विष्वास किया गया।) **149* 269**

INDIAN PENAL CODE, 1860

भारतीय दण्ड संहिता, 1860

Section 120-B – See section 197 of the Criminal Procedure Code, 1973.

धारा 120–बी – देखें दण्ड प्रक्रिया संहिता, 1973 की धारा 197। **136* 225**

Section 120-B – See sections 13 and 15 of the Prevention of Corruption Act, 1988.

धारा 120–बी – देखें भ्रष्टाचार निवारण अधिनियम, 1988 की धाराएं 13 और 15।

139 230

Sections 120-B and 302 – Conspiracy to commit murder – Circumstantial evidence, appreciation of.

धाराएं 120 बी और 302 – हत्या कारित करने का षड़यंत्र – परिस्थितिजन्य साक्ष्य का मूल्यांकन

154 279

Sections 148, 302, 304 and 323 r/w/s 149 – (i) Murder and culpable homicide not amounting to murder, distinction between – Law explained.

(ii) Non-recovery of gun and absence of opinion of ballistic expert, effect of.

(iii) Motive, significance of.

(iv) Sentencing, principles of.

धाराएं 148, 302, 304 और 323 सहपठित धारा 149 – (i) हत्या और सदोष मानव वध जो कि हत्या की कोटी में नहीं आता है के बीच अंतर – विधि समझाई गई।

(ii) गन बरामद न होना और बेलेस्टिक विषेषज्ञ की राय के अभाव का प्रभाव।

(iii) हेतुक का महत्व।

(iv) दण्ड के सिद्धांत। **155 283**

Section 193 – See section 340 of the Criminal Procedure Code, 1973 and section 45 of the Evidence Act, 1872.

धारा 193 – देखें दण्ड प्रक्रिया संहिता, 1973 की धारा 340 एवं साक्ष्य अधिनियम, 1872 की धारा 45। **156 286**

Sections 201 and 302 – (i) Murder – Circumstantial evidence – Last seen theory – Applicability, requirement of.

(ii) Murder – Circumstantial evidence, requirement and proof of.

धाराएं 201 और 302 – (i) हत्या – परिस्थिति जन्य साक्ष्य – अंतिम बार साथ देखें जाने का सिद्धांत – लागू होना और अनिवार्यताएँ।

(ii) हत्या – परिस्थितिजन्य साक्ष्य प्रमाण और आवष्यकता। **157 290**

Section 302 – Murder – Circumstantial evidence, appreciation of.

धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य का मूल्यांकन। **146 (v) 260**

Section 302 – Murder – Circumstantial evidence – Last seen theory, applicability of.

धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ देखें जाने का सिद्धांत लागू होना। **158 295**

Section 302 – Murder – Circumstantial evidence, appreciation of and last seen theory – Applicability of.

धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य का मूल्यांकन और अंतिम बार साथ देखें जाने का सिद्धांत लागू होना। **159* 296**

Section 302 – Murder – Evidence, appreciation of.

धारा 302 – हत्या – साक्ष्य का मूल्यांकन। **160 297**

Section 302 – See sections 32 and 45 of the Evidence Act, 1872.

धारा 302 – देखें साक्ष्य अधिनियम, 1872 की धाराएं 32 और 45। **150 270**

Section 302 r/w/s 34 – Common intention, invocation and proof of.

धारा 302 सहपठित 34 – सामान्य आषय का लागू होना और प्रमाण। **148 (ii) 267**

Sections 302 and 304 Part I – (i) Murder and culpable homicide not amounting to murder, distinction between – Explained.

(ii) Common intention, how can be gathered? It is to be gathered from conduct and manner in which crime was committed.

धाराएं 302 और 304 भाग 1 – (i) हत्या व हत्या की कोटी में न आने वाले सदोष मानव वध के बीच अंतर – समझाया गया।

(ii) सामान्य आषय कैसे देखा जा सकता है ? यह आचरण और अपराध जिस तरीके से किया गया उससे देखा जा सकता है। **161* 299**

Sections 302 and 304 Part I – (i) Murder or culpable homicide, proof of.

(ii) Non-recovery of weapon, effect of – Mere non-recovery of weapon of offence is not fatal to prosecution case.

धाराएं 302 और 304 भाग 1 – (i) हत्या और सदोष मानव वध का प्रमाण।

(ii) हथियार बरामद न होने का प्रभाव – केवल अपराध संबंधी हथियार बरामद न होना अभियोजन के मामले के लिए घातक नहीं होता है। **162* 300**

Sections 302, 304 Part II and 376 – Rape – Consent, proof of and offence of murder or culpable homicide not amounting to murder, commission of.

धाराएं 302, 304 भाग 2 और 376 – बलात्कार – सहमति का प्रमाण, हत्या या हत्या की कोटि में न आने वाले सदोष मानव वध का अपराध कारित करना। **163* 300**

Sections 302 and 436 – See sections 3, 9, 24 and 32 of the Evidence Act, 1872

धाराएं 302 और 436 – देखें साक्ष्य अधिनियम, 1872 की धाराएं 3, 9, 24 और 32

164* 301

Section 304-B – Dowry death:

(i) Dowry, what may amount to?

(ii) 'Soon before death', connotation of.

धारा 304– बी – दहेज मृत्युः

(i) दहेज क्या माना जा सकता है ?

(ii) 'मृत्यु के ठीक पूर्व' का अर्थ। **165 302**

Section 304-B – Dowry death – Offence under section 304-B, ingredients of.

धारा 304–बी –दहेज मृत्यु – धारा 304–बी भादंसं के घटक। **166 (i)* 304**

Sections 304-B & 498-A – 'Soon before death'— proximity test, application of.
Dowry death, connotation of.

धाराएं 304–बी और 498–ए – ''मृत्यु के ठीक पूर्व'' – सन्ननिकटता परीक्षण का लागू होना।
दहेज मृत्यु का अर्थ। **167 (i) & (ii) 305**

Section 354 – Sentencing

(i) Punishment, legality of – Courts neither create offences nor do they introduce or legislate punishment – It is the duty of the legislature – Court can only suggest in this regard to the legislature.

(ii) Distinction between 'girl child' and 'minor' and re-defining the term 'child' need therefor.

(iii) Prevention of child abuse – Need to take effective measures, reiterated.

धारा 354 – दंडाज्ञाः

(i) दंड की वैधानिकता – न्यायालय न तो अपराधों का सृजन कर सकते हैं और न ही वे दंड संबंधी विधान बनाते है – यह विधायिका का कर्तव्य है – न्यायालय विधायिका को इस बारे में सुझाव दे सकते है।

(ii) 'बालक' शब्द को पुनः परिभाषित करने की आवष्यकता और मादा बालक और अवयस्क के बीच अंतर।

(iii) बालक के दुरूपयोग के रोक थाम – प्रभावकारी कदम उठाने की आवष्यकता दोहराई गई। **168 310**

Section 376 – See Criminal Trial.

धारा 376 – देखें दांडिक विचारण। **144 253**

INSURANCE ACT, 1938

बीमा अधिनियम, 1938

Section 38 – (i) Unamended section 38 of the Act – Life Insurance Policy, assignment or transfer of.

(ii) Section 38 (as amended in 2015), effect of.

धारा 38 – (i) असंषोधित धारा 38 अधिनियम – जीवन बीमा पॉलिसी का हस्तांतरण या अंतरण

(ii) धारा 38 (संषोधित 2015) का प्रभाव। **169 315**

LIMITATION ACT, 1963

परिसीमा अधिनियम, 1963

Section 5 r/w/s 14 – See sections 115, 148, 149, 151 and Order 6 Rule 17 and Order 7 Rule 11 of the Civil Procedure Code, 1908.

धारा 5 सहपठित 14 – देखें सिविल प्रक्रिया संहिता, 1908 की धाराएं 115, 148, 149, 151 और आदेष 6 नियम 17 और आदेष 7 नियम 11। **123*** **207**

Article 65 – Suit for declaration of title by adverse possession, pleading and proof of.

अनुच्छेद 65 – विरोधी आधिपत्य द्वारा स्वत्व की घोषणा के लिए वाद, अभिवचन और प्रमाण।

170* **318**

MOTOR VEHICLES ACT, 1988

मोटर यान अधिनियम, 1988

Section 166 – (i) Doctrine of 'pay and recover', applicability of.

धारा 166 – 'भुगतान करे व वसूले' का सिद्धांत का लागू होना। **171 (i)*** **318**

N.D.P.S. ACT, 1985

एन.डी.पी.एस. अधिनियम, 1985

Section 20 (b) (ii) (C) – (i) Accused persons found in possession of 6 kg 200 gms. and 4 kg charas respectively containing more than 50 gms. of tetra hydrocannabinol – Held, contraband seized from the accused persons being more than intermediate quantity, falls under commercial quantity and the offence committed is punishable under section 20 (b) (ii) (C) and not under section 20 (b) (ii) (B).

(ii) Sentencing – Minimum punishment.

धारा 20 (बी)(ii)(सी) – (i) अभियुक्तगण के आधिपत्य में 6 किलो 200 ग्राम और 4 किलो चरस पाई गई जिसमें 50 ग्राम से अधिक टेट्रा हाइड्रोकेनाबिनोल था – अभिनिर्धारित किया गया अभियुक्तगण से अभिग्रहित सामाग्री मध्यम मात्रा से अधिक है और वाणिज्यिक मात्रा में आती है और अभियुक्त द्वारा कारित अपराध धारा 20 (बी) (ii) (सी) के अधीन दण्डनीय है धारा 20 (बी) (ii) (बी) के अधीन नहीं।

(ii) दण्डाज्ञा – न्यूनतम दण्ड। **172*** **319**

NEGOTIABLE INSTRUMENTS ACT, 1881

परक्राम्य लिखित अधिनियम, 1881

Section 138 – See section 45 of the Evidence Act, 1872.

धारा 138 – देखें साक्ष्य अधिनियम, 1872 की धारा 45। **151** **274**

Section 138 – The term 'debt or other liability', connotation of.

धारा 138 – शब्द 'ऋण या अन्य दायित्व' का अर्थ। **173** **320**

Sections 142, 142-A and 142-A (1) (as inserted by Second Ordinance, 2015) – Words 'as if that sub-section had been in force at all material times', connotation of & amended section 142 and newly inserted sections 142-A and 142-A (1), effect of – Have retrospective effect and are applicable to new as well as pending cases.

धाराएं 142, 142–ए और 142–ए (1) (जैसा कि 2015 के द्वितीय अध्यादेष द्वारा जोड़ा गया) – शब्द 'जैसे की उपधारा सभी तात्विक संबंधों पर प्रभावषील थी' का अर्थ और धारा 142 के संषोधन और नई समाविष्ट धाराएं 142–ए और 142–ए (1) का प्रभाव – ये (प्रावधान) भूतलक्षी है और नये प्रकरणों तथा लंबित प्रकरणों पर भी लागू होते हैं। **174 322**

PREVENTION OF CORRUPTION ACT, 1988

भ्रष्टाचार निवारण अधिनियम, 1988

Sections 7, 13 and 20 – Offences under sections 7 and 13, proof of – Presumption under section 20 of the Act – When can be drawn?

धाराएं 7, 13 और 20 – धारा 7 और 13 के अधीन अपराध का प्रमाण – धारा 20 अधिनियम की उपधारणा – कब ली जा सकती है ? **175* 324**

Sections 13 and 15 – Offences under sections 13 (1) (d) r/w/s 13 (2) and 15 of the Prevention of Corruption Act and section 120-B IPC – Discharge, when justified.

धाराएं 13 और 15 – धारा 13(1)(डी) सहपठित धारा 13(2) और 15 भ्रष्टाचार निवारण अधिनियम और धारा 120–बी भा.द.सं. के अपराध – उन्मोचन कब न्याय संगत है। **139 230**

Sections 13 and 15 – (i)Prevention of Corruption Act, 1988, object of – Is enacted to make the anti-corruption law more effective and widen its coverage.

(ii) The term 'public servant', extent of.

धाराएं 13 और 15 – (i) भ्रष्टाचार निवारण अधिनियम, 1988 का उद्देष्य – यह अधिनियम भ्रष्टाचार को रोकने और प्रभावषील तरीके से और विस्तार पूर्वक (ऐसे) अपराधों को (अधिनियम में) शामिल करने के जिए है।

(ii) शब्द 'लोक सेवक' का विस्तार। **176 324**

SPECIFIC RELIEF ACT, 1963

विनिर्दिष्ट अनुतोष अधिनियम, 1963

Sections 16 (c) and 20 – Specific performance of contract, requirement for.

धाराएं 16 (सी) और 20 – संविदा के विनिर्दिष्ट पालन के लिए आवष्यकता। **177 327**

SUCCESSION ACT, 1925

उत्तराधिकार अधिनियम, 1925

Sections 61 to 63, 70, 73 and 372 – Multiple Will, validity of – Other things being equal and in proper order, latest Will supersedes previous Wills.

धाराएं 61 से 63, 70, 73 और 372 – एक से अधिक वसीयत की वैधता – अन्य बाते समान और उचित प्रक्रम में होने पर अंतिम वसीयत पूर्व की वसीयत को अधिषिष्ठ (समाप्त) कर देती है।

178 328

TRADEMARKS ACT, 1999

व्यापार चिन्ह अधिनियम, 1999

Section 9 – Registration of trademark, permissibility of – Use of exclusive names of holy/religious books as trademarks for goods or services is impermissible – Another word or symbol is required to be added as suffix or prefix.

धारा 9 – व्यापार चिन्ह के पंजीकरण का अनुमत योग्य होना – वस्तुओं या सेवाओं के लिए पवित्र/धार्मिक पुस्तकों के एकमेव नाम का उपयोग अनुमत योग्य नहीं है – अन्य शब्द या चिन्ह उसके पूर्व या पष्चात् जोड़ना अनिवार्य है। **179 330**

WAKF ACT, 1995

वक्फ अधिनियम, 1995

Sections 83 (4) and 85 (as amended by Act of 2013) – Sections 83 (4) and 85 (as amended by Act of 2013 of the Act), objective of – Objective is only to expand the composition of Tribunal and to oust the jurisdiction of civil and revenue courts.

धारा 83 (4) और 85 (2013 अधिनियम द्वारा संषोधित) – धारा 83 (4) और 85 (अधिनियम 2013 द्वारा संषोधित) का उद्देष्य – इसका उद्देष्य केवल अधिकरण के गठन का विस्तार करना और सिविल और राजस्व न्यायालय का क्षेत्राधिकार समाप्त करना है। **180 331**

PART-III

(CIRCULARS/NOTIFICATIONS)

1. Notification dated 16.02.2016 of Ministry of Law and Justice (Department of Justice) regarding declaring certain services as public utility services under the Legal Services Authorities Act, 1987 **3**

PART-IV

(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

1. The Bangalore Principles of Judicial Conduct, 2002 **77**

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सम्पादकीय

प्रदीप कुमार व्यास
प्रभारी संचालक

सम्माननीय पाठकगण,

दिनांक 07.04.2016 का दिन मध्यप्रदेश न्यायपालिका के लिए एक ऐतिहासिक दिन रहा क्योंकि इस दिन 11 न्यायमूर्तिगण ने एक साथ माननीय उच्च न्यायालय के न्यायाधिपति के रूप में शपथ ली इस अंक में उन सभी सम्माननीय न्यायमूर्तिगण का परिचय प्रकाशित किया जा रहा है।

अप्रैल माह में अकादमी के Judge In-charge माननीय न्यायमूर्ति श्री एस.एस. केमकर साहब का बाम्बे उच्च न्यायालय में स्थानांतरण हुआ उन्होंने 11 अप्रेल, 2016 को बाम्बे उच्च न्यायालय के लिए प्रस्थान किया। उनके स्थान पर अब माननीय न्यायमूर्ति श्री एस.के. सेठ साहब श्रनकहम प्द.बींतहम बने है और अकादमी की कमेटी में परिवर्तन हुआ है और अब अकादमी को नव नियुक्त कमेटी का मार्गदर्शन प्राप्त होगा जिसमें माननीय न्यायमूर्ति श्री एस. के. सेठ साहब के साथ सदस्य के रूप में माननीय न्यायमूर्ति श्री आर.एस. झा साहब, माननीय न्यायमूर्ति श्री रोहित आर्य साहब, माननीय न्यायमूर्ति सुश्री वंदना कसरेकर जी और माननीय न्यायमूर्ति श्री वेद प्रकाश शर्मा साहब शामिल है।

12 मई, 2016 को माननीय मुख्य न्यायाधिपति महोदय श्री ए.एम.खानविलकर जी ने सर्वोच्च न्यायालय में शपथ ग्रहण के लिए प्रस्थान किया जिसके लिए अकादमी की ओर से उन्हें हार्दिक शुभकामनाएँ!

अकादमी की पूर्व कमेटी की सदस्य माननीय न्यायमूर्ति श्रीमती एस.आर. वाघमारे जी का दुखद निधन दिनांक 11.04.2016 को हुआ। इसी प्रकार अकादमी की पूर्व अतिरिक्त संचालक एवं सेवानिवृत्त माननीय न्यायमूर्ति श्रीमती मंजूषा पी. नामजोशी जी का दुखद निधन दिनांक 15.04. 2016 को हुआ। इस माह में न्यायपालिका ने दो विदुषी, मृदुभाषी, हॅसमुख महिला न्यायमूर्तिगण को खोया है। ईश्वर उनकी आत्मा को शांति प्रदान करे। उनका योगदान हम कभी नहीं भूल पायेंगे।

इन दो माह में, 09 मई, 2016 से 04 जून, 2016 तक वर्ष 2015 बैंच के सिविल न्यायाधीश वर्ग–2 के Induction Training का प्रथम चरण रखा गया है। इसी तरह 13 जून, 2016 से 25 जून, 2016 तक नव नियुक्त अपर जिला जज का प्रशिक्षण कार्यक्रम भी रखा गया है।

इस अंक में एक लेख श्री कपिल मेहता, ओ.एस.डी का Professionalism at Work Place पर शामिल किया गया है आशा है इस लेख से हमारे सभी न्यायाधीशगण को मार्गदर्शन प्राप्त होगा और वे अपना कार्य एक नई उर्जा के साथ कर पायेगें।

मैंने ''न्यायाधीशगण के लिए पठन सामग्री भाग–1,'' ''न्यायाधीशगण के लिए पठन सामग्री भाग–2'' को अप्रेल, 2016 तक अपडेट किया है साथ ही ''न्यायाधीशगण के लिए पठन समाग्री

भाग–3'' भी तैयार की है और इन तीनों को अकादमी की साइट पर अपलोड किया जा रहा है, आप सब से अनुरोध है कि इनका भरपूर लाभ लेवें।

माननीय उच्च न्यायालय के आदेश दिनांक 04 मई, 2016 से मेरा स्थानांतरण विशेष न्यायाधीश, एससी/एसटी एक्ट, उज्जैन के पद पर हो चुका है और मैं दिनांक 02 जून, 2016 को इस सम्माननीय संस्थान से कार्यभार मुक्त हो रहा हूँ। विगत चार वर्ष नौ माह में आप सबका मुझे जो सहयोग व मार्गदर्शन प्राप्त हुआ उसके लिए मैं आभारी हूँ।

मैं परम पिता परमेश्वर का हृदय से आभारी हूँ जिनके आशीर्वाद से मुझे ज्ञान प्राप्त करने का अमूल्य अवसर प्राप्त हुआ। मैं माननीय उच्च न्यायालय का आभारी हूँ कि मुझे यह अवसर प्रदान किया।

मैं मेरे साथ इस संस्थान में कार्यरत रहे सभी न्यायाधीशगण का भी अत्यंत आभारी हूँ जिनका मुझे सहयोग प्राप्त हुआ। मैं स्टाफ के समस्त कर्मचारीगण का भी हृदय से आभारी हूँ जिन्होंने मेरे कर्तव्य निर्वहन में मुझे भरपूर सहयोग दिया। मैं आशा करता हूँ कि ऐसा ही सहयोग मेरे पद उत्तरवर्ती माननीय संजीव एस. कालगांवकर जी को भी देंगे।

इस पत्रिका के बारे में आप के अमूल्य सुझाव सादर आमंत्रित है।

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पचास लोगों को यह सिखाना आसान है कि क्या किया जाना बेहतर है बजाय उन पचास लोगों में से एक होने के जो अपनी खुद की षिक्षाओं का पालन करें।

.... एक विद्वान

ज्ञान तभी शक्ति है, जब उसे जीवन में उतारा जाये।

.... एक विद्वान

FAREWELL TO HON'BLE THE CHIEF JUSTICE SHRI AJAY MANIKRAO KHANWILKAR

Hon'ble Shri Justice Ajay Manikrao Khanwilkar, who adorned the office of the Chief Justice of High Court of Madhya Pradesh for about three years, has been elevated as Judge of the Supreme Court of India.

His Lordship was born on 30th July, 1957 at Pune in Maharashtra. Obtained Degree in Commerce from Mulund College of Commerce, Mumbai University and Degree in Law from K.C. Law College, Mumbai University. His Lordship was enrolled as an Advocate in the year 1982 and handled Civil, Criminal and Constitutional matters before the Subordinate Courts, Tribunals and High Court of Judicature at Bombay on the Appellate side as well as the Original Side. Started practice exclusively in the Supreme Court of India from the year 1984. Was appointed as Standing Counsel for the State of Maharashtra, for Supreme Court matters in October, 1985 and also worked as Additional Government Advocate for the State of Maharashtra till December, 1989. Was appointed as Panel Counsel for Union of India in January, 1990 and represented Union of India in several matters of national importance. In August, 1994 was appointed Amicus Curiae by the Hon'ble Supreme Court of India to assist on environmental issues in the case of M.C. Mehta-Pollution Control in respect of West Bengal Industries and Tanneries. Was also appointed as Standing Counsel for the Election Commission of India for the Supreme Court matters in March, 1995. Was also appointed as Member of the Task Force constituted by the Ministry of Health and Family Welfare, Government of India in November, 1995 for examining and reporting on the amendments needed in the Prevention of Food Adulteration Act. Has also remained Executive Member of the Supreme Court Bar Association and Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association.

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

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

During his tenure as Chief Justice of Madhya Pradesh and in his capacity as Patron of Judicial Education, His Lordship took keen interest in the academic activities of the Academy and provided all round motivation, support and guidance for diversifying the academic activities of the Academy.

On elevation as Judge of Supreme Court, His Lordship was accorded farewell on May 12, 2016.

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

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TRANSFER OF HON'BLE SHRI JUSTICE SHANTANU S. KEMKAR TO MAHARASHTRA HIGH COURT

Hon'ble Shri Justice Shantanu S. Kemkar, who occupied the august office of the Judge of the High Court of Madhya Pradesh for more than thirteen years, has been transferred to High Court of Maharashtra as Judge.

Born on 23rd October, 1956. After obtaining B.Com. and LL.B (Hons.) Degrees, enrolled as an advocate of M.P. State Bar Council on 11.08.1979. Practised in the High Court of Madhya Pradesh, Bench Indore in Writ, Civil, Labour, Claims and Transport matters. Was Government Advocate of High Court of Madhya Pradesh, Bench Indore.

Was Panel Lawyer of M.P.S.R.T.C., M.P.E.B., I.D.A. and M.P. Housing Board. Elected as Secretary, High Court Bar Association, Indore for the years 1998-99 and 1999-2000. Appointed as Additional Judge of High Court of M.P. on 21st March, 2003 and as Permanent Judge on 19th January, 2004.

During His Lordship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Judge, Judge Incharge, Judicial Education and also Chairman, High Court Legal Services Committee.

His Lordship was accorded farewell ovation on 11th April, 2016 at Indore Bench of High Court of M.P., Indore.

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

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APPOINTMENT OF ADDITIONAL JUDGES IN THE HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Atul Sreedharan, Hon'ble Shri Justice Sushrut Arvind Dharmadhikari, Hon'ble Shri Justice Vivek Rusia, Hon'ble Shri Justice Anand Pathak, Hon'ble Shri Justice Ved Prakash Sharma, Hon'ble Shri Justice J.P. Gupta, Hon'ble Shri Justice Anurag Kumar Shrivastava, Hon'ble Shri Justice Housla Prasad Singh, Hon'ble Shri Justice Ashok Kumar Joshi, Hon'ble Shri Justice Vivek Agrawal and Hon'ble Smt. Justice Nandita Dubey have been administered oath of office by Hon'ble the Chief Justice Shri A.M. Khanwilkar, High Court of Madhya Pradesh on 7th April, 2016 as Additional Judges of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall of South Block of High Court of M.P., Jabalpur.

Hon'ble Shri Justice Atul Sreedharan was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on May 24, 1966. After obtaining degrees of B.A. (History) from the University of Madras in 1987 and LL.B. from Meerut University in the year 1992, enrolled as an Advocate of M.P. State Bar Council on 03.04.1992 and practiced under the able guidance of Mr. Gopal Subramanium till 1997 and assisted him in Civil and Criminal matters before the Supreme Court of India, High Court of Delhi and Trial Court at Delhi. From 1997 to December, 2000, practised independently at Delhi. Thereafter, shifted to Indore in the year 2001 and has been practising continuously before the High Court of M.P., Bench Indore. Has also been closely associated with Shri Satyendra Kumar Vyas, Sr. Advocate at Indore. Practised in Civil, Criminal, Writ, Service matters and matters relating to medical negligence before Trial Court, High Court and Consumer Fora. Was on the Panel of Madhya Pradesh Housing Board from 04.10.2002 till 2012 and Kendriya Vidyalaya Sangathan from the year 2004 till July 2012. Represented State of Madhya Pradesh as Panel Advocate before the High Court of Madhya Pradesh, Bench Indore from 2001 to 2003 and as Government Advocate from October 2003 to February 2004. Was appointed as Central Government Counsel to appear on behalf of Union of India from 19.09.2005 to 19.09.2008 and as Central Government Counsel (Senior Panel) from 19.02.2010 to 19.02.2013.

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

Hon'ble Shri Justice Sushrut Arvind Dharmadhikari was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on July 8, 1966 at Raipur (Chhattisgarh). After obtaining Bachelors Degree in Commerce from G.S. College of Commerce & Economics, Nagpur and LL.B. Degree from University College of Law Main Branch, Nagpur. Enrolled as an Advocate with the State Bar Council of Madhya Pradesh in the year 1992 and joined the profession as a junior Advocate to Shri Y.S. Dharmadhikari, Senior Advocate (Ex Advocate General of Madhya Pradesh) in the High Court of Madhya Pradesh at Jabalpur in 1992. Started independent practice in the year 1996. Practised in Civil, Constitutional, Criminal branches of law for about 24 years.

Worked as Counsel for Reserve Bank of India, Bhopal, Deposit Insurance and Credit Guarantee Corporation Ltd., Mumbai, District Central Co-operative Bank Ltd., Hoshangabad, District Co-op Agriculture and Rural Development Bank Ltd., Hoshangabad, NEPA Ltd., Nepanagar, in the Central Administrative Tribunal at Jabalpur, Satyam Computers Ltd., Hyderabad, Finolex Industries Ltd., Rajmata Vijayraje Scindia Krishi Vishwavidyalaya, Gwalior. Standing Counsel for Income Tax Department, Welfare Commissioner, Bhopal Gas Victims, Bhopal, Bharat Sanchar Nigam Ltd. (Telecom Factory Circle), Jabalpur, Kendriya Vidyalaya Sanghatan and Seniro Standing Counsel for Central Excise Department. Was Additional Central Government Standing Counsel since January 2000 and Central Government Counsel, High Court of M.P., Jabalpur since 2004.

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

Hon'ble Shri Justice Vivek Rusia was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on August 2, 1969 in a family of lawyers. Father late Shri Prabhakar Rusia was a Senior Advocate of High Court of M.P., mother Smt. Vimla Rusia and wife Smt. Priti Rusia are also Advocates. After obtaining B.Sc. degree from Govt. Science College, Jabalpur in the year 1989 and LL.B. in the year 1992 from Rani Durgavati University, enrolled as an Advocate and started practice w.e.f. 08.08.1992 as junior counsel in the office of Shri P. Sadashivan Nair and Smt. Indira Nair, Senior Advocates. Started independent practice in the year 1998. Was taken in the panel of Coal India Ltd.,

South Eastern Coal Fields Ltd., Western Coal Field Ltd., Northern Coal Field Ltd., Cantonment Board, Jabalpur, M.P. Poorva Kshetra Vidyut Vitran Company, M.P. Power Management Company Ltd., M.P. Madhya Kshetra Vidyut Vitran Company, M.P. Power Transmission Company Ltd., M.P. Power Generating Company Ltd., M.P. Housing & Infrastructure Development Board, M.P. Laghu Udyog Nigam, Jabalpur Development Authority, BSNL, Indian Olympic Association, Jila Sahakari Krishi & Gramin Vikas Bank Mydt., Panna, Sidhi and Satna, various Municipalities, Gram, Janpad and Zila Panchayats of Madhya Pradesh. Appointed as standing counsel of Government of India in the year 2010 for a period of three years. Elected as Joint Secretary of High Court Advocates Bar Association.

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

Hon'ble Shri Justice Anand Pathak was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on July 18, 1968. After completion of education, enrolled as an Advocate of M.P. State Bar Council and practised at Bench Indore in all fields of law i.e Civil, Criminal and Constitutional sides.

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

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

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

Held the post of Additional Director and thereafter Director of the State Judicial Academy between May 2002 to June 2007. As Director of the JOTRI (now MPSJA), diversified its activities and conceptualized various

Workshops/training programmes for Judicial Officers as well as Officers of other Departments like Electricity, Police, Forest, Medical, Prosecution, Co-operatives, District Consumer Forum etc. and was also Editor of bi-monthly Institutional Journal 'JOTI'. Following the pattern of National Judicial Academy, Bhopal, took initiative to prepare reading material on diverse specialized subjects of law. Acknowledged as a good orator and has delivered lectures and speeches in various training programmes on varied subjects in different Institutions including National Judicial Academy, Bhopal and National Law Institute University, Bhopal. From February, 2009 to March, 2010 served as Professor at the National Judicial Academy, Bhopal and thereafter, as District & Sessions Judge, Sehore. From March 2010 to March 2011, worked as Principal Registrar (Judl.) and thereafter, from April 2013 till 31.01.2016 as Registrar General of the High Court of M.P.

Authored book 'LEGAL ISSUES – AN ANTHOLOGY' a compilation of articles on various legal issues, foreworded by Hon'ble Mr. Justice R.V. Raveendran, Former Judge, Supreme Court of India. Also authored a book in Hindi on Panchayat Raj in Madhya Pradesh, published by M.P. State Legal Services Authority.

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

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

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

Hon'ble Shri Justice J.P. Gupta was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on March 21, 1959 at Sabalgarh, District Morena. After completion of education enrolled as an Advocate in the State Bar Council of Madhya Pradesh and started practising under the able guidance of Late Shri Bahadur Singh Dhakad, Senior Advocate, Sabalgarh. Joined M.P. State Judicial Services as Civil Judge Class II on March 5, 1983 and promoted to Higher Judicial Services on June 4, 1996. Granted Selection Grade Scale on June 1, 2002 and Super Time Scale on January 2, 2012.

Worked in different capacities at Morena, Bhopal, Sehore, Begumganj (Raisen), Guna, Datia, Shivpuri, Indore, Tikamgarh. Also served as Deputy Welfare Commissioner (Bhopal Gas Commission), Additional Registrar (Judl.), Additional Registrar (Vig), High Court of M.P..

Held the post of Director, State Judicial Academy and edited bimonthly Journal JOTI. As Director JOTRI (now MPSJA), had the distinct opportunity of imparting Induction Training Course to more than 460 newly appointed Civil Judges Class II of 2007, 2008, 2010 and 2011 batches and also conducted various Refresher Courses and Workshops to the Judicial Officers. It is worth mentioning here that during his tenure, JOTRI (now MPSJA) became perhaps the only Institute in the Country to have conducted week-long training course on the use of lap-top computers provided by the e-committee for each and every member of District Judiciary. Visited Bharuch, Ahmedabad as Group Leader for Study of Best Practices adopted by other States. Worked as District & Sessions Judge, Ujjain from 02.01.2012 to 20.10.2013 and thereafter as Principal Registrar, High Court of M.P., Bench Gwalior from 21.10.2013 to 30.03.2014. Again served as District & Sessions Judge, Ujjain from 31.03.2014 till elevation.

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

Hon'ble Shri Justice Anurag Kumar Shrivastava was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on April 11, 1956 at Rajnandgaon, Chattisgarh. After obtaining degrees of B.Sc. (Maths) in 1975 from Govt. Digvijay Mahavidyalaya, Rajnandgaon and LL.B. from Vidhi Mahavidyalaya, Rajnandgaon in the year 1979, enrolled as an Advocate in the State Bar Council of M.P. in the year 1980 and started practising in District Rajnandgaon under the able guidance of Senior Lawyer Shri K. C. Jain. Joined Madhya Pradesh State Judicial Services as Civil Judge Class II on April 27, 1983 at District Court Durg and promoted to Higher Judicial Services in June, 1996. Granted Super Time Scale on 02.01.2012.

Worked in different capacities at Mahasamund, Gariyaband, Mungeli, Korba (Tahsils of Raipur and Bilaspur districts), Maihar, Mandla, Jabalpur, Rewa, Sakti, Chhatarpur. Held the post of Member Secretary, State Legal Services Authority (M.P.), Jabalpur from April 2012 to March 2014 and organized Lok Adalats and

Mega Lok Adalats under the direction of Executive Chairman, SLSA in which a number of cases were decided amicably. Was appointed as Member of Monitoring Committee by Hon'ble Surpreme Court for providing drinking water to residents of 21 localities situated around the Union Carbide Plant of Bhopal and with the help of Municipal Corporation, Bhopal, prepared the Action Plan, identified the families entitled to get tap water connections and provided potable water connections to more than 11,000 families and submitted the progress report to Hon'ble Supreme Court from time to time. Served twice as District & Sessions Judge, Balaghat from June 2010 to March 2012 and again from April 2014 till elevation.

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

Hon'ble Shri Justice Housla Prasad Singh was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on July 1, 1956 at village Aschaura District Ballia, Uttar Pradesh. After obtaining degrees of B.Sc. from DBS College, Kanpur and LL.B. from Rani Durgavati Vishwavidyalaya, Jabalpur, enrolled as an Advocate in the State Bar Council of M.P. in the year 1979 and joined the Chamber of Senior Civil Advocate Late Shri N.K. Patel. Practised mainly in civil and criminal streams. Joined Madhya Pradesh State Judicial Services as Civil Judge Class II on March 7, 1983 and promoted to Higher Judicial Services in June 1996. Granted Selection Grade Scale on 01.01.2003 and Super Time Scale on 15.03.2012.

Worked in different capacities at Seoni, Sagar, Banda, Niwas, Sihora, Jabalpur, Damoh, Raipur (now Chhattisgarh), Satna, Umariya and Gwalior. Held the post of Chairman, District Consumer Redressal Forum, Jabalpur. Was posted as first District & Sessions Judge of the newly constituted District at Umariya in the year 2009 and thereafter at Sagar in the year 2013. Held different posts in Madhya Pradesh Judges' Association and played active role for the welfare of Judicial Officers.

Attended many Conferences, Workshops, Seminars and training programmes. Is a good speaker and has delivered lectures on varied subjects. Was Chairman, State Transport Appellate Tribunal, M.P., Gwalior prior to elevation.

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

Hon'ble Shri Justice Ashok Kumar Joshi was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on November 11, 1956 at Anjad District Barwani. Hails from the family of Lawyers and father Shri B.L. Joshi was leading lawyer of the then existing District West Nimar which was later on divided into Khargone and Barwani Districts. After completion of schooling in first division from Govt. Higher Secondary School Anjad, passed B.Sc., M.Sc. (Chemistry) and LL.B. examinations in first division from Vikram University, Ujjain as a student of Govt. P.G. College, Barwani. Participated in inter collegiate debate competitions and won prizes. During emergency period (1976-1977) was nominated as President of Student Union of Govt. P.G. College, Barwani on merit basis. In the same year was appointed as Chief Editor of Barwani College's Magazine 'Chandrika' and was also selected as Member of the Executive Committee of the Student Union of Vikram University, Ujjain.

Enrolled as an advocate of M.P. State Bar Council on 04.11.1981. Joined Madhya Pradesh State Judicial Services as Civil Judge Class II on March 11, 1983 and promoted to Higher Judicial Services in the year 1996. Granted Selection Grade Scale on 01.01.2003 and Super Time Scale on 15.03.2012.

Worked in different capacities at Dhar, Burhanpur, Indore, Manawar, Gwalior, Bhind, Agar, Guna and Shajapur. Was District & Sessions Judge, Alirajpur from 20.07.2009 to 23.03.2013. Was District Judge (Inspection), Indore from 30.03.2013 till elevation.

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

Hon'ble Shri Justice Vivek Agrawal was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on June 28, 1967 in Kasganj, Uttar Pradesh. After completion of education, enrolled as an Advocate in August 1992 and started practise. Practised at Civil, Criminal and Constitutional sides.

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

Hon'ble Smt. Justice Nandita Dubey was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on September 17, 1961 at Gwalior, Madhya Pradesh. Father-in-Law Hon'ble Shri Justice S.K. Dubey was Former Judge of the High Court of Madhya Pradesh and Grandfather-in-Law late Shri P.L. Dubey was Ex Advocate General of M.P.. After obtaining Bachelors Degree in Science in the year 1981 and Masters Degree in Arts Economics (Regional Planning and Economic Growth) in the year 1983 from Bhopal University, did LL.B. in the year 2001 from Jiwaji University, Gwalior and stood fifth in the University.

Practised in High Court of Madhya Pradesh, Bench Gwalior, various District Courts, Tribunals/Commissions etc. in Writ, Civil, Criminal, various Corporate matters, Industrial & Labour, Claims and debts recovery matters and specialized in SARFAESI Act and is well conversant with various Indian Laws, legal practices and procedures.

Was Standing Council for IFCI Ltd., M.P. Housing Board, H.D.F.C. Bank, Union Bank of India, Tata Motors Finance Ltd., Tata Motors Ltd., CITI Financials, KS Oils Ltd., TVS Motors Ltd., India Bulls Financial Ltd. besides having successfully represented various other Corporate clients like Cadburys Ltd., Agro Solvent Products Ltd. amongst others.

Was appointed as Hon. Secretary of "Core Consultative Group" and subsequently as Convener of the Complaint Cell for Gwalior and Chambal Divisions and also worked actively as a Human Rights Activist under the umbrella and patronage of the M.P. Human Rights Commission from 2000 to 2004.

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

We on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.

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OBITUARY

HON'BLE SMT. JUSTICE SHUBHADA RAVI WAGHMARE

Hon'ble Smt. Justice Shubhada Ravi Waghmare, was born on 05.11.1954. Law Graduate from Bombay University in the year 1978. Enrolled as Advocate on August 6, 1981 and started practice on Civil, Constitutional sides in the Bench of the High Court of Madhya Pradesh at Indore. Was Deputy Government Advocate during 1989-1991. Was Standing Counsel for M.P. Pollution Control Board for ten years. Was appointed as Senior Counsel for Government of India in the Central Administrative Tribunal in December, 2000. Was Member of Human Rights Core Group for the year 2001-2002, Secretary of the High Court Bar Association, Indore from 1996 to 1998 and Vice President for the year 2000-2001. Appointed as Judge of the High Court of Madhya Pradesh on October 11, 2004.

Had the distinction of being the first woman from the Bar to be elevated to the Madhya Pradesh High Court. Worked relentlessly for the cause of women.

During Her Ladyship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Judge. Delivered lectures to Judicial Officers in the Academy. Was Member of High Court Training Committees as well as other Committees of the High Court.

She left for her heavenly abode on 11.04.2016, while in service.

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HON'BLE SMT. JUSTICE MANJUSHA P. NAMJOSHI

[Excerpts from the note of condolence of Hon'ble the Chief Justice dated 18.04.2016 on the bereavement of Hon'ble Smt. Justice Manjusha P. Namjoshi]

Justice Smt. Manjusha P. Namjoshi was born on 21.08.1947. She joined judicial service as Civil Judge Class II on 04.06.1970. Before being appointed as District & Sessions Judge, she was Additional Director, Judicial Officers' Training Institute in the High Court of M.P. at Jabalpur. She was elevated as Judge of the High Court on 07.10.2005 and rendered valuable services at the Principal Seat (Jabalpur), before being transferred to Indore Bench. She demitted office on 19.08.2009 and was leading a quiet and fulfilled life at Indore. She breathed her last on 15.04.2016 at CHL Apollo Hospital, Indore.

Known to be extremely painstaking person, Justice Namjoshi firmly stood for the cause of rendering timely justice. Her judgments display her profound legal knowledge, erudition and ability to do in-depth analysis of material issues.

She relentlessly worked with complete dedication and humility for the cause of teeming underprivileged citizenry of the State. She was very firm in her thinking that no event/incident should stall the functioning of the Court or impede the hallmark of speedy justice. During her lifetime, she conveyed in writing vide letter dated 23.04.2014, to the Administrative Judge at the Main Seat, not to hold obituary and suspend Court work after her demise. This gesture is laudable and worthy of emulation by one and all, for upholding the constitutional mandate of rendering speedy justice. Her sentiments in that behalf were echoed by her family members in the moment of grief in the immediate aftermath of her demise, which also deserves special mention. The magnanimity and altruistic persona of Her Ladyship was unrivalled.

Justice Smt. Namjoshi is survived by her husband Shri P.V. Namjoshi, who superannuated as District Judge and two daughters namely; Smt. Nandini Vyas, a judicial officer in the State of Rajasthan and Smt. Geeta Natu.

I, on behalf of companion Judges and on my own behalf, convey heartfelt condolence to the members of the bereaved family of Late Justice Smt. Manjusha P. Namjoshi. I beseech the Almighty to confer eternal peace and solitude to the departed soul and bestow enough courage to the members of the family to bear this irreparable loss.

We, on behalf of JOTI Journal, express our deepest heartfelt condolences to the bereaved families and pray that the departed souls may rest in peace and tranquility.

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PROFESSIONALISM AT WORK PLACE

– Kapil Mehta
OSD, MPSJA

Introduction and significance of professionalism:

According to ***Webster's Dictionary***, professionalism means the conduct, aims or qualities that characterize or mark a profession or a professional person. The word "profession" is derived from the Latin term ***"professionem"*** (nominative *professio*) which means "under oath". Professionalism is a sum of specific aptitude, attitude, ethical values and specific behavior in a person or group of persons who are working for attaining some objectives for the society or clients carried under sound individual and group strength and specific beliefs. Professionalism refers to a person doing his job with sincerity and maintaining professional etiquette and ethics in the workplace. While the basic principles of individual professionalism are universal, it is also defined by a set of responsibilities set forth by an organization for its members to follow. Incorporating professionalism in the workplace is a critical element for any organization desiring to achieve success. Professionalism is a concerted effort by all within the workplace to provide the utmost of their ability each and every day and a concentration on quality of service and work. It is imperative that employer set certain criteria that all within the organization easily understand and should follow.

In professional life only one thing is expected, i.e. performance. We have to perform at a consistently higher level than others and that is the mark of a true professional. Our performance will be judged on the basis of our effectiveness and efficiency – Effectiveness is doing the right thing and efficiency is doing the things right. To perform efficiently and effectively, we require specialized knowledge. A personal commitment helps us to develop specialized knowledge and the skills required to apply it efficiently and effectively. One will be asked to perform if he is competent and it is the specialized knowledge that makes him competent.

A professional is one who does his best work when he finds the least like working. Professional is not a label one gives to oneself. It is a description one hopes others will apply to him. Professionalism is an essence which is to be felt. It is an attitude, state of mind and way of life. A true professional strives for excellence that too endlessly and is never satisfied.

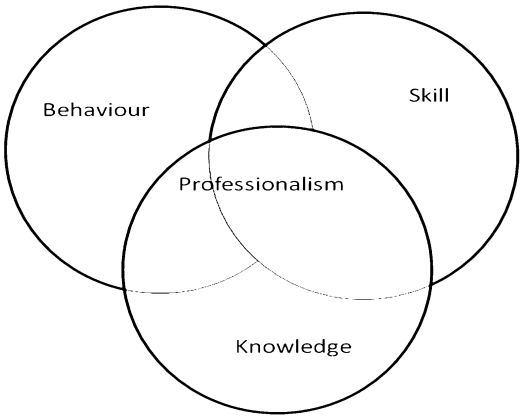
Development of professionalism is a continuing process and every Officer and employee has a responsibility to know, to understand and to abide by the fundamental professional standards and workplace expectations that support a positive work environment for promoting the highest possible standards of professionalism within the State.

The standards and expectations that follow, set a standard for orienting new Officers/Employees to our organizational culture in order to serve by reminding each one of them their role and responsibility in supporting a productive and healthy workplace. Apart that, the senior Officers should constantly be reminded that they have also to perform their task with an attitude of professionalism.

Professionalism is knowing how to do it, when to do it and doing it. When it comes to professionalism, it makes sense to talk about being professional in it. Standards are vital so that professionals can provide system that last.

A. Characteristics of a professional:

To be a true professional, one must be honest, skilled, courteous, reliable, considerate, dependable, co-operative, punctual and committed. He is expected to have positive attitude with a problem solving perseverance and is the one who strongly believes an upgradation in all spheres of life and who is honestly committed, ready to travel an extra mile, fully understands the importance of his responsibility and is accountable i.e. who never plays a blame game by blaming individuals or circumstances. He is one who does not just hear but listens to understand and never jump to conclusions i.e. he is never judgmental. He is well equipped as well as well organized and focused apart from having an excellent communication skills i.e. who understands not only others but also getting himself understood. He is reliable and consistent in delivering quality and has a lot of patience, tolerance and is a great observer.



B. Do's and Don'ts of professionalism:

It is expected from a professional that he can strike a balance between personal and professional commitment, stays fit; emotionally as well as physically, accepts any challenge happily and remains calm in all situations. He can never afford to be careless and worries about the credits and always lends a helping hand without dominating others.

On the other hand, unprofessionalism may be defined as conduct or behavior not in conformity with standards of a professional and is contrary to the accepted code of conduct of a profession.

Do's:

- A professional should avoid discussion on personal issues to avoid environment related empathy of bias of productivity.
- Should avoid gossip, colleague bashing, listening to and relying rumours of co-workers that come through the grapevine.
- Should support and encourage colleagues and co-workers and avoid constant complaining.
- Must believe in teamwork and work like a leader and should be ready to give credit to others.
- Should speak with courtesy to all internal and external customer and co-workers and who respects people and their position and his institution.
- Dress up according to work, position and requirement.
- Professional must be willing to have self evaluation / assessment to ascertain where he is and what he has to achieve?
- Professional is expected to have control over his emotions as it is said "if you don't manage your emotions, emotions will manage you."
- Must keep to himself and stay out of others affairs.
- A professional learns how to balance confidence, assertiveness and humility, never allowing anyone to pursuit them, to change their code of ethics or lower their standards.
- Should be easily accessible.
- Should keep personal issues and interests separated from that of the workplace.

Don'ts:

- A professional must refrain himself from aggressive behavior and verbal threat of violence, retribution, outburst, comments.

- Must not take advantage of his position.
- Colleagues or subordinates should not be exploited in any way.
- Must avoid violation of boundaries and his conduct must not amount to sexual misconduct and harassment etc.
- Must ensure that there is no breach of confidentiality.
- There must be no discrimination and biased behavior on the part of a professional.
- A professional should avoid gossiping, spreading rumours, backbiting and loose talks.
- Must avoid self disclosure and believe in team work.
- One must stay out of others affairs as nothing will bring greater peace than minding one's own business

C. Managerial roles and skills:

In administration, various aspects relating to management i.e. planning, organizing, leading and controlling, play a vital role. Office management skills consists of technical skills (i.e. knowledge and proficiency in activities involving methods, processes and procedures), human skills (i.e. ability to work with people co-operative effort, team work, participative environment) conceptual skill (i.e. ability to see the big picture) and diagnostic skill (ability to determine, analyse the nature and circumstance of a particular condition).

The management controls or directs people/resources in a group according to principles or values that have already been established. Goals of management personnel are to establish an environment to accomplish group goals with available resources, to develop efficiency for achieving the ends with least resources and most satisfaction and to develop effectiveness for achieving objectives.

For office management skills, specialized knowledge, skills and training are required and the use of these skills is not meant for self satisfaction for larger interests of the society and the success of the use of these skills is measured not in terms of money alone.

Being part of a judicial system, the Judges are required to inculcate and develop skills relating to Court Management as well as case management.

D. Court and Case Management:

Court and case managements are the need of the hour as the major drawback of Administration of Justice in India is delay in disposal of cases. In order to ensure timely and speedy trial and disposal of civil as well as criminal cases, the High Court of Madhya Pradesh has framed Rules, namely; **"Madhya Pradesh Case Flow Management in the Trial Courts and First Appellate Subordinate Courts (Civil) Rules, 2006" and "The Madhya Pradesh Case Management in Trial Courts and First Appellate Subordinate Courts (Criminal)** Rules, 2006". Judges are required to manage their cases in accordance with the above mentioned Civil and Criminal Rules in which provision has been made based on the nature of disputes, the quantum of evidence to be recorded and the time likely to be taken for the completion of case, that the cases shall be channeled into different tracks.

As per Civil Rules, **Track I** may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under section 106) of Transfer of Property Act; **Track 2** may consist of money suits and suits based solely on negotiable instruments; **Track 3** may include suits concerning partition and like property disputes, trademarks, copyrights and other intellectual property matters; and **Track 4** may relate to other residual matters. In this regard, all efforts should be taken on the part of a Judicial Officer to complete the suits in **Track 1** within a period of 9 months, **Track 2** within 12 months and suits in **Tracks 3** and **4** within 24 months.

As far as criminal trials are concerned, it should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in **Track I**, other cases where the accused is not granted bail and is in jail, should be kept in **Track II**, cases which affect a large number of persons such as cases of mass

cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc. should be kept in **Track III** and offences which are tried by special court such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in **Track IV**. **Track V** shall consist of all other offences. Efforts should be made to dispose of Track I cases within a period of nine months, Track II and Track III cases within twelve months and Track IV cases within fifteen months.

(These Rules have been published in Part III of JOTI Journal 2006 Page 34 and in JOTI Journal 2007 Page 5. Readers are requested to go through it).

For proper management of Court work, it is expected from Judges to manage their judicial and administrative work in such a way that all the work fixed for a particular day is accomplished and barring exceptional circumstances, no cases are to be adjourned in a routine mechanical way.

In this regard it is significant to mention the observations made by Hon'ble the Supreme Court in matters relating to trial of civil as well as criminal cases.

In ***Noor Mohammed v. Jethanand & another, (2013) 5 SCC 202,*** Apex Court has issued caution with regard to adjournments in civil cases and has opined that in a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casualty. All those who are involved in the justice-dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command.

Similarly, in ***Vinod Kumar v. State of Punjab, (2015) 3 SCC 220***, the Supreme Court has expressed its agony and anguish with regard to the manner in which criminal trials are being conducted by the trial courts by granting unwarranted adjournments. It has been observed by the Apex Court that the Court has a sacred duty to see that trial is conducted as per law. If adjournments are granted at the drop of a hat, it would tantamount to violation of rule of law and eventually

turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

Management of the affairs of various sections of Courts i.e. copying section, record section, nazarat section, malkhana section and statistical work section is also an integral part of court management.

Personal management: To be efficient, successful and healthy, personal management is extremely important. It consists of mainly; time management, stress management and health management.

Time management: In order to manage time, one has to understand that obstacles do exist. One has to recognize and identify them and then employ the strategy to overcome it. It is essential to set specific measurable, achievable, realistic, time based goals. It is also necessary to prioritize the work in terms of urgency and importance. One has to understand that he cannot do everything and there is no need to undertake those things that cannot be completed by him. One must learn when to say 'no' as inability to say 'no' burdens the person with undue stress. There is need to remain consistent to the goals set and to concentrate on the task at hand.

E. Stress and health management

In order to increase efficiency each day, management of stress is very much important. One cannot avoid stress generated out of work as well as stress related to home fronts. Therefore, it is important to learn how to deal with stress.

Planning and prioritization:

To cope up with heavy work, one has to first of all, plan and prioritize the work. While prioritizing task, one has to understand where do the majority of task fall. The following chart may help in proper planning and prioritizing the work:

	Urgent	**Not urgent**
Important	I. Important and urgent ***(This task requires immediate attention)***	II.Important but not urgent ***(It requires attention but not yet critical)***
Not important	III. Urgent but not important ***(It is nice, do)***	IV.Not urgent and not important ***(These activities are time eaters)***

One has to spare atleast 30-45 minutes on oneself in which he must do something of his liking *viz*. physical exercise, workout, meditation, yoga and pranayam, jogging, walking etc. which is not only good for physical fitness and well being but also for his mental well-being. One should take balanced diet, ensure intake of plenty of water and periodical medical checkup.

A to Z of stress and health management:

The major cause of stress is the inability of people to discover their real nature. In order to reduce stress, one is required to understand what is stressful for him and to identify what are the internal and external sources which causes stress. Major ways to reduce stress is time management, organization and delegation of work. One has to know his limitations as there is no point in stressing over something which one cannot change. If you don't like something, change it; if you can't change it, change the way you think about it. Stress is not what happens to us. It is our response to what happens and response is something which we can choose at any moment. In such a case, the factor which is responsible for stress, should be ignored. To avoid stress, at times it becomes necessary to accept the situation as it is which is beyond one's control. In this process of understanding and identifying factors responsible for generation of stress and evolving strategy to reduce stress, it would be apt to quote the A to Z of stress busters which are as under:

ABC

Always take time for yourself, at least 30 minutes per day. Practice Yoga.

Be aware of your own stress meter: Know when to step back and cool down.

Concentrate on controlling your own situation, without controlling everybody else.

DEF

Daily exercise will burn off the stress chemicals.

Eat lots of fresh fruit, veggies, bread and water, give your body the best for it to perform at its best.

Forgive others, don't hold grudges and be tolerant — not everyone is as capable as you.

GHI

Gain perspective on things, how important is the issue?

Hugs, kisses and laughter: Have fun and don't be afraid to share your feelings with others.

Identify stressors and plan to deal with them better next time.

JKL

Judge your own performance realistically; don't set goals out of your own reach.

Keep a positive attitude, your outlook will influence outcomes and the way others treat you.

Limit alcohol, drugs and other stimulants, they affect your perception and behaviour.

MNO

Manage money well, seek advice and save at least 10 per cent of what you earn.

No is a word you need to learn to use without feeling guilty.

Outdoor activities by yourself, or with friends and family, can be a great way to relax....

PQR

Play your favourite music rather than watching television.

Quit smoking: It is stressing your body daily, not to mention killing you too.

Relationships: Nurture and enjoy them, learn to listen more and talk less.....

STU

Sleep well, with a firm mattress and a supportive pillow; don't overheat yourself and allow plenty of ventilation.

Treat yourself once a week with a massage, dinner out, the movies: Moderation is the key.

Understand things from the other person's point of view.....

VWX

Verify information from the source before exploding.

Worry less, it really does not get things completed better or quicker.

Xpress: Make a regular retreat to your favourite space, make holidays part of your yearly plan and budget.....

YZ

Yearly goal setting: Plan what you want to achieve based on your priorities in your career, relationships, etc.

Zest for life: Each day is a gift, smile and be thankful that you are a part of the bigger picture.....

F. Judicial professionalism, ethics, norms and code of conduct:

Being the guardians of our legal system, Judges are expected to establish and maintain the highest level of professionalism. The way in which they manage their dockets, interact with counsels, litigants, witnesses and other stakeholders and the manner in which they preside over and conduct the business of the Court, sets a standard of professionalism. Diligence, personal integrity and a commitment to the attainment of justice are essential requirements of a good Judge.

Judicial professionalism demands both the competence of Judges to adjudicate cases according to law and to a have high standard of morality and conduct to ensure that Judges are fair and impartial.

The term 'judicial ethics' usually refers to a collection of rules or standard of conduct expected of a Judge. The ethical standards required from Judges call for perhaps the highest and most rigorous standards, sacrifices and discipline of any profession in the community. Judicial ethics are the basic principles of right action of the Judges. It consists of moral action, conduct, motive and character of Judges. It can be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation. Ethics is knowing the difference between what you have a right to do and what is right to do. It takes less time to do things right than to explain why you did it wrong.

An independent judiciary is the backbone of a civilized governance. Therefore, the Constitution of India provides for an independent judiciary by insulating it against any influence of any other wing of governance or any other agency or authority.

It is of paramount importance for judiciary to remain protected, strong and independent from within to inculcate and imbibe canons of judicial ethics inseparably into the personality of Judges.

Though source of judicial power is the law but in reality, judicial power emerges from two sources; ***firstly***, the public acceptance of the authority of the judiciary and ***secondly***, the integrity of the judiciary. Therefore, the greatest strength of the judiciary is the faith of the people in it and faith, confidence and acceptability cannot be commanded but they have to be earned and they can be done only by developing the inner strength by way of morality and ethics.

Our ancient literature, ***Sukra Neeti*** in Chapter IV-5-14-15 enumerates five vices which every judge should guard against to be impartial. They are:

(a) ***raga*** (leaning in favour of a party),

(b) ***lobha*** (greed)

(c) ***bhaya*** (fear)

(d) ***dvesha*** (ill-will against any one) and

(e) ***vadinoscha rahashruthi*** (the judge meeting and hearing a party to a case secretly, i.e. in the absence of the other party).

According to various religious philosophy, a Judge ought to be bestowed with a sense of complete detachment and humility. He ought to remember that he is not an author of his deeds but is only an actor who has to play his role in conformity with the script which represents the will of the author. He who is the same to foe and friend and also in honour and dishonour, who is the same in cold and heat, in pleasure and pain, who is free from attachment, to whom censure and praise are equal, who is silent, uncomplaining, steady minded and who is fully devoted.

The fragrance and freshness of flowers become a part of the personality of a Judge if what he thinks and what he does are all based on such values as are the judicial ethics. A Judge can be compared to a flower that never withers and remains ever fresh.

So far as judicial ethics, code of conduct and norms of behavior are concerned, it is of utmost importance on the part of Judicial Officers to abide by Bangalore Principles that all the Judges specially the new entrants are aware of the Rules.

(The said Rules are being published in Part IV of this issue and readers are requested to go through them).

G. Conclusion:

In judiciary, where the criteria of professionalism, expertise, good manners and ethics apply, the gender aspect is not relevant at all. What is important is citizens' confidence in Judges and judiciary which is strong enough to make us proud of our profession.

Since the credibility of the judiciary at large is at stake and it has to maintain and restore the faith of the common man in the judicial system, therefore, it is the need of the hour for Judges to discharge their functions of justice dispensation with utmost professional attitude i.e. with absolute commitment, sincerity, competence, maintaining high standards of integrity and diligence. In doing so it is also required on the part of Judicial Officer to regularly undergo self

evaluation and critical assessment of himself in order to upgrade his skills and enhance his knowledge.

Following pyramid can very well explain the concept of professionalism:

Teach

Be polite

Take action

Behave formally

Work responsibly

Finalize bibliography

Feel proud of teaching

Design quality materials

Prepare appropriate lessons

Attend workshops, read study

Have always a professional attitude

Avoid labelling and passing judgments

Show you care for stakeholders and individuals

Be a professional

Allow your passion to become your purpose, and one day it will become your profession.

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Courtesy: Some of the inputs have been borrowed from the material provided by the Resource Persons Shri Jayesh Pandit, Freelance, Infrasys Consultancy, Indore, Prof. Rahul Pathak, Shriram Institute of Management, Jabalpur, Prof. Parul Rishi, Faculty of HRM, Indian Institute of Forest Management, Bhopal and Dr. Anil Kumar Dhagat, Director, MBA, Gyan Ganga Institute of Technology, Jabalpur.

PART - II
NOTES ON IMPORTANT JUDGMENTS

121. CIVIL PROCEDURE CODE, 1908 – Section 47

EVIDENCE ACT, 1872 – Section 56

Execution of compromise decree – Inexecutability of decree – Whether subsequent events can be taken into consideration and decree can be held inexecutable on that ground? Held, Yes – Further held, it can very well be done when formidable element of public interest is involved – Maxim *"Salus Populi Est Suprema Lex"* explained.

सिविल प्रक्रिया संहिता, 1908 – धारा 47

साक्ष्य अधिनियम, 1872 – धारा 56

राजीनामा आज्ञप्ति का निष्पादन – आज्ञप्ति का निष्पादन योग्य न होना – क्या पष्चात्वर्ती घटना को विचार में लिया जा सकता है और उस आधार पर आज्ञप्ति निष्पादन योग्य न होना अभिनिर्धारित किया जा सकता है ? अभिनिर्धारित किया गया, हाँ – यह भी अभिनिर्धारित किया गया की जहां लोक हित के विकट तत्व निहित हो वहां ऐसा किया जा सकता है – सूत्र वाक्य *''सालूस पोपूली इस्ट सुप्रीमा लेक्स''* समझाया गया।

Sayyed Ratanbhai Sayeed (dead) by LRs and others v. Shirdi Nagar Panchayat and another

Judgment dated 22.02.2016 passed by the Supreme Court in Civil Appeal No. 14016 of 2015, reported in 2016 AIR SCW 1042

Extracts from the judgment:

As is discernable from the pleaded stand of the respondents/defendants and endorsed by the Nagar Panchayat/Municipal Council, the shops of the appellants have not only encroached upon the Palkhi Road (9 meters width) but also the adjoining road (15 meters width) adjacent to their plots and used as service road to the temple. Further their constructions also come within the prohibited distance of 37 meters from the centre of the Ahmad Nagar Manmad Road, State Highway No. 10 i.e. the control line fixed under the Highways Act. Such encroachments, according to the respondents, being in derogation of the provisions of Act 1965, Act 1966 and the Highways Act as well as in conflict with the development plan are required to be removed not only to promote the development of the area but also to secure the convenience and safety of the surging volume of devotees in particular and the local population in general.

To reiterate, the appellants have not disputed the sequence of events after the compromise decree for which it has been concurrently held in the preceding proceedings that the decree has become inexecutable. Not only these facts are

borne out from the contemporaneous documents, there is no persuasive reason either to delve into the same afresh. The unassailable fact is that after the compromise decree on 20.08.1979, a development plan for Shirdi had been formulated and finalized, in terms whereof amongst others, the Palkhi Road and its adjoining road leading to the temple are contemplated to be cleared of encroachments. Further, the appellants' structures are said to be within the prohibited distance of 37 meters from the Manmad State Highway No. 10 marking the control line. Noticeably the compromise decree did not declare the appellants' title in the land. It is admittedly vested in the State Government. The decree only protected their occupation of the site in possession till they were rehabilitated in the proposed shopping complex to come up in future. The decree, in the framework of the suit in which it was passed, also cannot be construed to be one, endorsing compliance of the statutory requirements of the legislations involved and in force at that point of time. Resultantly, the failure of the Sansthan to construct the shopping complex as undertaken under the compromise decree, ipso facto would not insulate the appellants from the mandate of the relevant statutes in force to test the legality or otherwise of the structures existing allegedly in violation thereof. In absence of any proof, adduced by the appellants to demonstrate that their structures existing do adhere to the prescriptions of the statutes invoked, their mere possession of the site since 1970 would not be available to them as an impenetrable shield against the infringements as alleged. These violations, if any, however would have to be addressed, by following the due process of law.

In all, having regard to the progression of events after the compromise decree, the contraventions alleged and the initiatives proposed in preponderate public interest, we do not feel persuaded to hold at this distant point of time, that the compromise decree is still executable. In our comprehension, the intervening developments have occurred in the free flow of events and in absence of any semblance of evidence of any collusion between the State Government, the Sansthan and the Nagar Panchayat/Municipal Council, we are not inclined to sustain the said accusation.

Whereas in ***Arun Lal and others v. Union of India and others, AIR 2011 SC 506*** and ***Dhurandhar Parsad Singh v. Jai Prakash University and others, AIR 2001 SC 2552*** the decrees involved had been held to have been rendered inexecutable in the contextual facts, which need not be dilated, in ***M/s. Laxmi and Co. v. Dr. Anant R. Deshpande & another, AIR 1973 SC 171,*** it was enunciated as a matter of general proposition, that a Court can take notice of subsequent events because of altered circumstances to shorten the litigation. It was held that if the court finds, in view of such intervening developments, the relief had become inappropriate or a decision cannot be given effect to, it ought to take notice of the same to shorten litigation, to preserve the right of both the parties and to subserve the ends of justice.

Inexecutability, of the decree of a court, in the face of intervening and supervening developments, is thus a consequence comprehended in law, however contingent on the facts of each case. We, thus, feel disinclined to interfere with the judgment and order dated 05.07.2010 of the High Court and impugned in CA. No. 3154 of 2011, so far as it pertains to the aspect of inexecutability of the compromise decree dated 20.08.1979. Any contrary view, would have the consequence of effacing the stream of developments for over three decades; more particularly when a formidable element of public interest is involved.

As noted hereinabove, the appellants have been consistently held not to be encroachers or trespassers on the land in their occupation, they having been let in thereto by the erstwhile Gram Panchayat, the then owner thereof. The land has since changed hands and is vested in the State Government. In our view, both the appellants and the respondents/defendants have to share the blame of leaving the compromise decree unexecuted for over a decade whereafter fresh rounds of confrontations surfaced leading to the present situation. Be that as it may, though there has been no determinance of the appellants' right, title and interest in the land, except that they are admittedly in continuous possession since the year 1970 and carrying on their business there, understandably, over the years, they have settled themselves in their plots and are earning their livelihood from the income of the business dealings. Though the build up of facts, since the compromise decree cannot be discarded, the contemplated measures of the respondents, to clear the area of the encroachments in public interest and for its overall development, would result in the displacement of the appellants as a compelling necessity. As a corollary, they have to be essentially rehabilitated or adequately compensated bearing in mind, the impact of the passage of time on the relevant perspectives since the date of the compromise decree.

The emerging situation is one where private interest is pitted against public interest. The notion of public interest synonymises collective welfare of the people and public institutions and is generally informed with the dictates of public trust doctrine – ***res communious*** i.e. by everyone in common. Perceptionally health, law and order, peace, security and a clean environment are some of the areas of public and collective good where private rights being in conflict therewith has to take a back seat. In the words of Cicero "the good of the people in the chief law".

The latin maxim ***"Salus Populi Est Suprema Lex"*** connotes that health, safety and welfare of the public is the supreme in law. Herbert Broom, in his celebrated publication, ***"A Selection of Legal Maxims"*** has elaborated the essence thereof as hereunder:

> "This phrase is based on the implied agreement of every member of the society that his own individual welfare shall, in cases of necessity, yield to that of the community; and

That his property, liberty and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good."

The demand of public interest, in the facts of the instant case, thus deserves precedence.

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122. CIVIL PROCEDURE CODE, 1908 – Section 47

Execution – Power of executing Court, extent of – Executing Court cannot travel beyond the decree – However, in case of any ambiguity in the decree with respect to measurement etc. of the disputed property, the Court is duty bound to ascertain it either by calling the original record or/and holding an enquiry as to measurement etc. as per procedure provided under section 47 of the CPC.

सिविल प्रक्रिया संहिता, 1908 – धारा 47

निष्पादन – निष्पादन न्यायालय की शक्तियों का विस्तार – निष्पादन न्यायालय आज्ञप्ति के बाहर नहीं जा सकती – यदि आज्ञप्ति में कोई संदिग्धता विवादित संपत्ति के माप आदि के संबंध में हो तब न्यायालय कर्तव्य से बंधे होते हैं कि वह या तो मूल अभिलेख तलब करके या/ और एक जाँच माप आदि के बारे में धारा 47 सीपीसी में बतलाई प्रक्रिया के अनुसार करें।

Shanti Jaiswal (Smt.) v. Indralal

Order dated 01.10.2013 passed by the High Court of M.P.in Writ Petition No. 959 of 2013, reported in ILR (2015) MP 1451

Extracts from the Order:

It is settled proposition of law that executing court has no right to go behind the decree. So firstly in such premises, I am of the considered view that the executing court was duty bound to ascertain the measurement of the disputed land, for which the decree was passed, after calling the record of the original suit. Besides this, such court was also duty bound to hold an enquiry to ascertain the measurement of the disputed land as per procedure under Section 47 of the CPC because the disputed question on which the executing proceeding was dismissed was directly relating to the execution of the decree and same could have been enquired by the executing court in accordance with the scheme of Section 47 of the CPC. In such premises, is it held that Executing Court has committed grave error in dismissing the execution proceeding without holding any enquiry under Section 47 of the CPC.

Apart the aforesaid, in the normal course no civil court passes any decree which could not be executed and once the executable decree is passed by the civil court, then contrary to finding of the judgment on which the decree has been passed the executing proceeding could not be thrown away unless such execution of such decree is barred by any provisions of law, which is not the

situation in the case at hand. So in such premises, also the executing court has committed error in dismissing the execution proceeding of executable decree.

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***123. CIVIL PROCEDURE CODE, 1908 – Sections 115, 148, 149, 151 and Order 6 Rule 17 and Order 7 Rule 11**

LIMITATION ACT, 1963 – Section 5 r/w/s 14

Facts of the case:

Trial Court permitted defendant to file counter-claim and ordered him to pay court fee – On non-payment of court fee, counter-claim was dismissed – Defendant then filed another application seeking counter-claim to be taken on record and delay be condoned – Trial Court condoned the delay but rejected the application for taking counter-claim on record on the ground of non-payment of court fee – Referring to the decision of the Orissa High Court in *Padmalaya Panda v. Masinath Mohanty, AIR 1990 Ori 102*, it was held that rejection of application for taking on record the counter-claim to the effect that as the court fee has not been paid, application cannot be considered, is fallacious – Court fee can only be deposited if the counter-claim is taken on record.

सिविल प्रक्रिया संहिता, 1908 – धाराएं 115, 148, 149, 151 और आदेष 6 नियम 17 और आदेष 7 नियम 11

परिसीमा अधिनियम, 1963 – धारा 5 सहपठित धारा 14

मामले के तथ्य :

विचारण न्यायालय ने प्रतिवादी को प्रतिदावा प्रस्तुत करने की अनुमति दी और उसे न्यायालय शुल्क भुगतान करने का आदेष दिया – न्यायालय शुल्क का भुगतान न करने पर प्रतिदावा खारिज किया – तब प्रतिवादी ने एक अन्य आवेदन प्रतिदावे को अभिलेख पर लेने के लिए और विलंब को क्षमा करने के लिए लगाया – विचारण न्यायालय ने विलंब क्षमा किया किन्तु प्रतिदावा अभिलेख पर लेने का आवेदन न्यायालय शुल्क का भुगतान न करने के आधार पर खारिज किया – उड़ीसा उच्च न्यायालय के निर्णय *पदमाल्या पाण्डा विरूद्ध मासीनाथ मोहन्ती, ए,आई,आर 1990 उडीसा 102* का उल्लेख करते हुए यह अभिनिर्धारित किया गया कि प्रतिदावा अभिलेख पर लेने का आवेदन न्यायालय शुल्क नहीं चुकाई गई है इस कारण खारिज करना, आवेदन ऐसे भ्रमपूर्ण तरीके से विचार में नहीं लिया जा सकता, न्यायालय शुल्क तभी जमा कराई जा सकती है जब प्रतिदावा अभिलेख पर लिया जाये।

Pravesh Pathak and others v. Smt. Shakuntala Sharma and others

Order dated 02.09.2015 passed by the High Court of M.P. in Civil Revision No. 61 of 2015, reported in 2016 (1) JLJ 31

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

Amendment of plaint – Doctrine of relate back – Objection on seeking of time barred relief, tenability of – Although amendment of plaint to incorporate relief of declaration of title has necessarily to relate back to the date of filing of the suit in 1985 but once the said amendments were allowed in 1995 and were not challenged by the defendants, the issue with regard to limitation has to be decided in favour of the plaintiff and the objections of the defendants that grant of amended relief is barred by limitation, cannot be sustained.

सिविल प्रक्रिया संहिता, 1908 – आदेष 6 नियम 17

वाद में संषोधन – रिलेट बेक का सिद्धांत – अवधि बाधित अनुतोष चाहने पर आपत्ति की प्रचलनषीलता – यद्यपि वाद में समाविष्ट किया गया स्वत्व घोषण का अनुतोष आवष्यक रूप से वाद प्रस्तुति दिनांक वर्ष 1985 में रिलेट बेक होता है एक बार जब वर्ष 1995 में उक्त संषोधन स्वीकार किया गया व प्रतिवादी न उसे चुनौती नहीं दी थी तब परिसीमा संबंधी वाद पद वादी के पक्ष में निराकृत होना ही चाहिए व प्रतिवादी की यह आपत्ति की संषोधित अनुतोष अवधि बाधित है नहीं चल सकती।

Vasant Balu Patil and others v. Mohan Hirachand Shah and others

Judgment dated 09.10.2015 passed by the Supreme Court in Civil Appeal No. 821 of 2009, reported in 2015 AIR SCW 6756

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125. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Amendment in pleading, permissibility of – Pleading sought to be inserted by way of amendment must be necessary and relevant – Unnecessary and irrelevant pleading cannot be allowed.

सिविल प्रक्रिया संहिता, 1908 – आदेष 6 नियम 17

अभिवचनों में संषोधन का अनुमत योग्य होना – संषोधन द्वारा जोड़े जाने वाले अभिवचन आवष्यक और सुसंगत होना चाहिए – अनावष्यक और असंगत अभिवचन अनुमत नहीं की जा सकते हैं।

Madhubala Jain (Smt.) v. Sardar Davinder Singh

Order dated 01.10.2013 passed by the High Court of M.P. in Writ Petition No. 13554 of 2013, reported in ILR (2015) M.P. 1455

Extracts from the Order:

Keeping in view the arguments advanced by the counsel, I have carefully gone through the papers placed on the record including the averments of the plaint and the impugned amendment application. It is undisputed fact on record that the present petitioners have filed the impugned suit against the respondents on the grounds available under section 12(1) of the M.P. Accommodation Control Act, 1961 (in short 'the Act'). Out of such ground, the ground of bonafide genuine

requirement has also been taken by the petitioners and averments of such grounds have been denied on behalf of the respondent / defendant in his written statement with the pleading that some alternate accommodation for the alleged need is available with the petitioners in the township of Jabalpur but subsequent to filing the written statement, in pendency of the suit, the impugned application was filed on behalf of respondent / defendant to insert the pleadings that the petitioners are also having alternate accommodation described in the application which are registered in the name of Smt. Sudha Jain w/o Arvind Jain the mother of petitioner No.2 and in the name of Smt. Shanti Bai Jain w/o Jai Kumar Jain, the mother-in-law of petitioner No. 1 and on consideration such application has been allowed by the trial court.

Law is almost settled by the Apex Court on the question of alternate accommodation that it should be provide that the same is owned by the landlord/ plaintiff. If such accommodation is not belonging to the plaintiff/ landlord then the same could not be treated to be the alternate accommodation for such plaintiff/ landlord. In such premises, the accommodation situated in the name of mother or situated in the name of mother-in-law, would not e treated to be the alternate accommodation under the provision of section 12(1)(e) and 12(1)(f) of the Act. So, in such premises, the proposed pleadings is not relevant in the matter because the proposed alternate accommodation started by the respondent undisputedly is not recorded or owned by any of the petitioners. So, in such premises, the impugned amendment was neither relevant with the matter nor necessary but the trial court has committed error in allowing the same. In such premises, the impugned order being perverse, is not sustainable. Consequently, by allowing this petition, the impugned order is set aside and the aforesaid application of the respondent for amendment is hereby dismissed.

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126. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Amendment of pleading – Post-trial amendment, permissibility of – Facts which are very well in the knowledge of the party on the date of filing of initial pleading and the same was not stated and, such fact is proposed to be pleaded by way of amendment application at later stage then unless sufficient cause is made out, such amendment application cannot be allowed.

सिविल प्रक्रिया संहिता, 1908 – आदेष 6 नियम 17

अभिवचन में संषोधन – विचारण प्रारंभ होने के बाद के संषोधन का अनुमत योग्य होना – तथ्य जो मूल अभिलेख पेष करने की तारीख पर पक्षकार के अच्छी तरह ज्ञान में थे और उनका कथन नहीं किया गया ऐसे तथ्यों को संषोधन आवेदन के माध्यम से बाद के प्रकम पर जोड़ना, जब तक पर्याप्त कारण नहीं बतलाया जाता ऐसा संषोधन आवेदन स्वीकार नहीं किया जा सकता।

Rajendra Dixit v. State of M.P.

Order dated 07.10.2013 passed by the High Court of M.P. in Writ Petition No. 17480 of 2013, reported in ILR (2015) MP 1461

Extracts from the Order:

Having heard the counsel, keeping in view the arguments advanced, I have carefully gone through the aforesaid application Annex.P/5 and the impugned order Annex.P/8 so also the other papers placed on the record. True it is that the petitioner wants to insert the word "temple" in the prayer clause and also some other places of the plaint at the stage of final arguments but in view of decision of the Apex Court in the matter of ***Ajendraprasadji N. Pandey and another v. Swami Keshavprakeshdasji N. and others, (2006) 12 SCC 1,*** in the matter of ***Vidyabai and others v. Padmalatha and another, 2009 (3) MPLJ 122 (SC)*** and in the matter of ***J. Samuel and others v. Gattu Mahesh and others, 2012 (3) MPLJ 37 (SC)*** holding that the facts which are very well in the knowledge of the party on the date of filing the initial pleading and same was not stated and, such fact is proposed to be pleaded by way of amendment application at later stage then unless sufficient cause is made out, such amendment application could not be allowed. In the case at hand, it is apparent fact that on the date filing the suit, the facts of proposed amendment was very well in the knowledge of the petitioners/ plaintiffs. Even after framing the issues on the settling date, the same was in the knowledge of the petitioners and at later stage, on recording the evidence of the petitioners as well as the respondents, the same was in the knowledge of the petitioners, inspite that, no effort was made to amend the pleadings. Only after closing the evidence of the parties when the case was fixed for final arguments, the aforesaid amendment application was filed. So, in such premises, the impugned order appears to be in consonance with law. It is also settled proposition that no party could be permitted to amend the pleadings in consonance with the evidence which have come on the record in the deposition of the witnesses. So, in such premises, the impugned order does not appear to be perverse or contrary to law. Hence, I have not found any merits in this petition even for admission. Consequently, the same deserves to be and is hereby dismissed at motion hearing stage.

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127. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 1

Cause of action, when can arise? It arises as and when real dispute arises i.e. when one party asserts any right and the other party denies it.

सिविल प्रक्रिया संहिता, 1908 – आदेष 7 नियम 1

वाद कारण कब उत्पन्न होता है ? यह तब उत्पन्न होता है जब वास्तविक विवाद उत्पन्न होता है अर्थात जब एक पक्षकार किसी अधिकार का अभिकथन करता है और दूसरा उससे इंकार करता हैं।

Rashtriya Ispat Nigam Ltd. v. M/s Prathyusha Resources and Infra Private Ltd. and another

Judgment dated 12.02.2016 passed by the Supreme Court in Civil Appeal No. 3699 of 2006, reported in 2016 AIR SCW 861

Extracts from the judgment:

This Court in a catena of judgments has laid down that the cause of action arises when the real dispute arises i.e. when one party asserts and the other party denies any right. The cause of action in the present case is the claim of the respondent/claimant to the determination of base year for the purposes of escalation and the calculation made thereon, and the refusal of the appellant to pay as per the calculations.

We find that the view taken by the High Court is correct as to when the real dispute arose between the parties to be adjudicated by the Arbitrator. It is nobody's case that the contract came to an end on 23.10.1997, but the difference on determination of base year first arose in the letter dated 15.07.1996. The said letter is already controverted as the service of the same was seriously contested before in Arbitration. However, the said letter was there even before completion of the work and prior to that the respondent/claimant had reserved his right to claim money later since the contract was still subsisting then. In light of the above reservation by the respondent/claimant, bills were raised in 1998 vide letter dated 04.09.1998, which actually resulted into exchange of letters which formed the base of dispute between the parties. It is an admitted fact that the bills were not finalized as could be seen from the letters dated 07.02.2000 and 09.05.2000. Therefore, we find that the findings of the learned Arbitrator and concurrently affirmed by the High Court are correct on the point that the cause of action arose on or after 04.09.1998. Hence, the said letter by the respondent/claimant to the appellant to initiate arbitration was not barred by the law of limitation.

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128. CIVIL PROCEDURE CODE, 1908 – Order 7 Rules 3 and 7

Non-compliance or inadequate compliance with the provisions of Order 7 Rule 3 of the Code, effect of.

Executable decree, duty of Court.

Non-compliance or inadequate compliance with the provisions of Order 7 Rule 3 of the Code does not, in all cases, lead to automatic rejection of plaint – The Court is duty bound to pass clear, definite and executable decree – To achieve this objective, the Court is empowered to direct the party to furnish missing or adequate particulars with regard to identification of disputed property.

सिविल प्रक्रिया संहिता, 1908 – आदेष 7 नियम 3 और 7

आदेष 7 नियम 3 (सी.पी.सी.) के प्रावधानों का अननुपालन या अपर्याप्त पालन का प्रभाव।

निष्पादन योग्य आज्ञप्ति, न्यायालय का कर्तव्य।

आदेष 7 नियम 3 (सी.पी.सी.) के प्रावधानों का अननुपालन या अपर्याप्त पालन सभी मामलों में वाद को स्वतः ही खारिज करने की ओर अग्रसर (होने का आधार) नहीं होता है – न्यायालय एक स्पष्ट, निष्चित और निष्पादन योग्य आज्ञप्ति पारित करने के लिए बाध्य होते हैं – इस उद्देष्य को प्राप्त करने के लिए न्यायालय सषक्त होती है कि वह पक्षकार को निर्देषित करे कि वह अनुपस्थित या अपर्याप्त विषिष्टियाँ जो वादग्रस्त संपत्ति के पहचान के बारे में है उनकी पूर्ति करे।

Saroj v. Inderchand Nahta and ors.

Order dated 05.01.2015 passed by the High Court of M.P. in Civil Revision No. 123 of 2014, reported in ILR (2015) M.P. 1567

Extracts from the Order:

It is evident from the perusal of the impugned order that learned trial Court has unambiguously held that the encroached portion of the drain situated between the properties of plaintiff on one hand and defendant on the other, has not been properly identified in the plaint. In other words if necessary amendments in the plaint are not incorporated, it would not be possible to pass an executable decree for removal of encroachment and obstruction to the drain. Thus, the only question that arises for consideration is, what were the option open before the trial Court in such a situation. Should it have straightaway rejected the plaint or it was open to it to direct rectification of defect in the pleadings ? It is pertinent to note that failure to provide sufficient particulars in the plaint for accurate identification of portion of land or drain in dispute, is not a defect related to merits of the case, it might merely be an inadvertent mistake not giving rise to any right in favour of the opposite party. In this situation, there is no reason as to why it should not be allowed to be rectified, particularly where the suit is still in the stage of evidence.

In this regard following observations made by the Supreme Court in the case of ***Pratibha Singh v. Shanti Devi Prasad, AIR 2003 SC 643*** may profitably be referred to. In Paragraph No. 15 of the said judgment it has further been observed that :

> "Having perused the revenue survey map of the entire area of R.S. Plot No. 595 and having seen the maps annexed with the registered sale deeds of the defendant judgment-debtors we are clearly of the opinion that the Sub-Plots 595/I and 595/II were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of settlement or survey, the Plaintiffs ought to have filed map of the suit property annexed with

> the plaint. If the plaintiffs committed an error the defendants should have objected to promptly. The default or carelessness of the parties does not absolve the trial Court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the Immovable property forming subject-matter of the suit being filed."

It is clear from aforesaid observations that the trial Court does not only have power but also has a duty to get the disputed immovable property properly identified in the plaint.

It has further been observed in the judgment that:

> "When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the Court record caused by overlooking of provisions contained in Oder 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case which of the two provisions would be ore appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of the decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47, CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission."

As may be seen from the aforesaid passage, the Court may ascertain the exact description of decretal property, even at the stage of execution.

In the case of ***Nagar Khan v. Gopi Ram, AIR 1976 Pat 2*** also, Patna High Court has observed that it is the duty of the Court to pass only such decree which can be executed under the machinery by Order 21 of the Code of Civil Procedure with all precision and without any confusion or embarrassment either to the executing Court or to any other person. However, on this ground a suit cannot be dismissed, nor a plaint rejected, and in such cases the Court may all upon the plaintiffs to furnish more particulars, even to the extent of allowing the amendment of the plaint.

In the light of aforesaid pronouncements, in the opinion of this Court, it is the duty of every Court to pass clear definite and executable decree. In order to

attain the aforementioned objective, court may direct the plaintiff to furnish missing particulars with regard to identification of disputed immovable property by way o amendment in the plaint or by calling for maps etc. The failure to adequately comply with the provision of order 7 rule 3, must not, in all cases, lead to automatic rejection of plaint.

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129. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 and Order 6 Rule 17

(i) Rejection of suit – Valuation of suit and payment of court fees – Averments, consideration of – For the purpose of valuation of suit and payment of court fees, averments in the plaint alone can be considered – Averments or objections, if any, in the written statement are not at all relevant.

(ii) Post-trial amendment, permissibility of – Application for amendment after long delay, especially after commencement of trial with regard to the facts which were in the knowledge of the party since beginning or commencement of the trial, is not permissible.

सिविल प्रक्रिया संहिता, 1908 – आदेष 7 नियम 11 और आदेष 6 नियम 17

(i) वाद खारिज किया जाना – वाद का मूल्यांकन और न्यायालय शुल्क का भुगतान – अभिवचनों पर विचार किया जाना – वाद के मूल्यांकन और न्यायालय शुल्क के भुगतान के उद्देष्य से केवल वाद पत्र के अभिवचन विचार में लिये जा सकते हैं – लिखित कथन के अभिवचन या आपत्ति यदि कोई हो तो वे बिल्कुल सुसंगत नहीं होते हैं।

(ii) विचारण प्रारंभ होने के बाद संषोधन का अनुमत योग्य होना – संषोधन आवेदन जो लंबे विलंब के बाद विषेष कर विचारण प्रारंभ होने के बाद दिया गया जो ऐसे तथ्यों के संबंध में था जो पक्षकार को प्रारंभ से या विचारण प्रारंभ होने के समय से ज्ञान में थे – (ऐसा संषोधन) अनुमत योग्य नहीं है।

Chedi v. Smt. Sona Bai

Order dated 04.10.2013 passed by the High Court of M.P. in Writ Petition No. 16331 of 2013, reported in ILR (2015) MP 1458

Extracts from the Order:

Having heard the counsel keeping in view his arguments I have carefully perused the papers placed on record along with both the impugned orders. I am of the considered view that for the purpose of valuation of the suit and payment of court fees only the averments of the plaint could be considered and the objections and the averments of the written statement are not relevant to decide such question as laid down by the Apex Court in the matter of ***Babu Sukhram Singh v. Ram Dular Singh, AIR 1958 SC 245***.

In view of such principle after going through the averments of the plaint (Ann. P.2), I am of the considered view that the trial Court has not committed any error in passing the impugned order dated 12.7.2011 directing the petitioner to value the suit on the basis of market value of the property and pay the court fees accordingly and such order does not require any interference at this stage.

So far other part of the order dismissing the application of the petitioner filed under Order 6 Rule 17 of CPC is concerned, it is apparent fact that the impugned suit was initially filed by the petitioner in the year 1998 for declaration and other relief but the relief of possession was not prayed and as per submission of the petitioners' counsel the petitioner was dispossess in the year 2002 and since then till 2013 no such application was filed to insert the relief for possession in the suit. So, in such premises apparently inspite having knowledge of such fact since 2002 for ten years no 3 step was taken by the petitioner to propose the amendment in the plaint and as per principle laid down by the Apex Court in the matter of ***Ajendra Prasad N. Pandey v. Swami Keshav Prakesh Dasji N., (2006) 12 SCC 1,*** the amendment application could not be allowed at later stage in the matter, especially after starting the process for recording the evidence in the matter, the same could not be allowed. So, in such premises, the remaining part of the order is also not required any interference at this stage

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***130. CIVIL PROCEDURE CODE, 1908 – Order 17 Rules 2 and 3 and Order 9 Rule 9**

Dismissal of suit under Order 17 Rule 3 CPC – Remedy, availability of – In case of failure of plaintiff to remain present in Court for evidence and on suit being dismissed by Court under Order 17 Rule 3 on the said ground, the only remedy available to such plaintiff is to file an appeal – Further held, application for restoration of suit under Order 9 Rule 9 CPC is not maintainable.

सिविल प्रक्रिया संहिता, 1908 – आदेष 17 नियम 2 और 3 और आदेष 9 नियम 9

आदेष 17 नियम 3 सीपीसी में दावा खारिज किया जाना – उपचार उपलब्ध होना – वादी के न्यायालय में साक्ष्य देने के लिए उपस्थित रहने में असफल रहने के कारण आदेष 17 नियम 3 के अधीन न्यायालय द्वारा वाद इस आधार पर खारिज कर दिया गया कि वादी न्यायालय में साक्ष्य के लिए उपस्थित रहने में असफल रहा है, ऐसे वादी को केवल अपील प्रस्तुत करने का उपचार उपलब्ध होता है – यह भी अभिनिर्धारित किया गया कि आदेष 9 नियम 9 सीपीसी के अधीन वाद को पुनः स्थापित करने का आवेदन चलने योग्य नहीं होता है।

Har Prasad and others v. Maniram and others

Order dated 22.09.2015 passed by the High Court of M.P. in Civil Revision No. 230 of 2013, reported in 2016 (1) MPLJ 414

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***131. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 2-A and Section 122**

CONTEMPT OF COURTS ACT, 1971 – Section 22

CONSTITUTION OF INDIA – Article 215

Breach of interim injunction order passed by High Court under Order 39 Rules 1 and 2 CPC – Recourse, availability of – Remedy available under Order 39 Rule 2-A CPC cannot abridge, abrogate, cut down or control power of High Court to proceed under Contempt of Courts Act or under Article 215 of the Constitution of India in respect of contempt – Further held, in view of section 122 of CPC, in case of any conflict between provisions of CPC and Rules framed by High Court, the latter will prevail and provisions of Order 39 Rule 2-A CPC cannot override said Rules.

सिविल प्रक्रिया संहिता, 1908 – आदेष 39 नियम 2–ए और धारा 122

न्यायालय अवमानना अधिनियम, 1971 – धारा 22

भारत का संविधान – अनुच्छेद 215

उच्च न्यायालय द्वारा आदेष 39 नियम 1 और 2 सीपीसी के तहत पारित अंतरिम व्यादेष का भंग – उपलब्ध उपचार – आदेष 39 नियम 2–ए सीपीसी के तहत उपचार उपलब्ध होने से उच्च न्यायालय की न्यायालय अवमान अधिनियम के अधीन अग्रसर होने या भारतीय संविधान के अनुच्छेद 215 के अधीन अवमान के संबंध में कार्यवाही करने की शक्तियाँ कम, रद्द, विच्छेदित या नियंत्रित नहीं हो जाती है – यह भी अभिनिर्धारित किया गया कि धारा 122 सीपीसी के प्रकाष में सीपीसी के प्रावधानों व उच्च न्यायालय द्वारा निर्मित नियमों में विरोधाभास होने पर (उच्च न्यायालय द्वारा निर्मित नियम) अधिमान्य होंगे और आदेष 39 नियम 2–ए सीपीसी का उन नियमों पर अधिभावी प्रभाव नहीं होगा।

Welset Engineers and another v. Vikas Auto Industries and others

Order dated 17.08.2005 passed by the Supreme Court in Civil Appeal No. 5127 of 2005, reported in (2015) 10 SCC 609

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132. CONSTITUTION OF INDIA – Articles 21 and 32

(i) Acid attack victims – Compensation – Determination and grant of – Nature and grievousness of injuries are the criteria to determine and award compensation – Further held, direction given in *Laxmi's case* is minimum amount to be paid to victim – Court and State may award more compensation.

(ii) Treatment and rehabilitation of acid attack victims – Duty of State reiterated.

(iii) Prevention of offence relating to acid attacks – Liability of State reiterated.

(iv) Need for effective and proper implementation of guidelines given in *Laxmi's case* – Expressed.

भारत का संविधान – अनुच्छेद 21 और 22

(i) अम्ल हमले के आहत – प्रतिकर – निर्धारण व दिया जाना – चोटों की प्रकृति और गंभीता में प्रतिकर निर्णित करने में मानदण्ड होते हैं – यह भी अभिनिर्धारित किया कि लक्ष्मी के मामले में दिये गये निर्देष पीड़ित को दी जानी वाली न्यूनतम राषि है – न्यायालय व राज्य इससे अधिक प्रतिकर दे सकते हैं।

(ii) अम्ल हमले के पीड़ित का उपचार और पुनः स्थापन – राज्य के कर्तव्य दोहराये गये।

(iii) अम्ल हमलों से संबंधित अपराध की रोकथाम – राज्य का दायित्व दोहराया गया।

(iv) लक्ष्मी के मामले में दिये गये निर्देष का प्रभावी और उचित कियान्वयन – बतलाया गया।

Parivartan Kendra v. Union of India and others

Judgment dated 07.12.2015 passed by the Supreme Court in Writ Petition (Civil) No. 867 of 2013, reported in 2015 AIR SCW 6597

Extracts from the judgment:

While disposing of the writ petition of ***Laxmi v. Union of India, AIR 2015 SC 3662*** this Court inter alia held, thus:-

> "We have gone through the chart annexed along with the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in ***Laxmi v. Union of India (2014) 4 SCC 427*** the minimum compensation of Rs. 3,00,000/- (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed by this Court are complied with and a minimum of Rs. 3,00,000/- (Rupees three lakhs only) is made available to each victim of acid attack.
>
> From the figures given above, we find that the amount will not be burdensome so far as the State Governments/Union Territories are concerned and, therefore, we do not see any reason why the directions given by this Court should not be accepted by the State Governments/Union Territories since they do not involve any serious financial implication.
>
> * * *
>
> Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting

convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.

The decisions taken in the meeting read as follows:

- The private hospitals will also be brought on board for compliance and the States/UTs will use necessary means in this regard.
- No hospital/clinic should refuse treatment citing lack of specialized facilities.
- First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.
- Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.

* * *

We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.

In the event of any specific complaint against any private hospital or government hospital, the acid attack victim will, of course, be at liberty to take further action.

With regard to the banning of sale of acid across the counter, we direct the Secretary in the Ministry of Home Affairs and Secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from today. It appears that some States/Union Territories have already issued such a notification, but, in our opinion, all States and Union Territories must issue such a notification at the earliest.

The final issue is with regard to the setting up of a Criminal Injuries Compensation Board. In the meeting held on 14.03.2015, the unanimous view was that since the District Legal Services Authority is already constituted in every district and is involved in providing appropriate assistance relating to acid attack victims, perhaps it may not be necessary to set up a separate Criminal Injuries Compensation Board. In other words, a multiplicity of authorities need not be created.

In our opinion, this view is quite reasonable. Therefore, in case of any compensation claim made by any acid attack victim, the matter will be taken up by the District Legal Services Authority, which will include the District Judge and such other co-opted persons who the District Judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes."

The above mentioned direction given by this Court in ***Laxmi's case*** (supra) is a general mandate to the State and Union Territory and is the minimum amount which the State shall make available to each victim of acid attack. The State and Union Territory concerned can give even more amount of compensation than Rs.3,00,000/- as directed by this Court. It is pertinent to mention here that the mandate given by this Court in ***Laxmi's case*** (supra) nowhere restricts the Court from giving more compensation to the victim of acid attack, especially when the victim has suffered serious injuries on her body which is required to be taken into consideration by this court. In peculiar facts, this court can grant even more compensation to the victim than Rs. 3,00,000/-.

We have come across many instances of acid attacks across the country. These attacks have been rampant for the simple reason that there has been no proper implementation of the regulations or control for the supply and distribution of acid. There have been many cases where the victims of acid attack are made to sit at home owing to their difficulty to work. These instances unveil that the State has failed to check the distribution of acid falling into the wrong hands even after giving many directions by this Court in this regard. Henceforth, a stringent action be taken against those erring persons supplying acid without proper authorization and also the concerned authorities be made responsible for failure to keep a check on the distribution of the acid.

When we consider the instant case of the victims, the very sight of the victim is traumatizing for us. If we could be traumatized by the mere sight of injuries caused to the victim by the inhumane acid attack on her, what would be the situation of the victim be, perhaps, we cannot judge. Nonetheless we cannot be oblivious of the fact of her trauma.

Considering the plight of the victim we can sum up that:

- the likeliness of the victim getting a job which involves physical exertion of energy is very low.
- the social stigma and the pain that she has to go through for not being accepted by the society cannot be neglected. Furthermore, the general reaction of loathing which she would have to encounter and the humiliation that she would have to face throughout her life cannot be compensated in terms of money.
- as a result of the physical injury, the victim will not be able to lead a normal life and cannot dream of marriage prospects.
- since her skin is fragile due to the acid attack she would have to take care of it for the rest of her life. Therefore, the after care and rehabilitation cost that has to be incurred will have huge financial implications on her and her family.

The Guidelines issued by orders in the ***Laxmi's case*** (supra) are proper, except with respect to the compensation amount. We just need to ensure that these guidelines are implemented properly. Keeping in view the impact of acid attack on the victim on his social, economical and personal life, we need to enhance the amount of compensation. We cannot be oblivious of the fact that the victim of acid attack requires permanent treatment for the damaged skin. The mere amount of Rs. 3 lakhs will not be of any help to such a victim. We are conscious of the fact that enhancement of the compensation amount will be an additional burden on the State. But prevention of such a crime is the responsibility of the State and the liability to pay the enhanced compensation will be of the State. The enhancement of the Compensation will act in two ways:-

1. It will help the victim in rehabilitation;

2. It will also make the State to implement the guidelines properly as the State will try to comply with it in its true sprit so that the crime of acid attack can be prevented in future.

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***133. COURT FEES ACT, 1870 – Section 7 (iv) (c)**

Suit for declaration of title and sale deed void – Registered sale deed executed on the strength of power of attorney – Court fees, payment of – Registered sale deed shall be presumed to be validly executed unless the presumption is displaced by leading evidence to the contrary – Therefore, sale deed being voidable document, *ad valorem* court fee under section 7 (iv) (c) of the Act is payable to avoid sale deed.

न्यायालय शुल्क अधिनियम, 1870 – धारा 7(iv)(c)

स्वत्व घोषणा और मुख्तयारनामा के आधार पर निष्पादित पंजीकृत विक्रय पत्र को शून्य घोषित करने का वाद – न्यायालय शुल्क का भुगतान किया जाना – पंजीकृत विक्रय पत्र वैध रूप से निष्पादित किया जाना उपधारित किया जायेगा जब तक कि उसके विरूद्ध साक्ष्य प्रस्तुत करके उपधारणा को (खण्डित) नहीं किया जाता (ऐसा) विक्रय पत्र एक शून्यकरणीय दस्तावेज होने से धारा 7(iv)(सी) अधिनियम के तहत मूल्य अनुसार न्यायालय शुल्क विक्रय पत्र से बचने के लिए भुगतान करना होगा।

Kamar Singh Rawat v. Makhan Singh Rawat and others

Order dated 30.10.2015 passed by the High Court of M.P. in Writ Petition No. 7277 of 2013, reported in 2016 RN 25 (HC)

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134. CRIMINAL PROCEDURE CODE, 1973 – Sections 91, 321 and 362

(i) Taking aid of section 91 to produce document at the stage of hearing of application under section 321 for withdrawal from prosecution, permissibility of – In the process of hearing of application for withdrawal from prosecution under section 321, accused cannot be permitted to take recourse to section 91 to produce documents.

(ii) Withdrawal from prosecution – Role of Public Prosecutor – When an application of withdrawal from prosecution is filed by Public Prosecutor, the law casts an obligation on him that he should be satisfied on the basis of materials on record keeping in view certain legal parameters.

(iii) Review of order by criminal Court, when may amount to – Law explained – Public Prosecutor had filed the application of withdrawal from prosecution which remained unheard – Public Prosecutor then after re-appreciating the facts and applying his mind to the totality of facts, filed another application for

not pressing the application preferred earlier under section 321 of the Code on the basis of decision taken in this regard by the authority – Held, filing of application not to press the earlier application cannot be compared with any kind of review of an order passed by the Court – Question of review can arise only when an order has been passed by a Court – Further held, filing of an application for seeking withdrawal from prosecution and application not to press the application filed earlier, are both within the domain of the Public Prosecutor.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 91, 321 और 362

(i) धारा 321 दंप्रसं के अभियोजन के प्रत्याहरण के आवेदन की सुनवाई के प्रक्रम पर धारा 91 दंप्रसं की सहायता लेकर दस्तावेज प्रस्तुत करवाने का अनुमत योग्य होना – धारा 321 दंप्रसं के अधीन अभियोजन के प्रत्याहरण के आवेदन की सुनवाई की प्रक्रिया में अभियुक्त को धारा 91 दंप्रसं की सहायता लेकर दस्तावेज प्रस्तुत करवाने के लिए अनुमत नहीं किया जा सकता।

(ii) अभियोजन का प्रत्याहरण – लोक अभियोजन की भूमिका – जब लोक अभियोजक द्वारा अभियोजन के प्रत्याहरण का आवेदन पेष किया जाता है तब विधि उस पर यह दायित्व डालती है कि वह अभिलेख पर उपलब्ध सामग्री के आधार पर कुछ विधिक मानदण्डों के बारे में अपना समाधान कर लें ।

(iii) दण्ड न्यायालय द्वारा अपने आदेष पुनरावलोकन कब माना जायेगा – विधि समझाई गई।

M/s V.L.S. Finance Limited v. S.P. Gupta and another

Judgment dated 05.02.2016 passed by the Supreme Court in Criminal Appeal No. 99 of 2016, reported in 2016 AIR SCW 721

Extracts from the Judgment:

In the case at hand, the learned Magistrate was directed by the High Court to consider the application filed by the Assistant Public Prosecutor seeking withdrawal of the application earlier preferred under Section 321 Cr.P.C. In such a situation, it is difficult to appreciate how Section 91 of Cr.P.C. can be taken aid of by the accused persons. In view of the same, we have no shadow of doubt that the High Court has fallen into error by permitting the accused persons to file an application under section 91 Cr.P.C.

Having said so, we have to address whether the High Court was justified in remitting the matter to the learned Magistrate for reconsideration of the application seeking withdrawal of the earlier application filed under Section 321 Cr.P.C. Needless to say, if the order of the High Court is set aside, the consequential order by learned Magistrate has to pave the path of extinction. The High Court on earlier occasion while disposing of Writ Petition (C) No. 3470 of 2012 and connected matters had clearly opined that the decision by the Lt. Governor directing to withdraw the application was justified. The said order had

attained finality after the special leave petitions assailing the same stood dismissed. The High Court on the earlier occasion had only observed that the accused persons had the right to pursue the matter further and to raise all the issues available to them in appropriate proceedings. By the impugned order, the learned single Judge by placing reliance on certain authorities has held that decidedly it is the Public Prosecutor who has to take the decision and not the Government or the Lt. Governor and so that dismissal of the writ petition against grant of consent by Lt. Governor to the withdrawal of application under Section 321 of Cr.P.C. had been erroneously relied upon by the courts below, particularly when right to pursue remedies before the criminal courts was preserved while deciding the writ petition.

We need not advert to the width of liberty granted to the accused persons by the writ court. The heart of the matter is whether the approach by the learned single Judge in passing the impugned order is legally correct. There can be no cavil over the proposition that when an application of withdrawal from the prosecution under Section 321 Cr.P.C. is filed by the Public Prosecutor, he has the sole responsibility and the law casts an obligation that he should be satisfied on the basis of materials on record keeping in view certain legal parameters. The Public Prosecutor having been satisfied, as the application would show, had filed the application. The said application was not taken up for hearing. The learned Magistrate had not passed any order granting consent for withdrawal, as he could not have without hearing the Assistant Public Prosecutor. At this juncture, the authority decided regard being had to the fact situation that the Assistant Public Prosecutor should withdraw the application and not press the same. After such a decision had been taken, as the application would show, the Assistant Public Prosecutor has re-appreciated the facts, applied his mind to the totality of facts and filed the application for not pressing the application preferred earlier under Section 321 Cr.P.C. The filing of application not to press the application cannot be compared with any kind of review of an order passed by the court. Question of review can arise when an order has been passed by a court. Section 362 Cr.P.C. bars the Court from altering or reviewing when it has signed the judgment or final order disposing of a case except to correct a clerical or arithmetical error. The said provision cannot remotely be attracted. The filing of the application for seeking withdrawal from prosecution and application not to press the application earlier filed are both within the domain of Public Prosecutor. He has to be satisfied. He has to definitely act independently and as has been held by the Constitution Bench in ***Sheonandan Paswan v. State of Bihar and others, AIR 1983 SC 194,*** for he is not a post office. In the present case, as the facts would graphically show, the Public Prosecutor had not moved the application under Section 321 Cr.P.C. but only filed. He could have orally prayed before the court that he did not in tend to press the application. We are inclined to think, the court could not have compelled him to assist it for obtaining consent. The court has a role when the Public Prosecutor moves the application seeking the consent for withdrawing from the prosecution. At that stage, the court is

required to see whether there has been independent application of mind by the Public Prosecutor and whether other ingredients are satisfied to grant the consent. Prior to the application being taken up being moved by the Public Prosecutor, the court has no role. If the Public Prosecutor intends to withdraw or not press the application, he is entitled to do so. The court cannot say that the Public Prosecutor has no legal authority to file the application for not pressing the earlier application. It needs no special emphasis to state that the accused persons cannot be allowed to contest such an application. We fail to fathom, how the accused persons can contest the application and also file documents and take recourse to Section 91 Cr.P.C. The kind of liberty granted to the accused persons is absolutely not in consonance with the Code of Criminal Procedure. If anyone is aggrieved in such a situation, it is the victim, for the case instituted against the accused persons on his FIR is sought to be withdrawn. The accused persons have no role and, therefore, the High Court could not have quashed the orders permitting the prosecution to withdraw the application and granting such liberty to the accused persons. The principle stating that the Public Prosecutor should apply his mind and take an independent decision about filing an application under Section 321 Cr.P.C. cannot be faulted but stretching the said principle to say that he is to convince the court that he has filed an application for not pressing the earlier application would not be appropriate. We are disposed to think so as the learned Magistrate had not dealt with the earlier application. Therefore, the impugned order dated 30.07.2015 passed by the High Court is set aside. As the impugned order is set aside, consequentially the order passed by the learned Magistrate on 22.09.2015 has to pave the path of extinction and we so direct. The learned Magistrate is directed to proceed with the cases in accordance with law. We may hasten to add that we have not expressed any opinion on the merits of the case. All our observations and the findings are to be restricted for the purpose of adjudication of the controversy raised.

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***135. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 157**

F.I.R – Delay, effect of and dispatch of F.I.R. to Magistrate, object of – It was alleged that F.I.R was ante-dated and delayed – Delay in transmitting the report to the Magistrate is linked to the lodging of the F.I.R. – If there is no delay in lodging an F.I.R., then any delay in communicating the report to the Magistrate would be of little consequence, since manipulation of the F.I.R. would then get ruled out.

The purpose of the forthwith communication of a copy of the F.I.R. to Magistrate is to check the possibility of its manipulation.

The prosecution must explain the delay in transmitting the special report to the Magistrate – However, if no question is put to the Investigating Officer concerning the delay, the prosecution is under no obligation to give an explanation.

There is no universal rule that whenever there is some delay in sending the F.I.R. to the Magistrate, the prosecution version becomes unreliable.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 154 और 157

प्रथम सूचना प्रतिवेदन – मजिस्ट्रेट को एफ.आई.आर. (की प्रति) भेजने का उद्देष्य और उसमें हुए विलंब का प्रभाव – मजिस्ट्रेट को (प्रथम सूचना) प्रतिवेदन (की प्रति) भेजना एफ.आई.आर. दर्ज करवाने से जुड़ा होता है – यदि एफ.आई.आर. दर्ज करवाने में कोई विलंब नहीं है तब (उसकी प्रति) मजिस्ट्रेट को भेजने में हुए विलंब के बहुत अल्प परिणाम होंगे, एफ.आई.आर. में छेड़–छाड़ की संभावना समाप्त हो जाएगी।

प्रथम सूचना प्रतिवेदन की प्रतिलिपि मजिस्ट्रेट को तत्काल भेजने का उद्देष्य उसमें होन वाली छेड़–छाड़ की संभावना पर जाँच (या नजर) रखना है।

अभियोजन को विषेष प्रतिवेदन मजिस्ट्रेट को भेजने में हुए विलंब का स्पष्टीकरण देना चाहिए – यदि अनुसंधान अधिकारी से सबंधित विलंब के बारे में कोई प्रष्न नहीं पूछे गये हैं तब अभियोजन पर स्पष्टीकरण (विलंब का) देने का दायित्व नहीं होता।

ऐसा कोई सार्वभौमिक नियम नहीं है कि एफ.आई.आर. (की प्रति) भेजने में कुछ विलंब होता है तो अभियोजन का कथानन अविष्वसनीय हो जाता है।

State of Rajasthan v. Daud Khan

Judgment dated 04.11.2015 passed by the Supreme Court in Criminal Appeal No. 126 of 2010, reported in 2016 CriLJ 165

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

INDIAN PENAL CODE, 1860 – Section 120-B

Previous sanction under section 197 of CrPC, necessity and applicability of – It is imperative that the alleged offence is committed in discharge of official duty by the accused – It is also important for the Court to examine the allegations contained in the final report against the accused, and if the alleged offences were committed by the accused in discharge of his official duty then to decide whether previous sanction is required to be obtained from the appropriate Government.

दण्ड प्रक्रिया संहिता, 1973 – धारा 197

भारतीय दण्ड संहिता, 1860 – धारा 120–बी

धारा 197 दंप्रसं के अधीन पूर्व अनुमति की आवश्यकता और उसका लागू होना – यह आवष्यक है कि अभिकथित अपराध अभियुक्त द्वारा कार्यालयीन कर्तव्य के निर्वाहन के दौरान किया गया हो – न्यायालय के लिए यह भी महत्वपूर्ण है कि वह अंतिम प्रतिवेदन में अभियुक्त के विरूद्ध लगाये गये अभिकथनों का परीक्षण करे और अभिकथित अपराध अभियुक्त द्वारा उसके कार्यालयीन कर्तव्य के निर्वाहन के दौरान किया गया था

(यह तथ्य) समुचित सरकार से पूर्व स्वीकृति ली जानी आवष्यक है यह तय करने के लिए देखें।

Prof. N.K. Ganguly v. CBI, New Delhi

Judgment dated 19.11.2015 passed by the Supreme Court in Criminal Appeal No. 798 of 2015, reported in 2015 (4) Crimes 372 (SC)

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137. CRIMINAL PROCEDURE CODE, 1973 – Sections 220 and 223

Holding of joint trial – Discretion of Court, exercise of – Is not mandatory. Guidelines for exercise of:

While exercising discretion as to holding of joint trial, Court is required to consider the following matters –

(a) Whether it would prolong trial of the cases?

(b) Whether it would be unnecessary wastage of judicial time?

(c) Whether it would confuse or cause prejudice to accused who had taken part only in some minor offence (s)?

(d) Whether facts, allegations, evidence are common or not?

(e) Whether accused persons were acting with a commonality of purpose?

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 220 और 223

संयुक्त विचारण किया जाना – न्यायालय के विवेकाधिकार का प्रयोग किया जाना – (संयुक्त विचारण) आज्ञापक नहीं है।

विवेकाधिकार के प्रयोग के दिषा निर्देष।

जब न्यायालय संयुक्त विचारण करने में विवेकाधिकार का प्रयोग करती है तब उसे निम्न बातों पर विचार करना आवष्यक होता है :–

(ए) क्या इससे मामलों का विचारण लंबा होगा ?

(बी) क्या इससे न्यायिक समय अनावष्यक बर्बाद होगा ?

(सी) क्या इससे अन्य अभियुक्त को भ्रम होगा या उनके हित प्रतिकूल रूप से प्रभावित होंगे जो कुछ छोटे अपराधों के लिए (विचारण) में भाग ले रहे है?

(डी) क्या तथ्य, अभिकथन, साक्ष्य एक समान है या नहीं ?

(ई) क्या अभियुक्तगण ने समान उद्देष्य के लिए कृत्य किया था?

Essar Teleholdings Limited v. Central Bureau of Investigation

Judgment dated 29.09.2015 passed by the Supreme Court in Criminal Appeal No. 1273 of 2015, reported in (2015) 10 SCC 562

Extracts from the Judgment:

Read in the backdrop of Sections 220 and 223, it is clear that a discretion is vested with the Court to order a joint trial. In fact, in ***Chandra Bhal v. State of U.P., (1971) 3 SCC 983,*** this Court stated:

> "Turning to the provisions of the Code, Section 233 embodies the general mandatory rule providing for a separate charge for every distinct offence and for separate trial for every such charge. The broad object underlying the general rule seems to be to give to the accused a notice of the precise accusation and to save him from being embarrassed in his defence by the confusion which is likely to result from lumping together in a single charge distinct offences and from combining several charges at one trial. There are, however, exceptions to this general rule and they are found in Sections 234, 235, 236 and 239. These exceptions embrace cases in which one trial for more than one offence is not considered likely to embarrass or prejudice the accused in his defence. The matter of joinder of charges is, however, in the general discretion of the court and the principle consideration controlling the judicial exercise of this discretion should be to avoid embarrassment to the defence by joinder of charges. On the appellant's argument the only provision requiring consideration is Section 235(1) which lays down that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person then he may be charged with and tried at one trial for every such offence. This exception like the other exceptions merely permits a joint trial of more offences than one. It neither renders a joint trial imperative nor does it bar or prohibit separate trials. Sub-section (2) of Section 403 of the Code also provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235 (1). No legal objection to the appellant's separate trial is sustainable and his counsel has advisedly not seriously pressed any before us."

The other contention of learned senior counsel for the petitioners before us has already been answered by this Court by upholding both the administrative order dated 15.03.2011 and the NCT notification dated 28.03.2011. This Court having held that the administrative order dated 15.03.2011 of the High court was valid, it is clear that even a Penal Code offence by itself – that is, such offence which is not to be tried with a Prevention of Corruption Act offence - would be within the Special Judge's jurisdiction inasmuch as the administrative order of the High Court gives power to the Special Court to decide all offences pertaining to the 2G Scam. In fact, once this order is upheld, the learned senior advocate's argument based on Section 4(3) of the Prevention of Corruption Act pales into insignificance. This is for the reason that independent of Section 4(3)

of the Prevention of Corruption Act and of the notification dated 28.03.2011, the Special Judge has been vested with the jurisdiction to undertake the trial of all cases in relation to all matters pertaining to the 2G Scam exclusively, which would include Penal Code offences by themselves, so long as they pertain to the 2G Scam. Learned Counsel for the appellant cited ***State (through CBI, New Delhi) v. Jitender Kumar Singh, (2014) 11 SCC 724,*** and paragraph 38 in particular to submit that a Special Judge appointed to try Prevention of Corruption Act cases, cannot try non Prevention of Corruption Act cases unless there is a causal link between such cases and the Prevention of Corruption Act cases, in which case they must be tried together. As has been held by us, once the challenge to the administrative order dated 15.3.2011, is specifically rejected, the offences arising out of the second supplementary chargesheet, being offences under the Penal Code relatable to the 2G scam, can be tried separately only by the Special Judge.

We find that the Special Judge, vide the order dated 2.9.2013, has given cogent reasons for not exercising his discretion to order a joint trial. He stated that the evidence in the main case has almost reached the end and as many as 146 witnesses in the main case and 71 witnesses in the second supplementary chargesheet have already been examined, clubbing the two cases together would result in the wastage of the effort already gone into and would lead to a failure of justice. The learned Judge concluded as follows:-

In the end I may add that it is not obligatory on the Court to hold a joint trial and provisions of these sections are only enabling provisions. An accused cannot insist with ulterior purpose or otherwise that he be tried as co-accused with other accused, that too in a different case. It is only a discretionary power and Court may allow it in a particular case if the interest of justice so demands to prevent miscarriage of justice. In the instant case, neither the facts and allegations are common, nor evidence is common nor the accused were acting with a commonality of purpose and, as such, there is no ground for holding a joint trial. I may also add that holding a joint trial at this stage may lead to miscarriage of justice.

In my humble view, a Court may not deem it desirable to conduct a joint trial, even if conditions of these Sections are satisfied, though not satisfied in the instant case, that is:

a) when joint trial would prolong the trial;
b) cause unnecessary wastage of judicial time; and
c) confuse or cause prejudice to the accused, who had taken part only in some minor offence.

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138. CRIMINAL PROCEDURE CODE, 1973 – Section 227

Omission/non-framing of charges, when may be fatal? It is fatal only if prejudice is caused to the accused and results in miscarriage of justice.

दण्ड प्रक्रिया संहिता, 1973 – धारा 227

आरोपों में कमी / विरचित न किया जाना, कब घातक हो सकता है! यह केवल तभी घातक होता है जब (इसके कारण) अभियुक्त के हितों पर प्रतिकूल प्रभाव कारित होता है और उसके परिणामस्वरूप न्याय की हानि होती है।

Bharamappa Gogi v. Praven Murthy and others

Judgment dated 09.02.2016 passed by the Supreme Court in Criminal Appeal No. 2216 of 2010, reported in 2016 AIR SCW 791

Extracts from the Judgment:

Having regard to the number of persons allegedly involved in the offences, as disclosed by the prosecution, the crimes committed are of murder in the course of robbery together with lurking house trespass and house breaking by night in order to commit offence punishable with imprisonment with common intention. Though Section 397 IPC deals with robbery or dacoity with attempt to cause death or grievous hurt and prescribes punishment by way of imprisonment of not less than seven years, in our view, the High Court ought to have decided the appeals on merit without remanding the case to the trial court for fresh adjudication after framing charge under Section 397 IPC and recording additional evidence, if deemed necessary.

The purpose of framing a charge against an accused person is to acquaint him with the incriminating facts and circumstances proposed to be proved against him in the trial to follow. The principal objective is to afford him an opportunity of preparing his defence against the charge. The possibility of prejudice to the accused arises, if he is not made conversant with the entire gamut of facts constituting the accusations leveled against him, as has been consistently propounded by this Court, amongst others, in ***V.C. Shukla v. State through CBI , (AIR 1980 SC 962.*** Though Section 397 IPC, having regard to the case of the prosecution, may not be wholly irrelevant, the charges framed against the respondents-accused by the trial court, do adequately encompass all essential facts building up the offences imputed against them.

In view of the inclusion of Section 34 IPC in the array of offences, for which the respondents-accused had been charged by the trial court, as well as the facts and the evidence sought to be relied upon by the prosecution, in our estimate, the order of remand was not called for and the appeals should have been decided on merits, on the basis of the charges already framed and the materials on record. The deduction of the High Court that the omission to frame charge under Section 397 IPC has resulted in miscarriage of justice is

unconvincing in the facts of this case. That meanwhile more than a decade has passed since the date of the incident, cannot also be readily over-looked.

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139. CRIMINAL PROCEDURE CODE, 1973 – Section 227

PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 and 15

INDIAN PENAL CODE, 1860 – Section 120-B

Offences under sections 13 (1) (d) r/w/s 13 (2) and 15 of the Prevention of Corruption Act and section 120-B of IPC – Discharge, when justified.

Facts of the case:

Agreement for sale of land from scheme of Indore Development Authority entered into between land owners and certain public servants including Ministers and Additional Secretary – Although accused persons were stated to be intending purchasers, agreements were not signed by them but were signed only by the prospective vendors i.e. the actual owners of the land – FIR lodged against certain public servants including Ministers and Additional Secretary alleging that a conspiracy was hatched between these public servants and owners of the land with the object of conferring undue advantage upon the owners – However, the names of the accused persons were not mentioned in the FIR – Neither consideration was mentioned in the agreement nor evidence showing that there was meeting of minds between the accused persons (appellants) and any of the other accused – Held, mere execution of such agreements cannot be treated as a relevant circumstance against appellant accused persons to justify framing of charges against them – Discharge of appellant accused persons held to be correct.

दंड प्रक्रिया संहिता, 1973 – धारा 227

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 13 और 15

भारतीय दंड संहिता, 1860 – धारा 120–बी

धारा 13(1)(डी) सहपठित धारा 13 (2) और 15 भ्रष्टाचार निवारण अधिनियम और धारा 120–बी भा. द.सं. के अपराध – उन्मोचन कब न्याय संगत है।

मामलों के तथ्य के क्रम समझाया गया।

Deepak Surana and others v. State of Madhya Pradesh

Judgment dated 08.02.2016 passed by the Supreme Court in Criminal Appeal No. 128 of 2016, reported in 2016 AIR SCW 1008

Extracts from the Judgment:

Land admeasuring about 22.56 acres, situated at Mumbai-Agra Road in Indore belonging to one Smt. Sohan Kumari Sankhla and her son was subject

matter of acquisition by the Indore Town Improvement Trust (subsequently, Indore Development Authority). The challenge in that behalf was pending in the High Court of Madhya Pradesh in Writ Petition No.1181 of 1988, during which pendency, a proposal was initiated by the then Additional Secretary in the Department of Housing on behalf of the State Government to release 7 acres of land to the land owners on no profit no loss basis. In view of such proposal, the aforesaid Writ Petition was disposed of by the High Court vide order dated 13.05.1996 directing Indore Development Authority to take appropriate decision in accordance with law.

Soon thereafter, four agreements for sale of certain parcels from the aforesaid land, admeasuring 5.50 acres in all, were said to have been executed. Though the intending purchasers in said four agreements were stated to be the appellants herein, the agreements in question were not signed by the appellants. The agreements were signed only by the prospective vendors namely, the aforesaid owners of the land.

Despite the aforesaid disposal of the Writ Petition by order dated 13.05.1996, since nothing was done in the matter, the land owners filed Writ Petition No.1437 of 1996 in the High Court submitting inter-alia that Indore Development Authority was avoiding implementation of the direction issued by the State Government. While this matter was so pending, a Public Interest Litigation being Writ Petition No. 511 of 1997 was filed challenging the decision of the State Government to release a portion of the land. This Writ Petition prayed for direction that the lands from the scheme of Indore Development Authority should not be permitted to be released. The High Court had issued notice in the matter and granted ex parte stay as prayed for.

Around this time, an FIR came to be lodged by Special Police Establishment, Lokayukta after conducting preliminary investigation. The basic allegations in this FIR dated 31.03.1998 were to the effect that a conspiracy was hatched between certain public servants including the then Ministers, Additional Secretary and the owners of the land. The object of that conspiracy was stated to be conferring undue advantage upon the owners of the land. The FIR alleged commission of offences punishable under Sections 13(1)(d) read with 13(2), Section 15 of the Prevention of Corruption Act, 1988 read with Section 120B of the IPC. It is relevant to note that the names of the appellants do not find any mention in this FIR.

After due investigation, Special Police Establishment, Lokayukta filed charge sheet in Special Case No.9 of 1998 arising from the aforesaid FIR in the Court of Special Judge, Bhopal against 18 accused persons. The appellants were arrayed as accused in this charge sheet.

The Special Judge, Bhopal after considering the entire material on record came to the conclusion that there was no material to proceed against the appellants and therefore he discharged the appellants of the charges levelled

against them. He, however, framed charges against rest of the accused persons including the public servants and the owners of the land. It was observed by the Special Judge that names of the appellants were neither mentioned in the FIR nor in the original complaint, that the agreements relied upon by the prosecution were unilateral in the sense that they did not bear the signatures of the appellants and that there was no mention how the alleged consideration was transferred. The Special Judge thus found that no case was made out by the prosecution to frame appropriate charges against the appellants and he thus vide his order dated 15.01.2008 discharged the appellants.

The aforesaid order of the Special Judge was challenged by the State in Criminal Revision No.649 of 2008. By the judgment and order under appeal, the High Court allowed the said Revision. It was observed that merely because the agreement of sale did not bear the signatures of the appellants it would not mean that the agreements could not be relied upon. Certain material furnished by the appellants in support of their case was not taken into account by the High Court on the ground that the material furnished by the accused could not be considered at the stage of framing of charge.

This appeal challenges the correctness of the decision of the High Court. We have heard learned Senior Advocate in support of the appeal and learned Advocate for the respondent-State. We have gone through the entire record and considered rival submissions.

In the present case, the agreements relied upon by the prosecution do not bear the signatures of the appellants. It is undoubtedly true that in ***Aloka Bose v. Parmatma Devi, AIR 2009 SC 1527***, it has been observed that an agreement of sale signed by the vendor alone is enforceable by the purchaser named in the agreement. But the question here is whether the appellants could be said to be involved in the conspiracy. The agreements in question were not even recovered from the custody of the appellants and were recovered from the vendors themselves. The agreements being unilateral and not bearing the signatures of the appellants, mere execution of such agreements cannot be considered as a relevant circumstance against the appellants. There is nothing on record to indicate that the consideration mentioned in the agreement could be traced to the appellants, nor is there any statement by any of the witnesses suggesting even proximity or meeting of minds between the appellants and any of the other accused. In the circumstances, the view that weighed with the Special Judge was quite correct. The High Court was not justified in setting aside the order passed by the Special Judge. In our considered view, the material on record completely falls short of and cannot justify framing of charges against the appellants.

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140. CRIMINAL PROCEDURE CODE, 1973 – Section 357-A

Compensation to rape victim – Quantum, determination of – Prevailing practice of awarding different amounts in between Rs. 20,000 to Rs. 10 lac as compensation needs to be introspected by all the States and Union Territories – Further held, they should consider and formulate a uniform scheme especially for rape victims in the light of the scheme framed in the State of Goa.

दण्ड प्रक्रिया संहिता, 1973 – धारा 357–ए

बलात्संग पीड़ित को प्रतिकर – मात्रा का निर्धारण – 20,000/– रूपये से 10 लाख रूपयें तक विभिन्न राषि आवार्ड करने की वर्तमान प्रचलित परिपाठी पर सभी राज्यों व केन्द्र षासित प्रदेषों को विचार करने की आवष्यकता है – यह भी अभिनिर्धारित किया गया कि उन्हें विचार करके एक सामान्य योजना विषेषकर बलात्संग पीड़ितो के लिए गोवा राज्य द्वारा बनाई गई योजना के प्रकाष में बनाना चाहिए।

Tekan alias Tekram v. State of Madhya Pradesh (now Chhattisgarh)

Judgment dated 11.02.2016 passed by the Supreme Court in Criminal Appeal No. 884 of 2015, reported in 2016 AIR SCW 817

Extracts from the Judgment:

Perusal of the victim compensation schemes of different States and the Union Territories, it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amount ranging from Rs.20,000/- to Rs.10,00,000/- as compensation for the offence of rape under section 357A needs to be introspected by all the States and the Union Territories. They should consider and formulate a uniform scheme specially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs.10,00,000/-.

While going through different schemes for relief and rehabilitation of victims of rape, we have also come across one Scheme made by the National Commission of Women (NCW) on the direction of this court in ***Delhi Domestic Working Women's Forum v. Union of India and ors. [Writ Petition (Crl) No. 362/93],*** whereby this Court inter alia had directed the National Commission for Women to evolve a "scheme" so as to wipe out the tears of unfortunate victims of rape. This scheme has been revised by the NCW on 15th April 2010. The application under this scheme will be in addition to any application that may be made under Section 357, 357A of the Code of Criminal Procedure as provided in paragraph 22 of the Scheme. Under this scheme maximum of Rs.3,00,000/- (Three lakhs) can be given to the victim of the rape for relief and rehabilitation in special cases like the present case where the offence is against an handicapped woman who required specialized treatment and care.

The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her Village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.

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141. CRIMINAL PROCEDURE CODE, 1973 – Sections 407 and 408

Transfer petition after commencement of trial, maintainability and permissibility of – Law explained – Sustenance of majesty of law by all concerned is necessary – The power to transfer has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so, to provide credibility to the trial and where there is a real apprehension of miscarriage of justice.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 407 और 408

विचारण प्रारंभ होने के बाद अंतरण याचिका का प्रचलनषील और अनुमत योग्य होना – विधि समझाई गई – कानून के प्रभुत्व की पुष्टि सभी संबंधित द्वारा होना आवष्यक है – अंतरण की शक्तियों का प्रयोग सावधानीपूर्वक और अपवाद स्वरूप परिस्थितियों में करना चाहिए जहाँ ऐसा करना विचारण की विष्वनीयता उपलब्ध करावाने के लिए आवष्यक होता है और जहाँ न्याय की हानि की वास्तविक आषंका हो।

Usmangani Adambhai Vahora v. State of Gujarat and another

Judgment dated 08.01.2016 passed by the Supreme Court in Criminal Appeal No. 1592 of 2015, reported in 2016 AIR SCW 336

Extracts from the Judgment:

In ***Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand, (2013) 8 SCC 593*** the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage:-

> "Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-à-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of

> the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."

The aforesaid passage, as we perceive, clearly lays emphasis on sustenance of majesty of law by all concerned. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. (See : ***Nahar Singh Yadav and another v. Union of India and others, AIR 2011 SC 1549***)

In the instant case, we are disposed to think that apprehension that has been stated is absolutely mercurial and cannot remotely be stated to be reasonable. The learned single Judge has taken an exception to the remarks given by the learned trial judge and also opined about non-examination of any witness by him. As far as the first aspect is concerned, no exception can be taken to it. The learned Sessions Judge, while hearing the application for transfer of the case, called for remarks of the learned trial judge, and in such a situation, he is required to give a reply and that he has done. He is not expected to accept the allegations made as regards his conduct and more so while nothing has been brought on record to substantiate the same. The High Court could not have deduced that he should have declined to conduct the trial. This kind of observation is absolute impermissible in law, for there is no acceptable reason on the part of the learned trial judge to show his disinclination. Solely because an accused has filed an application for transfer, he is not required to express his disinclination. He is required under law to do his duty. He has to perform his duty and not to succumb to the pressure put by the accused by making callous allegations. He is not expected to show unnecessary sensitivity to such allegations and recuse himself from the case. If this can be the foundation to transfer a case, it will bring anarchy in the adjudicatory process. The unscrupulous litigants will indulge themselves in court haunting. If they are allowed such room, they do not have to face the trial before a court in which they do not feel comfortable. The High Court has gravely erred in this regard. So far as the non-examination of the witnesses is concerned, as the factual score would uncurtain, the matter had travelled to the High Court in revision assailing the order passed under Section 319 CrPC. Be that as it may, the High Court has not adverted to the issue who was seeking adjournment and what was the role of the learned trial

judge. Grant of adjournment could have been dealt with by the High Court in a different manner. It has to be borne in mind that a judge who discharges his duty is bound to commit errors. The same have to be rectified. The accused has never moved the superior court seeking its intervention for speedy trial. The High Court has innovated a new kind of approach to transfer the case. The High Court should have kept in view the principles stated in ***K.P. Tiwari v. State of M.P., AIR 1997 SC 1157*** which are to the following effect:-

> "... It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks– more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

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142. CRIMINAL PROCEDURE CODE, 1973 – Section 433-A

(i) Power to grant remission, restriction thereon and 'special category', connotation of – Under section 433-A of the Code, a period prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and upto the end of one's life span – Death row convicts whose death sentence is commuted to life imprisonment can be categorized as 'special category' beyond application of remission. [*Sangeet and anr. v. State of Haryana, AIR 2013 SC 447* overruled].

(ii) Remission of sentence under Penal Code, power of – Whole investigation was carried out by the CBI – It is the Centre and not the State that has primacy in the matter of grant of remission – Further held, State in its right as Appropriate Government, cannot *suo motu* grant remission without concurrence of the Central Government.

(iii) Imprisonment for life, meaning of – Subject to right to claim remission etc., it means imprisonment for rest of life.

(iv) Commutation, remission of sentence – Appropriate Government, who may be? Law explained – Offence relating to State subject i.e. public order etc. – The State Government would be the Appropriate Government.

(v) Whether Appropriate Government can exercise power to suspend or remit *suo motu*? Held, No – Further held, it can only be initiated based on an application of the persons convicted as provided under section 432 (2) of the CrPC.

(vi) Power of remission under sections 432, 433, 433A, 434 and 435 of CrPC *vis-a-vis* exercise of power under Article 32 of the Constitution, comparison between – Power under Article 32 is independent of executive power of the State – Power of remission always vests with the State Executive – Apex Court at best can issue direction to consider any claim for remission and it cannot grant any remission and provide for premature release.

(vii) Power to grant remission, exercise of – Appropriate Government may exercise such power even after parallel power is exercised by President/Governor – Further held, Supreme Court cannot exercise such power under Article 32 of the Constitution.

(viii) Distinction between 'earned remission' and 'remission by Appropriate Government' – Explained.

(ix) Power to impose a modified punishment providing for any specific term of incarceration or till the end of convict's life, exercise of – Power derived from the IPC for any modified punishment within the punishment provided for in the IPC for such specified offences can only be exercised by the High Court and in the event of further appeal, only by the Supreme Court and not by any other Court in this country.

दण्ड प्रक्रिया संहिता, 1973 – धारा 433 – ए

(i) लघुकरण की शक्ति पर प्रतिबंध और 'विषेष श्रेणी' का अर्थ समझाया गया।

(ii) दण्ड संहिता के अधीन दिये गये दण्ड का लघुकरण करने की शक्ति – समझाई गई।

(iii) आजीवन कारावास का अर्थ – बतलाया गया।

(iv) दण्ड का लघुकरण – समुचित सरकार कौन है – विधि समझाई गई।

(v) क्या समुचित सरकार दण्ड को निलंबित या कम करने की शक्ति का स्वतः प्रयोग कर सकती है ? अभिनिर्धारित किया गया, नहीं – यह भी अभिनिर्धारित किया गया कि दोषसिद्ध व्यक्ति के धारा 432 (2) दंप्रसं के प्रावधान अनुसार आवेदन के आधार पर ही ऐसा किया जा सकता है।

(vi) धारा 432, 433, 433ए, 434 और 435 दंप्रसं की शक्तियाँ तथा संविधान के अनुच्छेद 32 की शक्तियों के बीच तुलना – समझाई गई।

(vii) लघुकरण की शक्ति का प्रयोग – समझाया गया।

(viii) 'अर्जित लघुकरण' और 'समुचित सरकार द्वारा लघुकरण' के बीच का अंतर – समझाया गया।

(ix) परिवर्तित दण्ड अधिरोपित करने की शक्ति स्पष्ट की गई।

Union of India v. V. Sriharan alias Murugun and others

Judgment dated 02.12.2015 passed by the Supreme Court in Writ Petition (Cri.) No. 48 of 2014, reported in 2015 AIR SCW 6605

Extracts from the Judgment:

It must be noted that the nature of requirement contemplated and prescribed in Section 435(1) and (2) is distinct and different. As because the expression ''Concurrence'' is used in subsection (2) it cannot be held that the expression ''Consultation'' used in sub-section (1) is lesser in force. As was pointed out by us in sub para 'n', the situations arising under sub-section (1) (a) to (c) will have far more far reaching consequences if allowed to be operated upon without proper check. Therefore, even though the expression used in sub-section (1) is 'Consultation', in effect, the said requirement is to be expressed far more strictly and with utmost care and caution, as each one of the sub-clauses (a) to (c) contained in the said sub-section, if not properly applied in its context may result in serious violation of Constitutional mandate as has been set out in Article 355 of the Constitution. It is therefore imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of Central Government, it will assume primacy and consequently the process of ''Consultation'' should in reality be held as the requirement of ''Concurrence''.

Answer to the preliminary objection as to the maintainability of the Writ Petition: Writ Petition at the instance of Union of India is maintainable.

Answers to the questions referred in seriatim

Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of ***Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka, AIR 2008 SC 3040,*** a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Ans. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court.

We hold that the ratio laid down in ***Swamy Shraddananda*** (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.

Question No.52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

Ans. The exercise of power under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government.

Question Nos. 52.3, 52.4 and 52.5

52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?

52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in ***G.V. Ramanaiah v. The Superintendent of Central Jail Rajahmundry and others, AIR 1974 SC 31*** should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government.

Question 52.6 Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the

procedure prescribed in subsection (2) of the same section is mandatory or not?

Ans. No suo motu power of remission is exercisable under Section 432(1) of Code of Criminal Procedure It can only be initiated based on an application of the person convicted as provided under Section 432 (2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

Question No.52.7 Whether the term "Consultation" stipulated in Section 435(1) of the Code implies "Concurrence"?

Ans. Having regard to the principles culled out in paragraph 160 (a) to (n), it is imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of ''Consultation'' in reality be held as the requirement of ''Concurrence''.

We thus answer the above questions accordingly.

The convict undergoing the life imprisonment can always apply to the 2007(13) SCC 606 concerned authority for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 Cr.P.C. and the authority would be obliged to consider the same reasonably. This was settled in the case of ***Gopal Vinayak Godse v. The State of Maharashtra and others, AIR 1961 SC 600*** which view has since then been followed consistently in ***State of Haryana v. Mahender Singh, 2007 AIR SCW 6988, State of Haryana v. Jagdish, AIR 2010 SC 1690, Sangeet v. State of Haryana, AIR 2013 SC 447*** and ***Laxman Naskar v. Union of India and others, AIR 2000 SC 986***. The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in ***Godse*** (supra). All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner.

Our Answer to sub question (a) of Question in Para 52.1 is:

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

Answer: The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 of 161 of the Constitution or under Section 432 Cr. P.C. and the authority would be obliged to consider the same reasonably.

Re: sub-question (b) of Question No.1 in Para 52.1

(b) Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda*** (supra), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

For the purpose of ascertaining which Government would be the Appropriate Government as defined under Section 432(7), what is to be seen is the sentence imposed by the criminal court under the Code of Criminal Procedure or any other law which restricts the liberty of any person or imposes any liability upon him or his property. If such sentence imposed is under any of the Sections of the Penal Code, for which the Executive Power of the Central Government is specifically provided for under a Parliament enactment or prescribed in the Constitution itself then the 'Appropriate Government' would be the Central Government. To understand this position more explicitly, we can make reference to Article 72(1)(a) of the Constitution which while specifying the power of the Executive head of the country, namely, the President it is specifically provided that the power to grant pardons, etc. or grant of remissions etc. or commutation of sentence of any person convicted of any offence in all cases where the punishment or sentence is by a Court Martial, then it is clear to the effect that under the Constitution itself the Executive Power is specifically conferred on the Centre. While referring to various Constitutional provisions, we have also noted such express Executive Power conferred on the Centre in respect of matters with reference to which the State is also empowered to make laws. If under the provisions of the Code the sentence is imposed, within the territorial jurisdiction of the State concerned, then the 'Appropriate Government' would be the State Government.sTherefore, to ascertain who will be Appropriate Government whether the Centre or the State, the first test should be under what provision of the Code o f Criminal Procedure the criminal Court passed the order of sentence. If the order of sentence is passed under any other law which restricts the liberty of a person, then which is that law under which the sentence was passed to be ascertained. If the order of sentence imposed any liability upon any person or his property, then again it is to be verified under which provision of the Code of Criminal Procedure or any other law under which it was passed will have to be ascertained. In the ascertainment of the above questions, if it transpires that the implication to the proviso to Article 73(1)(a) gets attracted, namely, specific conferment of Executive Power with the Centre, then the Central Government will get power to act and consequently, the case will be covered by Section 432(7) (a) of the Code and as a sequel to it, Central Government will be the 'Appropriate Government' to pass orders under Sections 432 and 433 of the Code of Criminal Procedure.

Therefore, whether under any of the provisions of the Criminal Procedure Code or under any Special enactment enacted by the Central Government by virtue of its enabling power to bring forth such enactment even though the State Government is also empowered to make any law on that subject, having regard

to the proviso to Article 73(1)(a), if the conviction is for any of the offences against such provision contained in the Code of Criminal Procedure or under such special enactments of the Centre if the Executive Power is specified in the enactment with the Central Government then the Appropriate Government would be the Central Government. Under Section 432(7) (b) barring cases falling under 432(7)(a) in all other cases, where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, then alone the Appropriate Government would be the State.

Therefore, keeping the above prescription in mind contained in Section 432 (7) and Section 55A of the IPC, it will have to be ascertained whether in the facts and circumstances of a case, where the Criminal Court imposes the sentence and if such sentence pertains to any Section of the Penal Code or under any other law for which the Executive Power of the center extends, then in those cases the Central Government would be the 'Appropriate Government'. Again in respect of cases, where the sentence is imposed by the Criminal Court under any law which falls within the proviso to Article 73(1)(a) of the Constitution and thereby the Executive Power of the Centre is conferred and gets attracted, then again, the Appropriate Government would be the Centre Government. In all other cases, if the sentence order is passed by the Court within the territorial jurisdiction of the concerned State, the concerned State Government would be the Appropriate Government for exercising its power of remission, suspension as well as commutation as provided under Sections 432 and 433 of the Code of Criminal Procedure. Keeping the above prescription in mind, every case will have to be tested to find out which is the Appropriate Government State or the Centre.

Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person concerned as provided under Section 432 (2) and after duly following the procedure prescribed under Section 432 (2). We, therefore, fully approve the declaration of law made by this Court in ***Sangeet*** (supra) in paragraph 61 that the power of Appropriate Government under Section 432 (1) Code of Criminal Procedure cannot be suo motu for the simple reason that this Section is only an enabling provision. We also hold that such a procedure to be followed under Section 432 (2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the Appropriate Government. We, therefore, answer the said question to the effect that the suo motu power of remission cannot be exercised under Section 432 (1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

We are however concerned in the present case with offence under Section 302 IPC simplicitor. The respondents-convicts stand acquitted insofar as offences under the TADA are concerned. We find force in the submissions of learned Senior Advocate for the respondents that the offence under Section 302 IPC is directly related to "public order" under Entry 1 of List II of the 7th Schedule to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the executive power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence under Section 302 IPC is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the executive power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from ***K.M. Nanavati v. State of Bombay, AIR 1961 SC 112*** in matters concerning offences under Section 302 IPC it is the Governor under Article 161 or the State Government as appropriate Government under the Cr.P.C. who have been exercising appropriate powers.

While stoutly resisting the said submission made on behalf of the Union of India, learned Senior Counsel, who appeared for the State of Tamil Nadu contended that in the case on hand, this Court while commuting the death sentence of some of the convicts did not exercise the Executive Power of the State, and that it only exercised its judicial power in the context of breach of Article 21 of the Constitution. It was further contended that if the stand of Union of India is accepted then in every case where this Court thought it fit to commute sentence for breach of Article 21 of the Constitution, that would foreclose even the right of a convict to seek for further commutation or remission before the Appropriate Government irrespective of any precarious situation of the convict, i.e., even if the physical condition of the convict may be such that he may be vegetable by virtue of his old age or terminal illness. It was also pointed out that in ***V. Sriharan alias Murugan v. Union of India & ors., AIR 2014 SC 1368*** dated 18.02.2014, this Court while commuting the sentence of death into one of life also specifically observed that such commutation was independent of the power of remission under the Constitution, as well as, the Statute. In this context, when we refer the power of commutation/remission as provided under Code of Criminal Procedure, namely, Sections 432, 433, 433A, 434 and 435, it is quite apparent that the exercise of power under Article 32 of the Constitution by this Court is independent of the Executive Power of the State under the Statue. As rightly pointed out by learned Senior Counsel for the respondents in his submissions made earlier, such exercise of power was in the context of breach of Article 21 of the Constitution. In the present case, it was so exercised to commute the sentence of death into one of life imprisonment. It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory

or Constitutional authority. Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional violation or rejection of a claim for remission, without any justification or colourful exercise of power, in either case by the Executive Authority of the State, there may be scope for reviewing such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. To quote a few, reference can be had to the decisions reported as ***State of Punjab v. Kesar Singh, AIR 1996 SC 2512 Delhi Administration (now NCT of Delhi) v. Manohar Lal, AIR 2002 SC 3088*** which were followed in ***State (Government of NCT of Delhi) v. Prem Raj, (2003) 7 SCC 121***. Paragraph 13 of the last of the decision can be quoted for its lucid expression on this issue which reads as under:

> "13. An identical question regarding exercise of power in terms of Section 433 of the Code was considered in ***Delhi Admn.(now NCT of Delhi) v. Manohar Lal*** (supra). The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In ***Kesar Singh*** (supra) this Court observed as follows [though it was in the context of Section 433(b)]:
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> "The mandate of Section 433 Code of Criminal Procedure enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts…… That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside."

The first part of the said question pertains to the power of the Appropriate Government to grant remission after the parallel power is exercised under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of Code of Criminal Procedure on the other needs to be noted. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advise of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any Court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the president of the Union and the Governor of the State while functioning as the Executive Head of the respective bodies, only have to act based on the advice of the Council of Ministers of the Union or the State. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Code of Criminal Procedure though the exercise of the power under both the provisions vests with the Appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power under Sections 432 and 433 is nothing but the one exercisable by the same authority as the Executive Head, it must be noted that the real position is different. For instance, when we refer to Section 432, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further under sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 it is provided therein that the Appropriate Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. One significant feature in the Constitutional power which is apparent is that the President is empowered under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of the State. Whereas under Sections 432 and 433 of the Code of Criminal Procedure the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of

the power under Sections 432 and 433 of Code of Criminal Procedure when once similar such power was exercised by the Constitutional Authorities under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect.

Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms.

The difference between earned remissions "for good behaviour" and the remission of sentence under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accrues and accumulates to the credit of the prisoner without there being any specific order by the appropriate Government in an individual case while the one under Section 432 requires specific assessment in an individual matter and is case specific. Could such exercise be undertaken under Section 432 by the appropriate Government on its own, without there being any application by or on behalf of the prisoner? This issue has already been dealt with in following cases by this Court.

A]. In ***Sangeet*** (supra), it was observed in paras 59, 61 and 62 as under:-

> "59. There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 CrPC. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 CrPC lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in ***Samjuben Gordhanbhai Koli v. State of Gujarat, AIR 2010 SC (Supp)*** 85 when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 CrPC.
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> 61. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 Cr.P.C. cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially

pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in State of Haryana v. Mohinder Singh, AIR 2000 SC 890 that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Cr.P.C does provide this check on the possible misuse of power by the appropriate Government."

B] In ***Mohinder Singh v. State of Punjab, (2013) 3 SCC 294*** the observations in para 27 were to the following effect:

"27. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be possible subject to fulfilment of certain

conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in ***Sangeet*** (supra), there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years' or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code."

C] In ***Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay, (2013) 13 SCC 1***, it was observed in paras 921 and 922 as under:

"921. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court, in various decisions, has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government.

922. As rightly observed by this Court in ***Sangeet*** (supra), there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years' imprisonment. A convict undergoing

life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code, which in turn is subject to the procedural checks mentioned in the said provision and to further substantive check in Section 433-A of the Code."

That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in ***Sangeet*** (supra) that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.

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143. CRIMINAL PROCEDURE CODE, 1973 – Section 436-A

CONSTITUTION OF INDIA – Article 21

Overcrowding of prisons – Inhuman conditions therein – Unnatural deaths in prisons – Prisoners, like all human beings, deserve to be treated with dignity – Directions issued in this regard including directions to Member Secretary, SLSA, in co-ordination with Secretary, DLSA to ensure that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts and Legal Aid for the poor does not become poor Legal Aid.

Secretaries of DLSA directed further to look into the issue of release of undertrial prisoners in compoundable offences by exploring the possibility of compounding of offences rather than requiring a trial to take place.

दण्ड प्रक्रिया संहिता, 1973 – धारा 436–ए

भारत का संविधान – अनुच्छेद 21

जेलों में भीड़ – वहां की अमानवीय दषाएँ – कैदियों की अप्राकृतिक मृत्यु – कैदी भी अन्य मनुष्य के समान होते हैं और वे भी सम्मान के साथ बर्ताव करने के हकदार होते हैं – मामले में सदस्य सचिव, राज्य विधिक सेवा प्राधिकरण को इस संबंध में निर्देष जारी किए गये कि वे जिला विधिक सेवा प्राधिकरण के सचिव से सहयोग करके यह सुनिष्चित करें कि सक्षम अधिवक्तागण की पर्याप्त संख्या में एक सूची तैयार की जाये जो विचाराधीन बंदियों को सहायता कर सके और गरीब लोगों को विधिक सहायता मिल सके।

जिला विधिक सेवा प्राधिकरण के सचिवों को ये निर्देष भी दिये गये कि वे शमनीय अपराधों के विचाराधीन बंदियों के मामलों में समझौते की संभावना देखे और एक विचारण की बजाय ऐसे मामले में समझौता हो सके इसकी संभावना पता करे।

Re - Inhuman Conditions in 1382 Prisons

Order dated 05.02.2016 passed by the Supreme Court in Writ Petition (Civil) No. 406 of 2013, reported in 2016 (1) Crimes 153 (SC)

Extracts from the Order:

Prison reforms have been the subject matter of discussion and decisions rendered by this Court from time to time over the last 35 years. Unfortunately, even though Article 21 of the Constitution requires a life of dignity for all persons, little appears to have changed on the ground as far as prisoners are concerned and we are once again required to deal with issues relating to prisons in the country and their reform.

As far back as in 1980, this Court had occasion to deal with the rights of prisoners in ***Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488***. In that decision, this Court gave a very obvious answer to the question whether prisoners are persons and whether they are entitled to fundamental rights while

in custody, although there may be a shrinkage in the fundamental rights. This is what this Court had to say in this regard:

> "Are prisoners persons? Yes, of course. To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognises rights of prisoners in the International Covenant on Prisoners' Rights to which our country has signed assent. In ***Batra case, (1978) 4 SCC 494***, this Court has rejected the hands-off doctrine and it has been ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration."

It is clear that in spite of several orders passed by this Court from time to time in various petitions, for one reason or another, the issue of overcrowding in jails continues to persist and apart from anything else, appears to have persuaded Justice R.C Lahoti to address a letter of the Chief Justice of India on this specific issue of overcrowding in prisons.

We cannot forget that the International Covenant on Civil and Political Rights, to which India is a signatory, provides in Article 10 that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Similarly, Article 5 of the Universal Declaration of Human Rights (UDHR) provides: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

With reference to the UDHR and the necessity of treating prisoners with dignity and as human beings, Vivien Stern (now Baroness Stern) says in A Sin Against the Future: Imprisonment in the World as follows:

> "Detained people are included because human rights extend to all human beings. It is a basic tenet of international human rights law that nothing can put a human being beyond the reach of certain human rights protections. Some people may be less deserving than others. Some may lose many of their rights through having been imprisoned through proper and legal procedures. But the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill treatment or torture remain. There is a minimum standard for the way a state treats people, whoever they are. No one should fall below it."

In a similar vein, it has been said, with a view to transform prisons and prison culture:

> "Treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior actions, will demonstrate an unflagging commitment to human dignity.

> It is that commitment to human dignity that will, in the end, be the essential underpinning of any endeavor to transform prison cultures.". [The Mess *We're In: Five Steps Towards the Transformation of Prison Cultures* by Lynn S. Branham, Indiana Law Review, Vol. 44, p. 703, 2011]

The sum and substance of the aforesaid discussion is that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions need to be issued by this Court and these are as follows:

1. The Under Trial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31st March, 2016. The Secretary of the District Legal Services Committee should attend each meeting of the Under Trial Review Committee and follow up the discussions with appropriate steps for the release of undertrial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.
2. The Under Trial Review Committee should specifically look into aspects pertaining to effective implementation of Section 436 of the Cr.P.C. and Section 436A of the Cr.P.C. so that undertrial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Under Trial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first time offenders so that they have a chance of being restored and rehabilitated in society.
3. The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.
4. The Secretary of the District Legal Services Committee will also look into the issue of the release of undertrial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.
5. The Director General of Police/Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc.
6. The Ministry of Home Affairs will ensure that the Management Information System is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

7. The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein.

8. The Under Trial Review Committee will also look into the issues raised in the Model Prison Manual 2016 including regular jail visits as suggested in the said Manual.

We direct accordingly.

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144. CRIMINAL TRIAL:

INDIAN PENAL CODE, 1860 – Section 376

(i) Recording of evidence by video-conferencing, validity of – Recording of testimony of witness by video-conferencing is valid, provided proper safeguards are followed.

(ii) Procedure and safeguards for recording of testimony of a witness, who was a foreign national, by video-conferencing stated.

(iii) Furnishing of recorded videographic testimony to accused, necessity of – Furnishing it to an accused may eventually turn out to be a cumbersome process, if the same has to be replicated in all cases, specially because the procedure increasingly being adopted, by allowing the accused to participate in their trials, from jail premises also – Furthermore, it is likely to lead more record, which will also have to be maintained for its safe custody.

दांडिक विचारण :

भारतीय दण्ड संहिता, 1860 – धारा 376

(i) वीडियो कांफ्रेसिंग द्वारा लेखबद्ध साक्ष्य की वैधता – यदि उचित सुरक्षा उपायों का पालन किया जाता है तो एक साक्षी की वीडियो कांफ्रेसिंग के माध्यम से ली गई साक्ष्य वैध होती है।

(ii) एक साक्षी जो विदेषी राष्ट्र का है उसका कथन वीडियो कांफ्रेसिंग से लेने के बारे में प्रक्रिया व सुरक्षा उपाय बतलाये गये।

(iii) अभियुक्त को अभिलिखित वीडियो कांफ्रेसिंग कथन प्रदान करने की आवष्यकता समझाई गई।

Sujoy Mitra v. State of West Bengal

Judgment dated 02.12.2015 passed by the Supreme Court in Criminal Appeal No. 1620 of 2015, reported in 2016 (1) Crimes 105 (SC)

Extracts from the Judgment:

We have heard learned counsel for the rival parties at some length, and are satisfied, that the following procedure should be adopted, in addition to the steps and safeguards provided in the impugned order, while recording the statement of PW5:

I) 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.

II) 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.

III) 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.

IV) 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. V) 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.

VI) 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.

VII) 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.

VIII) 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.

We are satisfied, that the aforesaid parameters will meet the ends of justice, and that no further inputs are required. Needless to mention, that the procedure for recording the statement of PW5, as noticed above, was finalised with the invaluable assistance of the learned counsel for the rival parties.

In recording our conclusions in regulating the above procedure, the learned senior counsel for the appellant emphasized, that recording of the video-graphic testimony of the witness should be furnished to the appellant, and it is only thereupon, that the direction contained in the judgment rendered by this Court in ***State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 SCC 601***, can be deemed to have been fully complied with. The instant contention of the learned senior counsel for the appellant is based on a variety of reasons including the fact, that the statement may be recorded in a language which is not known, and/or is not properly understandable to the accused. And even if the statement of the witness is recorded in English, because of different accents of English (based on the countries of their origin), it may not be possible to fully understand the testimony of the concerned witness.

Having given our thoughtful consideration to the instant contention advanced at the hands of the learned senior counsel for the appellant, we find no reason whatsoever to agree with the same. In case of there being any difficulty in recording the testimony of the concerned witness, it is always open to the trial Court to seek appropriate assistance (based on, or independently of such plea raised by a party to the proceeding), as may be required by the trial Court, for a truthful recording of the testimony of the concerned witness.

We are of the view, that furnishing recorded video-graphic testimony to an accused may eventually turn out to be a cumbersome process, if the same has

to be replicated in all cases. Specially because this procedure is increasingly being adopted, by allowing the accused to participate in their trials, from jail premises also (at certain stages of the trial). And furthermore, it is likely to lead more record, which will also have to be maintained for its safe custody. What has been allowed to the accused herein, is what an ordinary accused would be entitled to, had the statement been recorded by the trial Court itself.

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145. DOWRY PROHIBITION ACT, 1961 – Section 6

Criminal proceeding under section 6, nature and requirement of – Criminal proceeding under section 6 of the Act is independent of the criminal prosecution under sections 3 and 4 of the Dowry Prohibition Act, however, in absence of specific allegations of entrustment of the dowry amount and articles to accused persons, criminal proceeding under section 6 is not maintainable.

Giving of dowry and the traditional presents at or about the time of wedding does not in any way raise the presumption that such a property was thereby entrusted and put under the dominion of the parents-in-law of the bride or other close relations so as to attract ingredients of section 6 of the Act.

दहेज प्रतिषेध अधिनियम, 1961 – धारा 6

धारा 6 के अधीन दांडिक कार्यवाही की प्रकृति और अनिवार्यता – धारा 6 अधिनियम के अधीन दांडिक कार्यवाही धारा 3 और 4 दहेज प्रतिषेध अधिनियम के अधीन दांडिक अभियोजन से एक स्वतंत्र (कार्यवाही) होती है, दहेज की राषि और सामानों का अभियुक्तगणों को न्यस्त किये जाने के बारे में विषिष्ट अभिकथन के अभाव में धारा 6 के अधीन दांडिक कार्यवाही चलने योग्य नहीं होती हैं।

दहेज और रूढ़ीगत भेंट के अंतर को बतलाया गया।

Bobbili Ramakrishna Raju Yadav & ors. v. State of Andhra Pradesh represented by ITS Public Prosecutor, High Court of A.P., Hyderabad, A.P. and another

Judgment dated 19.01.2016 passed by the Supreme Court in Criminal Appeal No. 45 of 2016, reported in 2016 (1) Crimes 142 (SC)

Extracts from the Judgment:

Section 6 of the Dowry Prohibition Act lays down that where the dowry is received by any person other than the bride, that person has to transfer the same to the woman in connection with whose marriage it is given and if he fails to do so within three months from the date of the marriage, he shall be punished for violation of Section 6 of the Dowry Prohibition Act. Section 6 reads as under:-

6. ***Dowry to be for the benefit of the wife or her heirs*** .-

(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman-

(a) if the dowry was received before marriage, within [three months] after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within [three months] after the date of its receipts; or

(c) if the dowry was received when the woman was a minor, within [three months] after she has attained the age of eighteen years; and pending such transfer, shall hold it in trust for the benefit of the woman.

[(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefore, [or as required by sub-section (3),] he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine [which shall not be less than five thousand rupees, but which may extend to ten thousand rupees] or with both.]

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being:

[Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall,-

(a) if she has no children, be transferred to her parents; or

(b) if she has children, be transferred to such children and pending such transfer, be held in trust for such children.]

If the dowry amount or articles of married woman was placed in the custody of her husband or in-laws, they would be deemed to be trustees of the same. The person receiving dowry articles or the person who is dominion over the same, as per Section 6 of the Dowry Prohibition Act, is bound to return the same within three months after the date of marriage to the woman in connection with whose marriage it is given. If he does not do so, he will be guilty of a dowry offence under this Section. The section further lays down that even after his conviction he must return the dowry to the woman within the time stipulated in the order.

In ***Pratibha Rani v. Suraj Kumar & anr., (1985) 2 SCC 370,*** this Court observed as follows:-

> "20. We are clearly of the opinion that the mere factum of the husband and wife living together does not entitle either of them to commit a breach of criminal law and if one does then he/she will be liable for all the consequences of such breach. Criminal law and matrimonial home are not strangers. Crimes committed in matrimonial home are as much punishable as anywhere else. In the case of stridhan property also, the title of which always remains with the wife though possession of the same may sometimes be with the husband or other members of his family, if the husband or any other member of his family commits such an offence, they will be liable to punishment for the offence of criminal breach of trust under Sections 405 and 406 of the IPC.
> After all how could any reasonable person expect a newly married woman living in the same house and under the same roof to keep her personal property or belongings like jewellery, clothing etc., under her own lock and key, thus showing a spirit of distrust to the husband at the very behest. We are surprised how could the High Court permit the husband to cast his covetous eyes on the absolute and personal property of his wife merely because it is kept in his custody, thereby reducing the custody to a legal farce. On the other hand, it seems to us that even if the personal property of the wife is jointly kept, it would be deemed to be expressly or impliedly kept in the custody of the husband and if he dishonestly misappropriates or refuses to return the same, he is certainly guilty of criminal breach of trust, and there can be no escape from this legal consequence...."

It is well-settled that power under Section 482 Cr.P.C. should be sparingly exercised in rare cases. As has been laid down by this Court in the case of ***Madhavrao Jiwajirao Scindia & ors. v. Sambhajirao Chandrojirao Angre & ors., (1988) 1 SCC 692,*** that when a prosecution at the initial stage was asked to be quashed, the test to be applied by the Court was as to whether the uncontroverted allegations as made in the complaint *prima facie* establish the offence. It was also for the Court to take into consideration any special feature which appears in a particular case to consider whether it was expedient and in the interest of justice to permit a prosecution to continue. This was so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and therefore, no useful purpose was likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceedings even though it may be at a preliminary stage.

In the light of the well settled principles, it is to be seen whether the allegations in the complaint in the present case and other materials accompanying the complaint disclose the offence punishable under Section 6 of the Dowry Prohibition Act. Marriage of first appellant and Syamala Rani was solemnized in Vizianagaram on 04.05.2007 and the couple was living in Bangalore. Appellants 2 to 6 – the parents and sisters of appellant No.1 were living in Vizianagaram. It is the contention of the appellants that there are no allegations in the complaint that the 'stridhana articles' were given to appellants 2 to 6 and that they failed to return the same to Syamala Rani. In paras (3) and (4) of the complaint filed by the second respondent, it is alleged that he paid the dowry amount "to the accused and some 'stridhana articles' like double cot and other furniture and utensils required to set up a family". In the complaint, it is vaguely alleged that even after death of deceased-Syamala Rani, the accused started threatening the complainant and that the accused offered to pay an amount of Rs.10,000/- towards full and final settlement. The relevant averments in the complaint in paragraphs (5) and (6) read as under:-

> "The complainant submits that even after the death of the deceased the accused by keeping the dead body on one side, started threatening the complainant and his family members that if they give any report to the police, they will be killed then and there only and they offered to pay an amount of Rs.10,000/- towards full and final settlement. There the complainant, who was in deep shock at the death of his daughter could not answer anything but gave a report to the police.
>
> The complainant submits that he lead several mediations with the accused through his colleagues, whose names are mentioned below for return of the dowry, but the accused did not return the amount and other amounts, given under different heads. A duty cast upon the accused to return those articles and amount, which were presented as dowry on demand made by the accused. The complainant reserves his right to file a fresh complaint against all the accused for return of the dowry."

By reading of the above, it is seen that there are no specific allegations against appellants 2 to 6 that the dowry articles were entrusted to them and that they have not returned the dowry amount and the articles to Syamala Rani. Equally, there are no allegations that those dowry articles were kept in Vizianagaram and used by appellants 2 to 6 who were separately living away from the couple in Bangalore. Even though complainant has alleged that the dowry amount was paid at the house of the accused at Gajapathinagaram, there are no specific allegations of entrustment of the dowry amount and articles to appellants 2 to 6.

Giving of dowry and the traditional presents at or about the time of wedding does not in any way raise a presumption that such a property was thereby entrusted and put under the dominion of the parents-in-law of the bride or other close relations so as to attract ingredients of Section 6 of the Dowry Prohibition Act. As noticed earlier, after marriage, Syamala Rani and first appellant were living in Bangalore at their matrimonial house. In respect of 'stridhana articles' given to the bride, one has to take into consideration the common practice that these articles are sent along with the bride to her matrimonial house. It is a matter of common knowledge that these articles are kept by the woman in connection with whose marriage it was given and used by her in her matrimonial house when the appellants 2 to 6 have been residing separately in Vizianagaram, it cannot be said that the dowry was given to them and that they were duty bound to return the same to Syamala Rani. Facts and circumstances of the case and also the uncontroverted allegations made in the complaint do not constitute an offence under Section 6 of the Dowry Prohibition Act against appellants 2 to 6 and there is no sufficient ground for proceeding against the appellants 2 to 6. Be it noted that appellants 2 to 6 are also facing criminal prosecution for the offence under Sections 498A, 304B IPC and under Sections 3 and 4 of the Dowry Prohibition Act. Even though the criminal proceeding under Section 6 of the Dowry Prohibition Act is independent of the criminal prosecution under Sections 3 and 4 of Dowry Prohibition Act, in the absence of specific allegations of entrustment of the dowry amount and articles to appellants 2 to 6, in our view, continuation of the criminal proceeding against appellants 2 to 6 is not just and proper and the same is liable to be quashed.

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146. EVIDENCE ACT, 1872 – Sections 3, 8, 24 and 27

INDIAN PENAL CODE, 1860 – Section 302

(i) Last seen theory – Law reiterated – If the prosecution establishes the last seen theory by cogent and credible evidence, an inference can be drawn against the accused which may lead to the finding of his guilt.

(ii) Motive, significance and proof of – It is not incumbent on the prosecution to prove the motive for the crime in each and every case – Motive is indicated to heighten the probability of the offence – Further held, proof of motive only adds to the weight and value of evidence adduced by the prosecution – Evidence relating to motive is a corroborative piece of evidence – However, merely in absence of evidence as to motive, the prosecution case cannot be thrown out.

(iii) Extra-judicial confession, evidentiary value of – It is a weak piece of evidence and the Courts are to view it with great care and caution.

(iv) Evidence as to recovery, appreciation of.

Facts of the case:

Accused allegedly gave extra-judicial confession to member of village Gram Panchayat in presence of another person that he had inflicted injuries to deceased – The two witnesses produced the accused before the I.O. and the confession led to the recovery of blood stained clothes from the box lying in the house of the accused and also knife from the field – On examination of the articles in Forensics Science Laboratory, though human blood was detected on clothes of the accused but so far as the blood stained clothes and knife in concerned, the material was disintegrated – Held, since extra-judicial confession is highly doubtful, much weight cannot be attached to the alleged recovery of blood stained clothes and knife.

(v) **Murder – Circumstantial evidence, appreciation of – In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused – The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and in consistent with their innocence (*Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622* and *Bablu alias Mubarik Hussain v. State of Rajasthan, AIR 2007 SC 697* relied on)**

साक्ष्य अधिनियम, 1872 – धाराएं 3, 8, 24 और 27

भारतीय दण्ड संहिता, 1860 – धारा 302

(i) अंतिम बार साथ देखें जाने का सिद्धांत – विधि दोहराई गई – यदि अभियोजन अंतिम बार साथ देखें जाने का सिद्धांत अकाट्य और अविष्वसनीय साक्ष्य द्वारा स्थापित करता है तब अभियुक्त के विरूद्ध अनुमान निकाला जा सकता है जो उसमें दोषी होने के निष्कर्ष की ओर ले जा सकता है।

(ii) हेतुक का महत्व और प्रमाण – अभियोजन के लिए यह आवष्यक नहीं है कि वह प्रत्येक मामले में हेतुक प्रमाणित करे – हेतुक अपराध की सम्भाव्यता को बढ़ाने की ओर इंगित करता है – हेतुक का प्रमाण अभियोजन द्वारा प्रस्तुत साक्ष्य का वजन और मूल्य बढ़ा देता है – हेतुक संबंधित साक्ष्य पुष्टि कारक साक्ष्य होती है – केवल हेतुक के प्रमाण का अभाव होने पर अभियोजन के मामले को फेंका नहीं जा सकता।

(iii) न्यायिकेत्तर संस्वीकृति का साक्ष्यिक मूल्य – यह एक कमजोर साक्ष्य होती है और न्यायालय को इसे अधिक सावधानी से देखना चाहिए।

(iv) जप्ती की साक्ष्य का मूल्यांकन।

मामले के तथ्यों के क्रम में बतलाया गया।

(v) हत्या – परिस्थितिजन्य साक्ष्य का मूल्यांकन – विधि बतलाई गई।

Vijay Shankar v. State of Haryana

Judgment dated 04.08.2015 passed by the Supreme Court in Criminal Appeal No. 337 of 2008, reported in AIR 2015 SC 3686

Extracts from the Judgment:

Prosecution mainly based its case on the circumstances:- (i) motive; (ii) last seen theory; (iii) extra-judicial confession; (iv) trial of dog squad leading to Baithak of the accused and (v) recovery of blood-stained clothes and knife. In the light of the above principles, let us examine whether the prosecution has proved the circumstances by convincing and whether those circumstances unerringly point towards the guilt of the accused.

Motive:- So far as the motive is concerned, Sukhbir Singh (PW 10), brother of the deceased stated that the appellant – Vijay Shankar used to park his cycle on their farm and his brother Satish Kumar had rebuked him about fifteen days prior to the occurrence for parking his cycle. PW-10 further stated that on the intervening night of 16.03.1995/17.03.19955, the appellant came to the farm in an condition and stated that since Satish and Sukhbir are not allowing him to park his cycle and are not allow him to take liquor in their farm, he will not let them to celebrate Holi. The appellant is the neighbour of PW 10 and deceased- Satish Kumar. Allegation of previous enmity between the appellant and the deceased family has not been proved. Excepting PW-10, no other independent witness was examined to prove that Satish Kumar had rebuked the appellant and serious doubts arise as to the motive suggested and the alleged previous enmity.

As per the version of on 16.03.1995, his brother Satish Kumar came to the farm for celebrating the festival of Holi and his children went to the house in village Dujana while Kumar stayed back at the farm and that they celebrated Holi festival by cracking fireworks and continued talking up to wee hours of 17.03.1995 and thereafter he left for his home while Kumar continued to be in the poultry farm. There were three servants in the poultry farm. There were three servants in the poultry farm; two were sleeping in the adjoining room where Satish Kumar was sleeping and the third servant was sleeping in the truck parked at some distance from the farm. None of the farm servants were examined and this again doubts about the evidence of PW-10 and the motive suggested.

In each and every case, it is not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence.

Proof of motive only adds to the weight and value of evidence adduced by the prosecution. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution. In the present case, absence of convincing as to motive makes the court to be circumspect in the matter or assessment of evidence and this aspect was not kept in view by the High Court and the trial court.

Last seen Theory:- The trial court as well as the High Court based the conviction the appellant mainly on the last seen theory relying on the evidence of Vidya Rattan (PW-11) who allegedly saw the appellant on the intervening night of 16.03.1995/17.03.1995 coming out of the room of Satish Kumar. In his evidence, PW-11 stated that on the intervening night of 16.03.1995/17.03.1995 his buffalo was massing from his farmhouse and therefore he went towards village Budha in search of his buffalo. PW-11 stated that it was moonlit night and at about 2.30 a.m., when he reached Dujana bus stop, he saw the appellant-Vijay Shankar coming out of the room of Satish Kumar and could identify the accused in the bulb light which was in the courtyard of the room. PW-11further stated that thereafter he went to village Dieghal in search of his buffalo. PW-11further stated that when he came to Dujana at 3.00 p.m., he the crowd of people at the bus stand and he came to know that on the previous night someone has murdered Satish Kumar by causing knife injuries and after 10/1minutes police came to the spot and PW-11 informed the police what he saw previous night. Prosecution strongly relied upon the evidence of PW-11 to bring home the guilt the accused was last seen with the deceased.

Evidence of PW-11 is assailed contending that PW-11 is not a reliable witness and he being the owner of sixty acres of land and also owning a petrol pump, is quite unbelievable that he went in the midnight from one village to other in search of buffalo. Learned counsel for the placed reliance on the Modis' Medical Jurisprudence and Toxicology 19th Edn. Para (2) at g that according to Tidy, "the best known person cannot be recognized in the clear moonlight beyond a distance of seventeen yards..." and it is quite improbable that PW-11 could see the accused-appellant so clearly from such a long distance.

As the prosecution case mainly revolves around the evidence of PW-11, it is necessary to carefully consider the High Court and the trial court have properly appreciated the evidence of PW-11 and whether the courts below were right in accepting the prosecution case based on evidence of PW-11. PW-11 is a resident of village Dieghal. If we look at the economic position of PW-11, admittedly he owns, sixty acres of land and also a petrol pump. It is quite improbable to believe that he was going alone from village Dujana to Diewhich is at a distance of ten kilometers in the midnight in search his buffalo. Trial court and the High Court erred in holding that the evidence of PW-11cannot be brushed away as even a

rich man may take theft of petty items seriously and may take every effort to search the same. It is unnatural that in the midnight PW-11 went alone without informing anyone taking anyone with him. Further as pointed out by Sukhbir Singh (PW-10) the distance of the room where Satish Kumar was sleeping and the road leading to village Dujana is three killas i.e. three acres the northern side of the room, their fields are situated and as per the version of Vidya Rattan (PW-11) he had the appellant from a distance of twenty five feet in the moonlight and also in the light of electric bulb fixed in the courtyard of the room. It is quite improbable that in the night from such a long distance PW-11 was able identify the accused.

If the prosecution establishes the last seen theory, an inference can be drawn against the accused which may lead accused which may lead to the of his guilt. Considering the evidence of PW-11 and the improbabilities, evidence of PW-11inspires confidence nor does it lead to a conclusion that the appellant was last seen with the deceased. As noticed earlier, PW-10 and Satish Kumar hthree servants; tow were sleeping in the adjoining room where deceased Satish Kumar was sleeping and the third one was sleeping in truck parked at some distance from the farm. From the post mortem certificate Ex. PS, it is seen that the deceased has sustained number of injuries on the neck, chest and upper arm. From the post – mortem certificate it is also seen that deceased Satish Kumar was well built and nourished. Probably, deceased might have resisted and raised alarm, it is quite improbable that the farm servants never the noise and that none of the servants came to the rescue of deceased Satish Kumar which again raises serious doubts about the prosecution case.

Extra-judicial confession:- Yet another circumstance relied upon by the prosecution is the extra-judicial confession allegedly made by the appellant to Budh Ram (PW-12). PW-12 has stated that he was a member of Gram Panchayat Dujaand on 19.03.1995, Vijay Shankar-appellant came to his residence where Har Sarup Numberdar was also pPW-12 stated that Vijay Shankar gave an extra-judicial of inflicting injuries to deceased-Satish Kumar and requested PW-12 to save him. When PW-12 was only a member of Gram Panchayat and not a person of influence with the police, it is doubtful that the appellant Vijay Shankar had approached him making extra-judicial confession and requested him to save him. At this juncture, suggestion put to PW-10 during his cross-examination is relevant to be noted. In the cross-examination of PW-10, it was suggested to him that he has let out his shop to Budh Ram Gujjar, brother of Badlu, on the condition that Budh Ram Gujjar will depose in the case therefore PW-12 cannot be said to be an independent witness.

Principles in respect of evidentiary value and reliability of extra-judicial confession have been summarized by this Court in ***Sahadevan & anr. v. State of Tamil Nadu, AIR 2012 SC 2435*** which reads as under:-

"i. The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution;

ii. It should be made voluntarily and should be truthful;

iii. It should inspire confidence;

iv. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence;

v. For an extra judicial confession to be the oasis of conviction, it should not suffer from any material discrepancies and inherent improbabilities;

vi. Such statement essentially has to be proved like any other fact and in accordance with law."

Extra-judicial confession is a weak piece of evidence and the courts are to view it with greater care and caution. For an extra-judicial confession to form the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities. In the case on hand, extra-judicial confession allegedly made to PW-12 does not inspire confidence and cannot form the basis for the conviction.

Recovery :- According to the prosecution, after the alleged confession, Budh Ram (PW-12) and Har Sarup produced the appellant before the investigating officer and Singh (PW-20) arrested the appellant on 19.03.1995. His confession led to the recovery of bloodstained clothes from the box lying in the house of the appellant and also knife from the field. Bloodstained clothes and also the knife were sent to the Forensic Science Laboratory and human blood was detected in the bloodstained clothes of the appellant. So far as the bloodstained clothes and knife, the material was disintegrated. As discussed earlier, extra-judicial confession made to Budh Ram (PW-12) is highly doubtful and in these circumstances, much weight cannot be attached to the alleged recovery of bloodstained clothes and the knife.

Considering the totality of the facts and evidence, in our view, the circumstances relied upon by the prosecution are not established by convincing evidence and they do not form a complete chain pointing to the guilt of the appellant. Ordinarily, in exercise of its jurisdiction under Article 136 of the Constitution of India, the Supreme Court does not enter into re-appreciation of evidence. When ordinarily the Supreme Court would refrain from re-examining the evidence, the Supreme Court will certainly interfere when evidence adduced by the prosecution falls short of reliability and unsafe to base conviction. The conviction recorded by the courts below is not supported by credible evidence and the prosecution has failed to establish the guilt of the accused beyond reasonable doubt and benefit of doubt is to be given to the appellant.

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147. EVIDENCE ACT, 1872 – Sections 3 and 32

Recording of dying declaration, requirement of and certificate of fitness by medical expert, necessity of – A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a Medical Officer – Further held, dying declaration recorded by Head Constable, who found the declarant mentally fit to give statement, is reliable.

साक्ष्य अधिनियम, 1872 – धाराएं 3 और 32

मृत्यु कालिक कथन के लेखबद्ध करने में चिकित्सा विषेषज्ञ द्वारा सही दषा या फिटनेस के प्रमाण पत्र की अनिवार्यता और आवष्यकता – एक वैध मृत्युकालिक कथन चिकित्सा अधिकारी के, कथन करने वाले के सही दषा में होने संबंधी या फिटनेस प्रमाण पत्र लिये बिना भी किया जा सकता है – यह भी अभिनिर्धारित किया कि प्रधान आरक्षक ने कथन करने वाले को मानसिक रूप से कथन देने की स्थिति में पाया और मृत्युकालिक कथन लेखबद्ध किया, (ऐसा मृत्युकालिक कथन) विष्वसनीय है।

Gulzari Lal v. State of Haryana

Judgment dated 02.02.2016 passed by the Supreme Court in Criminal Appeal No. 92 of 2016, reported in 2016 AIR SCW 795

Extracts from the Judgment:

Being aggrieved by the judgement and order passed by the learned Additional Sessions Judge, the accused moved the High Court of Punjab and Haryana by filing Crl. Appeal No. 367-DB of 2002 questioning the correctness of the finding on the charge and sentence imposed on them. The co-accused Om Prakash died during the pendency of the appeal before the High Court.

On 20.05.2012 after re-appreciation of evidence on record, the High Court observed in its order that the case in hand was not only based on the dying declaration of the deceased but also on the un-shattered testimony of the injured eye witness which was deemed to be the base pillar to prove the charges against the accused. The Court further relied on the testimony of Rajinder Singh (PW-11) who stated that he had seen the appellant coming out of the house of Maha Singh (deceased) through the main door. He also claimed to have seen another person climb over and jump the boundary wall of the house. He further stated that he has seen Maha Singh (deceased) and Dariya Singh in an injured condition inside the house. The High Court observed that this proves the fact that the occurrence had taken place on the cot within the house from where, after suffering injuries, the deceased had fallen down. Barring minor contradictions in the evidence which in any case, does not affect the substratum of the prosecution case, the evidence of the abovementioned prosecution witness is quite natural and corroborates the other evidence on record, including the report of the Forensic Science Laboratory as well as the recovery of the murder weapon. The High Court, after hearing the arguments of the learned counsel for both parties, dismissed the appeal having found no merit in it. Hence, the present appeal.

The learned counsel appearing on behalf of the appellant contends that the High Court erred in considering the motive as alleged by the prosecution did not fit in with the pattern of crime for the reason that there was no enmity of the appellant with Maha Singh (deceased). In-fact, the deceased had been witness in a case where the appellant and co-accused were accused. The deceased got the matter compromised resulting in acquittal of Om Prakash (the co-accused) and Dharam Raj. Thus, the deceased had saved the appellant and motive cannot be attributed to the appellant.

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148. EVIDENCE ACT, 1872 – Sections 3 and 134

INDIAN PENAL CODE, 1860 – Section 302 r/w/s 34

(i) Evidence of sole eye witness, credibility of – Uncorroborated testimony of sole eye witness, if found reliable, can be the basis of conviction.

(ii) Common intention, invocation and proof of – Section 34 of IPC embodies the principle of joint liability in the doing of a criminal act and its essence is in the existence of common intention i.e. prior meeting of minds, acting in concert and existence of pre-arranged plan which is to be proved or inferred either from the conduct of accused person or from the attendant circumstances.

To invoke section 34 IPC, it must be proved that:

(a) there was common intention on the part of several persons to commit a particular crime; and

(b) the crime was actually committed by them in furtherance of the common intention.

साक्ष्य अधिनियम, 1872 – धाराएं 3 और 134

भारतीय दण्ड संहिता, 1860 – धारा 302 सहपठित 34

(i) एक मात्र चक्षु साक्षी की साक्ष्य की विष्वसनीयता – एक मात्रा चक्षु साक्षी की अपुष्ट साक्ष्य, यदि विष्वास योग्य पाई जाती है, उसे दोषसिद्धि का आधार बनाया जा सकता है।

(ii) सामान्य आषय का लागू होना और प्रमाण – समझाया गया।

Sudip Kr. Sen alias Biltu v. State of West Bengal and others

Judgment dated 07.01.2016 passed by the Supreme Court in Criminal Appeal No. 17 of 2016, reported in 2016 AIR SCW 310

Extracts from the Judgment:

It is well settled that the court may act on a testimony of a single witness though uncorroborated, provided that the testimony of single witness is found reliable. Trial court which had the opportunity of seeing and hearing PW-6 found him wholly reliable and trustworthy and held that evidence of Sandipan Majumdar

PW6 cannot be doubted as far as the role attributed to A-1 to A-6 except Jishu Jain is concerned, which was affirmed by the High Court. We find no ground to interfere with the concurrent finding recorded by the Courts below as to the reliability of PW-6 and to record the conviction.

Observing that there is no impediment for recording conviction based on the testimony of a single witness provided it is reliable in ***Prithipal Singh & ors. v. State of Punjab & anr., (2012) 1 SCC 10,*** it was observed as under:-

> "49. This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

[See ***Vadivelu Thevar v. State of Madras, AIR 1957 SC 614, Sunil Kumar v. State (Govt. of NCT of Delhi, AIR 2004 SC 552, Namdeo v. State of Maharashtra, AIR 2007 SC (Supp) 100*** and ***Bipin Kumar Mondal v. State of W.B., AIR 2010 SC 3638***]

Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:- (i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention. Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon

inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

Considering the facts and circumstances of the case in hand, it is evident that there was prior concert and that the appellants have acted in furtherance of common intention. As seen from the evidence of PW-6, all the appellants and another coaccused Sk. Kochi were doing illegal business of extorting money from the flat owners. On the date of occurrence, all the appellants and another co-accused Sk. Kochi came together and Sudip Kumar Sen @ Biltu (A-3) started abusing the deceased and Apu Chatterjee (A-6) exhorted others that if the men of Khoka were not killed, there would be no peace. On such exhortation, Tapas Das and Sankar Das (A-2 and A-4) caught hold of the deceased and Goutam Ghosh and Sk. Kochi (A-1 and A-5) fired at the deceased. Facts and circumstances clearly establish meeting of minds and common intention of the appellants in committing the murder of Saikat Saha and the appellants were rightly convicted under Section 302 read with Section 34 IPC. No ground for interference under Article 136 of the Constitution of India is made out.

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***149. EVIDENCE ACT, 1872 – Section 14**

HINDU ADOPTION AND MAINTENANCE ACT, 1956 – Sections 10 (iv), 11 (vi), 15 and 16

(i) Adoption, proof and validity of – Ceremony of giving and taking and adoption deed registered after 8 years from such ceremony duly proved by adducing evidence – No rebuttal in evidence by the opposite party – Adoption, held to be valid.

(ii) Absence of evidence in support of pleading, effect of – Unless the evidence is adduced on record in support of the pleadings, no inference can be drawn in favour of the party who has taken the defence in the pleading and has not proved the same. (*Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 MP 225* relied on)

साक्ष्य अधिनियम, 1872 – धारा 14

हिन्दू दत्तक और भरण–पोषण अधिनियम, 1956 – धाराएं 10 (iv), 11 (vi), 15 और 16

(i) दत्तक ग्रहण का प्रमाण और वैधानिकता – दत्तक देने और लेने के अनुष्ठान के आठ वर्ष बाद दत्तक लेख पंजीकृत करवाया गया जो सम्यक रूप साक्ष्य प्रस्तुत कर प्रमाणित किया गया – विपक्षी द्वारा कोई खण्डन साक्ष्य प्रस्तुत नहीं की गई – दत्तक ग्रहण वैध होना अभिनिर्धारित किया गया।

(ii) अभिवचन के समर्थन में साक्ष्य के अभाव का प्रभाव – जब तक अभिवचन के समर्थन में अभिलेख पर साक्ष्य प्रस्तुत नहीं होती है, उस पक्षकार के पक्ष में कोई

अनुमान नहीं निकाला जा सकता जो अभिवचन होने का बचाव लेता है लेकिन उसे प्रमाणित नहीं करता है। (*गुल्ला खरगजीत कारपेन्टर विरूद्ध नरसिन्ह नंद किषोर रावत, एआईआर 1970 एमपी 225* पर विष्वास किया गया।)

Indrapal Singh @ Raja Bhaiya and others v. Jandel Singh and others

Order dated 06.11.2015 passed by the High Court of M.P. in Second Appeal No. 170 of 2015, reported in 2016 (1) JLJ 86

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150. EVIDENCE ACT, 1872 – Sections 32 and 45

INDIAN PENAL CODE, 1860 – Section 302

(i) Dying declaration, reliability of – Identity of deceased was not personally verified by the Magistrate – However, doctor identified the patient to the Magistrate – Although deceased was administered pathedine injection, but doctor after examining the deceased, found him in fit condition to make dying declaration as the effect of the medicine would last not more than two hours – Dying declaration did not contain signature or thumb impression of the deceased – Doctor being an expert and official witness, whose evidence corroborated with that of Magistrate who recorded that dying declaration, dying declaration held to be credible.

(ii) Plea of alibi, tenability of – In absence of credible evidence to the effect that at the relevant time, the accused person was in a different place other than the place of occurrence, plea of alibi not tenable.

साक्ष्य अधिनियम, 1872 – धाराएं 32 और 45

भारतीय दण्ड संहिता, 1860 – धारा 302

(i) मृत्युकालिन कथन की विष्वसनीयता – मृतक की पहचान मजिस्ट्रेट द्वारा व्यक्तिगतरूप से सत्यापित नहीं की गई – डॉक्टर ने मरीज को पहचाना था – यद्यपि मृतक को पैथाडिन इन्जेक्षन लगाया गया था किन्तु डॉक्टर ने उसका परीक्षण करने के बाद उसे मृत्यु कालिन कथन करने के लिए सही स्थिति में होना पाया था और यह भी पाया था कि ऐसी दवाई का असर दो घंटे के बाद समाप्त हो जाता है – मृत्युकालिन कथन पर मृतक के हस्ताक्षर या निषानी अगूंठा नहीं था – अभिनिर्धारित किया गया डॉक्टर एक विषेषज्ञ और शासकीय गवाह होने से जिसकी साक्ष्य की पुष्टि मृत्यु कालिन कथन लेखबद्ध करने वाला मजिस्ट्रेट की साक्ष्य से हुई अतः मृत्यु कालिन कथन विष्वसनीय होना अभिनिर्धारित किया गया।

(ii) अन्यत्र होने के अभिवाक की प्रचलनषीलता – ऐसी विष्वसनीय साक्ष्य की अनुपस्थिति में कि सुसंगत समय पर अभियुक्तगण घटना स्थल से भिन्न स्थान पर थे ऐसा बचाव चलने योग्य नहीं है।

Narender Kumar v. State of NCT of Delhi

Judgment dated 16.12.2015 passed by the Supreme Court in Criminal Appeal No. 447 of 2010, reported in 2016 AIR SCW 150

Extracts from the Judgment:

When we examine the defence canvassed on behalf of the appellants, according to them PW-7/C the dying declaration cannot be relied upon for various defects. It was contended that the identity of the deceased was not verified by the learned Metropolitan Magistrate PW-7. Insofar as the said stand is concerned, when we peruse the evidence of PW-7 the learned Magistrate, we find that he has stated that PW-12 Dr. Nayar identified the patient to him though he had not obtained the identification of the patient in writing from PW-12. That apart, in the initial part of the evidence he has narrated as to how PW-2 the Assistant Sub-Inspector of Police approached him to record the dying declaration of the deceased, that he was accompanied by PW-2 to the hospital, that he was taken to the patient thereafter, namely, the deceased Laxman Singh s/o of Huba Singh and after preliminary orientation and after satisfying himself that the patient was fully conscious and was capable of making the statement and making an endorsement vide PW-7/D and also after getting it endorsed it by PW-12 he proceeded to record exhibit PW-7/C, the dying declaration of the deceased.

Having noted the above detailed statement made by PW-7 learned Metropolitan Magistrate, we have no doubt in our mind about the verification of the identity of the patient/deceased and, therefore, we do not find any substance in the said submission.

It was then contended that the patient was administered pathedine injection for the pain and suffering that he was undergoing by around 11.30 a.m. and that the effect of pathedine would remain at least for four hours and, therefore, the deceased could not have been in a position to give evidence coherently. As far as the said submission was concerned, we must go by the expert opinion, namely, the doctor who was present and who permitted PW-7 to record the dying declaration. The doctor was examined as PW-12. The Doctor in his evidence stated that when he examined the patient at 12.15 p.m. he found the deceased in a fit condition to make statement and thereafter he called upon PW-2 to summon the Magistrate. Subsequently, he made another entry under exhibit PW-12/A at 2.30 p.m. finding the patient again in a fit condition to make a statement and he also put his signatures under exhibit PW-1/C.

The doctor PW-12 also explained that normally the effect of pathedine injection would last for 3-4 hours depending upon the severity of the pain. He further stated that the deceased had suffered 80% burn injuries as per the entries in the MLC, that he was given medicines at 12.50 p.m. and if the pain

was severe the effect of pathedine injection may not last for more than two hours. He reiterated that according to him when the dying declaration was recorded by PW-7 the deceased was in a fit condition to make a statement.

Having regard to the said statement of PW-12, which was also corroborated in every respect by PW-7 who has made an endorsement in the dying declaration itself that the patient was fully conscious and capable of making his statement and the said witnesses are official witnesses one of whom, namely, PW-12 is an expert witness, we have no reason to disbelieve their version and, therefore, the submission on that footing is also liable to be rejected.

It was then contended that the dying declaration did not contain either the signature or thumb impression of the deceased which is in violation of the guidelines issued by the High Court of Delhi in regard to the recording of dying declaration.

When we consider the said submission, in the first place, it must be stated that it was only a guideline. The guidelines were issued by the High Court in order to ensure that any defect in regard to the identity of the deceased or the veracity of the contents of the dying declaration are not doubted on the ground that the concerned patient himself could not have made such a statement in order to implicate someone in the offence. The issuance of the guidelines is for the purpose of ensuring and for testing the genuineness of the dying declaration of person who is in the last moment of his life. Merely because there was a defect in following the said guideline, which, as is now pointed out, is of a trivial nature and if the dying declaration recorded is otherwise proved by ample evidence, both oral as well as documentary, on the ground of such trivial defects, the whole of the dying declaration cannot be thrown out. In the case on hand, we have noted that the dying declaration was recorded by PW-7 who was summoned by PW-12 the doctor who noted the condition of the patient and PW-7 was brought to the hospital by PW-2, the ASI and before recording the dying declaration PW-12 endorsed the capability of the deceased to make the statement apart from PW-7 himself ensuring that the deceased was in a fit condition to make the statement and thereafter the said statement was recorded by PW-7 a responsible judicial Officer. It cannot be held that simply because PW-7 omitted to get the thumb impression or signature of the deceased the dying declaration should be rejected. As has been noted by the High Court in its judgment where it has reached a conclusion that the recording of the dying declaration was established and found to be truthful and the statement contained therein was made voluntarily and recorded correctly, there is no reason to doubt the said document PW-7/C for the reason that the signature or thumb impression was not obtained on the said document. Therefore, we hold that the dying declaration was proved in the manner known to law and, therefore, there is no scope to reject the same.

On behalf of the second appellant in Criminal Appeal No.484 of 2010, a plea was raised to the effect that between 11 a.m. and 2 p.m. on 05.08.1980 he was in the Central Excise Laboratory as he was directed to deposit a substance

for test in the said laboratory where he had to stay back between 11 a.m. to 2 p.m. The plea of alibi was raised on the above basis and in fact the prosecution themselves examined PW-20 one A.S. Negi, LDC of Excise Department who in his deposition stated that on 05.08.1980 he was working as LDC in Excise laboratory, he knew Om Prakash the accused, that the accused met him at 11 a.m. to deposit a sample, that thereafter he asked him to come after 2 p.m. as they used to receive samples only between 2 and 4 p.m. and that one Har Lal, UDC was also sitting in the same room in which PW-20 was sitting and that accused Om Prakash brought the sample only after 2 p.m. which was deposited by Har Lal, UDC. It is quite apparent that the appellant Om Prakash himself being a police constable the prosecuting agency wanted to support the appellant and, therefore, came forward to examine PW-20 whose version has otherwise nothing to do with the case of the prosecution, on the other hand it was detrimental to the case of prosecution. PWs-17 to 19 were also examined to support the above version.

PWs-17 and 18 also stated that on 05.08.1980 appellant Om Prakash was in the Excise office at 2, Battery Lane, Rajpur Road, Delhi at about 10.30 or 11 a.m. and remained there till 2 p.m. As was noted by us earlier, the evidence of PWs-17, 18, 19 and 20 were all wholly unnecessary to speak about the case of the prosecution. We can understand if they had been examined on the side of Om Prakash. In any event, even going by the version of those witnesses he was found in the office of excise laboratory after 10.30 a.m. until 2 p.m. According to the deceased, he was burnt at the instance of the appellants just about 10.30 a.m. in the quarter No.4 of police post of Andha Mughal. Therefore, prior to 10.30 a.m. the whereabouts of the accused Om Prakash were not surely stated. He was assigned the task of taking the sample at 9.40 a.m. Therefore, between 9.40 a.m. and 10.30 a.m. the location of the said accused was not shown to have been in a different place other than the place of occurrence. That apart, the trial Court has noted that the excise laboratory at battery line was just 5-6 minutes drive from the police post. The trial Court made a detailed analysis of this issue and has found that there was no truth in the claim of alibi of the second appellant Om Prakash.

Having regard to the above factors noted by the trial Court as well as by the High Court, we are also of the view that there is no substance in the said plea made on behalf of the said appellant.

On behalf of Narender Kumar, the appellant in Criminal Appeal No. 447/2010, it was faintly suggested that he had earlier booked the brother of deceased one Sher Singh for an offence under Delhi Police Act for which the said Sher Singh came to be fined the sum of Rs.30 and, therefore, to wreck vengeance on him he was falsely implicated. As was rightly rejected by the trial Court as well as the High Court the said defence appears to be a very remote one as compared to a very solid evidence in the form of dying declaration contained in exhibit PW-7/C in which the deceased categorically referred to the

specific role played by the said appellant Narender Kumar that he poured the kerosene from a stove which was lying in the quarters No.4 which was also recovered later on under exhibit PW-10/A. Therefore, it is too late in the day for the appellant to raise such a flimsy ground by way of defence. We do not find any scope to accede to such a plea raised on behalf of the appellant in Criminal Appeal No.447/2010.

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151. EVIDENCE ACT, 1872 – Section 45

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Opinion of handwriting expert, necessity of – In order to determine the age of entries, opinion of handwriting expert is relevant and such matter may be referred to handwriting expert.

साक्ष्य अधिनियम, 1872 — धारा 45

परक्राम्य लिखित अधिनियम, 1881 — धारा 138

हस्तलेख विषेषज्ञ की राय की आवष्यकता – इंद्राजों की आयु के निर्धारण के लिए हस्तलेख विषेषज्ञ की राय सुसंगत होती है और ऐसा मामला हस्तलेख विषेषज्ञ भेजा जा सकता है।

Rajendra Mundra v. Kailash Jain

Order dated 08.12.2014 passed by the High Court of M.P. in Misc. Criminal Case No. 799 of 2014, reported in ILR (2015) M.P. 1594

Extracts from the Order:

The facts relevant for disposal of this application are that the respondent filed a complaint under section 138 Negotiable Instrument Act against the present applicant on the 2 dishonor of two cheques allegedly issued by the present applicant in favour of the respondent for the total sum amounting to Rs.6,00,000/-. At the stage of defence evidence, an application was filed by the present applicant for examination of the disputed cheques by the handwriting expert and also calling witness Pappu Patodi as defence witness. It is alleged by the present applicant that the respondent was working as an employee in his establishment. As a business practice, blank cheques with signature of the present applicant were given to third party as a security for the amount that due against them. One such cheque was returned by the third party Pappu Patodi S/o Ratan Patodi. The cheque was returned back to the respondent who misused the cheque and had returned his own name and other writing on the cheque and filed the present complaint committing fraud and mischief.

The learned Judicial Magistrate by the impugned order dismissed the application on the ground that no question was asked during the cross-examination of the complainant Kailash Jain in respect of writing on the cheques. No suggestion was given to him during cross-examination. The signatures were admitted by the present applicant and nowhere it is mentioned that he wanted to prove that remaining entries on the cheque were filled by somebody else.

The Revisional Court in his order dated 17.01.2014 observed that once signature on the cheque is admitted then inference can be drawn that the cheque was issued validly by the person signing the cheque. Even if remaining entries were filled up by 3 some other person the presumption shall be drawn that cheque was issued by the person by whom the cheque was purported to have been signed. If the present applicant wanted to prove that cheque was issued for some other transaction then he could have adduce evidence for this purpose. The learned Revisional Court deserved that the application was filed only to cause delay and, therefore, he dismissed the revision and the order passed by the learned Judicial Magistrate was confirmed.

Against this, the present applicant placed reliance on judgment of Hon'ble Supreme Court in ***G.Someshwar Rao v. Samineni Nageshwar Rao, (2009) 14 SCC 677.*** It was observed therein by the Hon'ble Apex Court that right of the accused to lead evidence in his defence is not absolute such right has to be used only for furthering the cause of justice but not subverting it. The Hon'ble Court observed that it shows the intention of accused to delay disposal of the matter. However, the Hon'ble Court granted opportunity to examine expert at the cost of the appellant. The second judgment of Hon'ble Supreme Court relied on by the present applicant is ***T.Nagappa v. Y.R. Muralidhar, (2008) 5 SCC 633***. The facts of this case were similar to the facts of the present case. The contention of the appellant in that case was that in the year 1999, he handed over the cheque as security for a hand loan of Rs. 50,000/- and instead of returning the cheque, the person to whom the cheque was handed over as a security misused the cheque by entering a huge amount which was not 4 owned by the appellant to that person. The prayer was to examining the handwriting expert to determine the age of the signature on the cheques as the remaining entries were in different handwritings. The Hon'ble Court observed that in para 12 of the judgment that :

> "12. However, it is not necessary to have any expert opinion on the question other than the following: "Whether the writing appearing in the said cheque on the front page is written on the same day and time when the said cheque was signed as 'T. Nagappa' on the front page as well as on the reverse, or in other words, whether the age of the writing on Ext. P-2 on the front page is the same as that of the signature 'T. Nagappa' appearing on the front as well as on the reverse of the cheque, Ext. P-2 ?"

For that limited purpose, examination of the cheque was allowed by the Hon'ble Court. As against this the respondent cited the judgment of Hon'ble Punjab and Haryana High Court in ***Darshan Lal v. Arjun Singh, 2004 CriLJ 1723 (P & H)*** in which the examination of the cheque by the handwriting expert was not found necessary.

Reverting back to the present case, here also the case of the present applicant is that the writing on the cheque is different than that of his own. According to him, the remaining entries on the cheque were filled subsequently and in this case also the age of the signature and age of the remaining entries are crucial to decide whether the averments by the present applicant are true or false. This apart the main 5 objection of the respondent was that in the reply of the notice given by the present applicant such plea was taken that the other entries on the cheque were filled by the respondent. However, going through the averments in para 2 and 3 of the reply which is filed as Annexure A/4 with the present application, it is clear that according to the present applicant the cheques were blank when they were signed by the present applicant and the remaining entries were filled subsequently in a different handwriting allegedly by the respondent.

Taking all the facts and circumstances of the case into consideration, the present application deserves to be allowed and is accordingly allowed. The impugned orders are set aside. It is directed that the cheque may be sent for examination by the handwriting expert at the cost of the present applicant to answer the query whether the writing appear in the said cheque on the front page is written on the same day and time when the said cheque was signed on the front page, in other words whether the age of the writing on the cheque on the front page is same as of the signature of the present applicant.

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***152. EXCISE ACT, 1915 (M.P.) – Unamended Sections 46 & 47 and Section 47-A**

CRIMINAL PROCEDURE CODE, 1973 – Section 452

Disposal of property – Order as to confiscation of vehicle in judgment, validity and procedure of – Law explained.

In judgment, Judicial Magistrate came to the conclusion that the vehicle in which foreign liquor was illegally being transported, is liable to be confiscated – Cancelling the order of interim custody (supurdinama), order as to confiscation passed by the Magistrate and the owner was directed to produce the property in Court – However, neither show cause notice was given to the owner (supurdigar) nor such option given to them as provided by unamended provisions of the Act – Held, since incident took place on 07.05.1995 i.e. prior to substitution of amended provisions in the Act w.e.f. 04.08.2000, therefore, unamended provision would apply – Further held, as the procedure prescribed in unamended provision of the Act has not been complied with, the order of confiscation is bad in law.

आबकारी अधिनियम, 1915 (म.प्र.) – असंषोधित धाराएं 46 और 47 तथा धारा 47ए

दण्ड प्रक्रिया संहिता, 1973 – धारा 452

संपत्ति का निराकरण – निर्णय में वाहन के संपहरण का आदेष, वैधता और प्रक्रिया – विधि समझाई गई।

संषोधित प्रावधान 04.08.2000 को प्रतिस्थापित किये जाने के पूर्व की घटना होने से प्रक्रिया स्पष्ट की गई।

Mishrilal v. State of M.P.

Order dated 04.01.2016 passed by the High Court of M.P. in Misc. Criminal Case No. 5438 of 2015, reported in 2016 (1) JLJ 346

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153. HINDU MARRIAGE ACT, 1955 – Sections 13-B and 23 (1) (bb)

(i) Doctrine of 'pre-existing duty', applicability of.

Settlement agreement between husband and wife as to payment of Rs. 12,50,000/- towards alimony, as consideration for divorce, as wife was in need of money for treatment of breast cancer – Undue influence – Divorce by mutual consent, grant of – Held, it is pre-existing duty of husband to provide facilities for treatment to wife – Further held, the payment of amount of Rs. 12,50,000/- is not a valid consideration for the settlement and divorce cannot be granted on the basis of the settlement being based on undue influence.

(ii) Hindu marriage, nature of – Explained.

हिन्दू विवाह अधिनियम, 1955 – धाराएं 13–बी और 23 (1)(बीबी)

(i) 'पूर्व से अस्तित्व में रहे कर्तव्य' के सिद्धांत का लागू होना।

पति और पत्नि के बीच समझौता अनुबंध हुआ कि पति पत्नि को 12,50,000 रूपये विवाह विच्छेद के प्रतिफल के रूप में जीवन निर्वाह के रूप में देगा, पत्नि को स्तन कैंसर के उपचार के लिए धन की आवष्यकता थी – असम्यक असर – परस्पर सहमति से तलाक का लिया जाना – अभिनिर्धारित किया गया, यह पति का पूर्व से अस्तित्व में रहा कर्तव्य है कि वह पत्नि को उपचार की सुविधा उपलब्ध करावे – यह भी अभिनिर्धारित किया गया कि 12,50,000 रूपये का भुगतान एक वैध प्रतिफल समझौते के लिए नहीं है और समझौता असम्यक असर पर आधारित होने से विवाह विच्छेद नहीं किया जा सकता।

(ii) हिन्दू विवाह की प्रकृति – समझाई गई।

Vennangot Anuradha Samir v. Vennangot Mohandas Samir

Judgment dated 02.12.2015 passed by the Supreme Court in Transfer Petition (Civil) No. 702 of 2015, reported in 2015 AIR SCW 6524

Extracts from the judgment:

From the admitted facts, it is evident that the petitioner needs sufficient amount of money for the treatment of breast cancer. Hence, it cannot be ruled out that in order to save her life by getting money, she agreed for a settlement of dissolution of marriage. On these facts, a question that came in our mind is as to whether the Court would be justified in granting a decree for divorce on the basis of settlement when the wife is suffering with breast cancer and is in need of money for her treatment and can that be the consideration for dissolution of marriage.

Hindu marriage is a sacred and holy union of husband and wife by virtue of which the wife is completely transplanted in the household of her husband and takes a new birth. It is a combination of bone to bone and flesh to flesh. To a Hindu wife her husband is her God and her life becomes one of the selfless service and profound dedication to her husband. She not only shares the life and love, but the joys and sorrows, the troubles and tribulation of her husband and becomes an integral part of her husband's life and activities. Colebrooke in his book "Digest of Hindu Law Volume II" described the status of the wife thus:-

> "A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts:- whether she ascend the pile after him or survive for the benefit of her husband, she is a faithful wife."

Further Colebrooke in his book Digest of Hindu Law Volume-II quoted the Mahabharata at page 121 thus:-

> "Where females are honoured, there the deities are pleased; but where they are unhonoured there all religious acts become fruitless."

This clearly illustrates the high position which is bestowed on Hindu women by the Shastric law.

From the study of Hindu Law and different religious books, it cannot be disputed that after marriage law enjoins the corresponding duty on the husband to look after her comforts and not only to provide her food and clothes but to protect her from all calamities and to take care of her health and safety.

In the peculiar facts of the present case if we consider the instant settlement, which is nothing but a contract to dissolve the marriage, the Court has to satisfy itself that the contract is legal and valid in the eye of law. From perusal of the facts of the case and the development which has taken place in the present case, it seems that the petitioner-wife agreed for divorce by mutual consent on the condition that the respondent-husband will pay her Rs.12,50,000/- as full and final settlement. The petitioner-wife is suffering from such a disease which has compelled her to agree for the mutual consent divorce. The fact that petitioner-wife is ready for the mutual consent divorce after knowing about her medical condition raises a suspicion in our mind as to whether the consent obtained from the petitioner-wife is free as required by law for granting the decree of divorce by mutual consent.

If we consider the provisions of Indian Contract Act, it provides that consent is said to be free when it is not caused by "undue influence" as defined in Section 16 of the Act. The contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

One more doctrine is to be taken into consideration i.e. "Pre-existing duty doctrine". It is a principle under the Contract Act that states that if a party to a contract is under a pre-existing duty to perform, then no consideration is given for any modification of the contract and the modification is therefore voidable. In the 13th edition of the Pollock & Mulla Indian Contract and Specific Relief Act in Vol.1, it is mentioned at page 101 about the Pre-existing obligation under law which provides that:-

> "The performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise; because such performance is no legal burden to the promise, but rather relives him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing."

We can apply this principle in the present case. As discussed above, it is a duty of the respondent-husband to take care of the health and safety of the petitioner-wife. In the instant case also it is a primary duty of the husband only to provide facilities for the treatment of the petitioner. This is a pre-existing duty of the husband, provided the husband has sufficient means and he is diligently doing his part in taking care of her. In the present case, by the settlement agreement the respondent-husband is promising to do something which he is already duty bound, is not a valid consideration for the settlement.

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154. INDIAN PENAL CODE, 1860 – Sections 120-B and 302

EVIDENCE ACT, 1872 – Section 3

(i) Conspiracy to commit murder – Circumstantial evidence, appreciation of – Accused being member of the family allegedly burnt deceased to death – There was evidence that accused alongwith other accused persons had taken deceased in the evening whereafter deceased did not return – Dead body of deceased recovered on the same day at night – Personal belongings of deceased and blood stained clothes of accused were recovered at the instance of accused and the accused offered no explanation with regard to said discoveries – There was undue haste on the part of accused in cremation of dead body of the deceased – Accused reported incident to police as suicide – He did not try to get medical help for deceased –

Held, the circumstances reveal *mens rea* of the accused and the existence of conspiracy between the accused and other accused persons – Further held, accused is liable to be convicted for conspiracy to commit murder.

(ii) Testimony of relative and partisan witness, appreciation of – The factor that witnesses are relatives and therefore, partisan witnesses *per se* cannot discredit them or adversely affect the probative worth of their testimony.

भारतीय दण्ड संहिता, 1860 – धाराएं 120–बी और 302

साक्ष्य अधिनियम, 1872 – धारा 3

(i) हत्या कारित करने का षड़यंत्र – परिस्थिजन्य साक्ष्य का मूल्यांकन – मामले के तथ्यों के क्रम को समझाया गया।

(ii) रिष्तेदार और हितबद्ध साक्षी की साक्ष्य का मूल्यांकन – यह तथ्य की गवाह रिष्तेदार है, हितबद्ध गवाह होने मात्र से उन्हें अविष्वसनीय नहीं माना जा सकता या उनके साक्ष्यिक मूल्य को यह तथ्य प्रतिकूल रूप से प्रभावित नहीं करता।

State of Punjab v. Suraj Prakash and another

Judgment dated 15.12.2015 passed by the Supreme Court in Criminal Appeal No. 2056 of 2009, reported in 2016 AIR SCW 1015

Extracts from the Judgment:

The evidence on record when analysed provides the following incriminating circumstances ***vis-a-vis*** the accused persons :–

(i) On 22nd June, 2000, at about 6/7 p.m., the evening before the discovery of the dead body of the deceased later that night, accused Dharminder and Nazar Singh had visited the house of Gurdip and had taken him along with them whereafter the deceased did not return.

(ii) The fact that Gurdip was in the company of Dharminder and Nazar Singh was confirmed by accused No. 2, accused No. 3 Bhalla Ram, accused No. 4 Rani and accused No. 5 Nazar to the informant along with Harbhajan had gone to their house to enquire about the whereabouts of Gurdip Singh, the very same evening.

(iii) On 23rd June, 2000, when P.W. 6 Harbhajan Singh had visited the house of Rani, accused No. 4 she disclosed to her that her son Dharminder, accused No. 1 had committed suicide and had also requested him to search for Gurdip Singh whose where abouts were not known till then.

(iv) On the basis of disclosures made by accused No. 5 Nazar Singh, his blood stained shirt which he was wearing at the time of offence and also the gold kara belonging to Gurdip was recovered. The gold kara was identified to be that of Gurdip by P.W. 7.

(v) No explanation has been provided by accused No. 4 as to how his shirt got stained with blood.

(vi) Acting on the disclosures of Dharminder accused No. 1, the personal belongings of the deceased were recovered from the place which he had indicated. There was no explanation from the side of the accused Dharminder as to how these personal belongings came into his possession or got recovered from the place shown by him.

(vii) The extra-judicial confession made by accused Dharminder to Jagjit Singh who conveyed it to Gurmeet, the informant that he (Dharminder) along with his brothers, mother and friend Nazar Singh had conspired and murdered Gurdip in the temple and had endeavoured to pass on the incident as one of suicide by Dharminder.

(viii) Suraj, accused No. 2 had informed the Police between 1:15 a.m. and 3:30 a.m. on 23rd June, 2000, that his brother accused No. 1 Dharminder had committed suicide by immolating himself in the temple and expressing at the same time that no legal action was called for.

(ix) The dead body was found about 1:15 a.m. inside the temple and Suraj and his mother Rani had gone to the place of occurrence. They seemed to be certain about the death of the person concerned and did not attempt to provide any medical attention and had waited for a sufficient long time to inform the Police only to apprise them of the incident and not for any legal action in connection therewith. Such a conduct is incomprehensible if the body was really that of Dharminder.

(x) The visible haste on the part of the accused persons to get the Inquest and postmortem done and have the dead body cremated before the real identification would surface so as to destroy the corpus of the offence.

(xi) The testimony of P.W. 4 Rajender Kumar, testifying about the disclosures made by accused Dharminder to him about the conspiracy and the execution thereof to murder Gurdip.

(xii) A failed attempt on the part of Bhalla Ram to show that he was on duty that night from 9:00 p.m. to 500 a.m. in the face of his presence at the time of Inquest that was conducted after 3:30 a.m., by the Police and his signature on the Inquest report.

True it is, that a conviction on the basis of circumstantial evidence alone would demand that the circumstances be such so as to form a complete chain so much so that every possible hypothesis of the innocence of the accused person (s) is ruled out. The test would depend on the facts of each case and the circumstances presented thereby. On an assessment of the evidence adduced by the prosecution and the incriminating circumstances noted hereinabove, we are of the unhesitant opinion that the same unmistakably establish the culpability of all the accused persons in the charges framed against them. To start with, not only accused Nos. 1 2, 3 and 4 are members of the same

family and were fully aware that accused No. 1 Dharminder was uncontrollably enamoured by Ranju and that Gurdip was also a contender for her, which in our opinion is a motive for the perpetration of the crime for which they have been charged with, the materials on record establish that in order to facilitate the commission of the offence they took along with them accused No. 4 Nazar Singh so that the deceased could be trapped in their design, taken to the temple, first injured in the leg so as to main him and then over power him to be doused with kerosene and put on fire and ensure that he was dead by the time, the report was made to the Police posing as if their brother accused No. 1 Dharminder had committed suicide. The criminal intent of the accused persons, according to us is writ large and the circumstances enumerated hereinabove do not permit any other view. The circumstances fit in with the version of the witnesses and present a complete and a clear picture of the incident and the manner of commission of the offence. Had the accused persons not conspired to commit the offence, the family members would have endeavored at first to procure medical help than letting the body lie in the temple and take enough time to inform the Police to be sure that death had taken place. The very fact that after having participated in the crime and also having ensured that Gurdip had died, a false information was lodged with the Police to the effect that it was accused No. 1 Dharminder, who had committed suicide demonstrates the *mens rea* of the accused persons beyond any reasonable doubt. There was a criminal intent to mislead the Police and cover up the incident of murder of Gurdip to be that of suicide of Dharminder and had not Jagjit met this accused at the railway station, the episode might have ended in this fashion.

Though an attempt has been made to contend that the witnesses are all relatives of the deceased and, therefore, partisan having regard to the substance and the coherence of their testimony, we are of the view that this factor *per se* cannot discredit them or aversely affect the probative worth of their statements on oath. The recovery of the personal belongings of Gurdip from the place as shown by Dharminder and that of the blood stained shirt of Suraj worn by him at the time of commission of the offence, at their instance, also in our opinion furnishes a fool proof evidence of nexus between the accused persons and the crime. There is no dispute with regard to the identity of the dead body as well. Not only the post mortem indicates that the body was identifiable as the face was not burnt which is also a fact supported by the findings recorded in the Inquest Report, the witnesses as referred to hereinabove on being shown the photographs of the dead body have identified the same to be that of Gurdip. There is no plea on behalf of the defence and rightly so, that accused No. 1 Dharminder is not alive. In that view of the matter on a consideration of the evidence as a whole, we are of the opinion that there is no room for any reasonable doubt about the culpability of the accused persons in a body to have conspired to murder Gurdip by first assaulting him with an iron reti in the leg and then set him ablaze alive by over powering him in the temple in the dead of night. The situs of the occurrence, being a temple of which accused No. 4

Rani was the Priestess, in our opinion, overwhelmingly prove her knowledge, collaboration and participation in the same.

In all, therefore, the incriminating circumstances established by the prosecution form a complete chain of events which do not permit any confusion or doubt with regard to the involvement of all the accused persons in this heinous crime of murder. What makes this offence abhorrent is the fact that not only the murder was committed in a deceitful manner, the same was designed to be a case of suicide by one of their sons, thereby trying to mislead he investigating agency and abuse the process of law. In the above view of the matter, we are constrained to hold that the learned appellate Court grossly erred in assessing the evidence on record in acquitting accused Nos. 2 and 3 Suraj and Bhalla Ram. We, therefore, reverse the order of acquittal of these two accused persons into one of conviction under Sections 302, 419, 404, 201, 120B of the I.P.C.

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155. INDIAN PENAL CODE, 1860 – Sections 148, 302, 304 and 323 r/w/s 149

CRIMINAL TRIAL:

(i) Murder and culpable homicide not amounting to murder, distinction between – Law explained.

(ii) Non-recovery of gun and absence of opinion of ballistic expert, effect of – In case of availability of other cogent and credible, direct or circumstantial evidence, non-recovery of gun used in the commission of crime and absence of opinion of ballistic expert, will have no effect.

(iii) Motive, significance of – Proof of motive heightens the possibility of the crime and adds weight and value to the evidence of the eye witnesses.

(iv) Sentencing, principles of – Court is duty bound to inflict proper sentence, regard being had to the nature of the offence and the manner in which it was committed – Undue sympathy would do more harm to criminal justice system undermining the public confidence in the efficacy of the system.

भारतीय दण्ड संहिता, 1860 – धाराएं 148, 302, 304 और 323 सहपठित धारा 149

दांण्डिक विचारण :

(i) हत्या और सदोष मानव वध जो कि हत्या की कोटी में नहीं आता है के बीच अंतर – विधि समझाई गई।

(ii) गन बरामद न होना और बेलेस्टिक विषेषज्ञ की राय के अभाव का प्रभाव – यदि अन्य अकाट्य और विष्वसनीय प्रत्यक्ष या परिस्थितिजन्य साक्ष्य उपलब्ध हो तब अपराध कारित करने में प्रयुक्त गन के बरामद न होने और बेलेस्टिक विषेषज्ञ की राय के अभाव का कोई प्रभाव नहीं होता है।

(iii) हेतुक का महत्व – हेतुक का प्रमाण होने पर अपराध की संभावना बढ़ जाती है और यह प्रत्यक्ष साक्षीगण के साक्ष्य के वजन व मूल्य को बढ़ा देती है।

(iv) दण्ड के सिद्धांत – बतलाये गये ।

Abdul Waheed v. State of Uttar Pradesh

Judgment dated 01.09.2015 passed by the Supreme Court in Criminal Appeal No. 1166 of 2005, reported in (2016) 1 SCC 583

Extracts from the Judgment:

Shabbir Khan and Abbas filed Civil Suit No. 110 of 1974 (Ext. Ka-40) alleging that the appellant Abdul Waheed has started construction of his house over the site of Panchayat Ghar. On the application of Abbas Khan, the Munsif Court vide order dated 17.04.1974 passed the order of status quo. Ext. Ka-41 is the copy of the Commissioner's Report and map in the aforesaid suit. Ext. Ka-42 is the application moved by Shabir Khan in the aforesaid suit No. 110 of 1974 for taking action against the appellant Abdul Waheed under Order 39 Rule 2 CPC which was registered as Miscellaneous Case No. 65 of 1974 and the same was scheduled to be heard on the next date of the incident i.e. 6.11.1974. By the evidence of PW1 and by the aforesaid documents prosecution has established the motive of the accused. Admittedly, the accused persons were close relations of the appellant-accused hence they also rendered a helping hand in the commission of the crime and all of them formed an unlawful assembly with common intention of inflicting injuries to the complainant party. There is plausible and cogent evidence establishing motive of the accused person for committing the alleged crime. Proof of motive of the accused towards the deceased heightens the possibility of the crime. Proof of motive adds weight and value to the evidence of the eyewitnesses.

The prosecution version is assailed contending that the prosecution has not explained the recovery of third gun from the scene of occurrence. The learned Senior Counsel for the appellant contended that three allegedly recovered empty cartridges were sent to ballistic expert, PW 8 who has given a certificate (Ext. Ka 23) that two of the said cartridges were fired from Gun No. 3696-69 i.e. the gun allegedly recovered from co-accused Abdul Hai and the third cartridge was not fired from either of the two guns and in the absence of the recovery of the recovery of third gun, the version of the prosecution becomes highly doubtful. Be it noted that although it is proved that two cartridges were fired from the gun recovered from the accused, from the statement adduced by the three eyewitnesses it is evident that Abdul Waheed had a gun and he fired one shot from his gun. The said cartridge could have been fired possibly from the gun of appellant Abdul Waheed which was not recovered. Non-recovery of gun from the appellant nor opinion of ballistic expert regarding three cartridges does not in any way raise doubts about the prosecution case and the involvement of the appellant.

The learned Senior Counsel further urged that gunshot fired by the appellant hit Abbas on his arm which is not a vital part of the and the appellant cannot be held guilty of the murder. By perusal of the post-mortem certificate (Ext. Ka-25), it is seen that Abbas sustained following injuries:

(i) Gunshot wound 1½" x ½" x bone-deep on the front and inner side of right upper arm. 3½" above elbow with fracture of the shaft of humerus bone.

(ii) Multiple gunshot wound of exit of varying dimensions from 1/8" x 1/8" x 1/10" x 1/10" in middle part of right upper arm with everted margins.

(iii) Abrasion ½" x ½" on the right side of tip of nose.

The doctor recovered twelve shots from the wounds and Dr H.D. Gupta opined that the death of the deceased Abbas was due to shock and haemorrhage as a result of injuries sustained by him.

The appellant and the accused party were having enmity against the deceased Abbas Khan on account of civil suit and filing of contempt petition. The appellant and the accused party went to chhabutra of Abbas Khan armed with pistol, guns and lathis which shows the intention of the appellant to commit the murder. An ordinary person is not presumed to know the precise location of the arteries in the human limbs. Therefore, if a stab with a knife or dagger, aimed at an arm or a leg, severs an artery and injured man dies as a result, it may be reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt or grievous hurt with a dangerous weapon. The case in hand is quite different. When gun is used and the person who fires the gun must be presumed to have knowledge and intention that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death and the offence is clearly murder. Having regard to the enmity and the weapon used, the courts below rightly held that the appellant-accused was guilty of committing the murder of Abbas Khan.

On behalf of the appellant it was stated that the occurrence was of the year 1974 and the appellant is aged about ninety years and sending him to prison at his distant point of time would be harsh. We are not impressed with this submission. In the occurrence when two persons died and number of others were injured, in our view, age of the accused is of no relevance. Undue sympathy would do more harm to the criminal justice system undermining the public confidence in the efficacy of the system. It is therefore the duty of every court to award proper sentence having regard to the manner in which the offence was committed. The trial court and the High Court have recorded concurrent findings and the findings are based upon evidence warranting no interference in exercise of jurisdiction under Article 136 of the Constitution of India.

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156. INDIAN PENAL CODE, 1860 – Section 193

CRIMINAL PROCEDURE CODE, 1973 – Section 340

EVIDENCE ACT, 1872 – Section 45

(i) Complaint with regard to perjury against expert, maintainability of – Approach of Court must be different than that of complaint against witness of fact(s) – Expert evidence needs to be given a closer scrutiny and different approach as it is an opinion by a professional expert.

(ii) Section 340 CrPC – Offence referred to in section 195 CrPC, procedure for – It is not mandatory for the Court to record finding as to commission of offence of perjury – Opinion on the part of the Court as to whether offence should be duly enquired into, is sufficient.

भारतीय दण्ड संहिता, 1860 – धारा 193

दण्ड प्रक्रिया संहिता, 1973 – धारा 340

साक्ष्य अधिनियम, 1872 – धारा 45

(i) विषेषज्ञ के विरूद्ध झूठी साक्ष्य देने से संबंधी परिवाद की प्रचलनषीलता – न्यायालय का दृष्टिकोण एक तथ्य के साक्षी के विरूद्ध आई (इस प्रकार की) परिवाद से भिन्न होना चाहिए– विषेषज्ञ की साक्ष्य की सूक्ष्म छानबीन आवष्यक होती है और भिन्न दृष्टिकोण आवष्यक होता है क्योंकि यह एक व्यवासायिक विषेषज्ञ की राय होती है।

(ii) धारा 340 दंप्रसं– धारा 195 दंप्रसं में उल्लेखित अपराधों के लिए प्रक्रिया – न्यायालय के लिए यह आज्ञापक नहीं है कि वह झूठी साक्ष्य देने के अपराध किये जाने के बारे में निष्कर्ष अभिलिखित करें – न्यायालय के भाग पर उनकी यह राय पर्याप्त होती है कि क्या अपराध की सम्यक जाँच की जाना चाहिए।

Prem Sagar Manocha v. State (NCT of Delhi)

Judgment dated 06.01.2016 passed by the Supreme Court in Criminal Appeal No. 9 of 2016, reported in 2016 AIR SCW 290

Extracts from the Judgment:

Section 340 of CrPC, prior to amendment in 1973, was Section 479-A in the 1898 Code and it was mandatory under the pre-amended provision to record a finding after the preliminary inquiry regarding the commission of offence; whereas in the 1973 Code, the expression 'shall' has been substituted by 'may' meaning thereby that under 1973 Code, it is not mandatory that the court should record a finding. What is now required is only recording the finding of the preliminary inquiry which is meant only to form an opinion of the court, and that too, opinion on an offence 'which appears to have been committed', as to whether the same should be duly inquired into. We are unable to appreciate the submission made by the learned Senior Counsel that the impugned order is liable to be quashed on the only ground that there is no finding recorded by the

court on the commission of the offence. Reliance placed on ***Har Gobind v. State of Haryana, AIR 1979 SC 1760*** is of no assistance to the appellant since it was a case falling on the interpretation of the pre-amended provision of the CrPC. A three-Judge Bench of this Court in ***Pritish v. State of Maharashtra, AIR 2002 SC 236*** has even gone to the extent of holding that the proceedings under Section 340 of CrPC can be successfully invoked even without a preliminary inquiry since the whole purpose of the inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. To quote:

> "9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not . Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed."

In the impugned order, the High Court did form an opinion after the inquiry. To quote:

> "90. It was argued on behalf of the state by the learned standing counsel that the ballistic expert's deposition, Ex. PW-95 was calculated to let the accused Manu Sharma off the hooks. It was submitted that the witness had stated that no definite opinion could be given whether the two empty cartridges were fired from the same weapon. However, on the basis of the same material, he took a somersault and gave a completely contrary opinion in the Court saying that they appear to have been fired from different weapons. It was submitted that by the time this witness stepped on to the box, the defence had formed its definite plan about a "two weapon theory". The deposition of this witness was sought to support the "two weapon theory". That this court and Supreme Court rejected the theory did not in any way undermine the fact that PW-95 gave false evidence."

Therefore, what is to be seen is whether the High Court is justified in forming the opinion on commission of the offence under Section 193 of IPC. The stand of the appellant in his report (Ex PW-95/2) dated 04.02.2000, and while deposing before the court at the trial, it is to be noted, was consistent. Query No.3 was whether both the empty cartridges were fired from the same firearm or otherwise. Since there was no recovery of the firearm, the same was not sent along with the cartridges for the examination by the expert. Therefore, the opinion tendered was that he was unable to give any definite opinion in answer to Query No.3, "unless the suspected firearm is available for examination." It was at that juncture, there was a court question. According to the court, "for reply to query no. 3, the presence of the firearm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments". To that question, the appellant responded that "after comparison, I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different firearms". It is not a clear, conclusive, specific and definite opinion. In further examination, the appellant has clearly stated that "I have already stated these two cartridge cases appear to have been fired from two different fire arms. Definite opinion would have been given once the weapon is given to me for examination".

We fail to understand how the stand taken by the appellant, as above, attracts the offence of perjury. As we have already observed above, the appellant has all through been consistent that as an expert, a definite opinion in the case could be given only if the suspected firearm is available for examination. It is nobody's case that scientifically an expert can give a definite opinion by only examining the cartridges as to whether they have been fired from the same firearm. It was the trial court which insisted for an opinion without the presence of the firearm, and in that context only, the appellant gave the non-specific and indefinite opinion. An expert, in such a situation, could not probably have given a different opinion.

Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 of CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts; but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion.

In ***National Justice Compania Naviera SA v. Prudential Assurance Co Ltd (The "Ikarian Reefer"), (1995) 1 Lloyd's Rep 455,*** the Queen's Bench (Commercial Division) even went to the extent of holding that the expert has the freedom in such a situation to change his views. It was stated that "if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report".

Hence, merely because an expert has tendered an opinion while also furnishing the basis of the opinion and that too without being conclusive and definite, it cannot be said that he has committed perjury so as to help somebody. And, mere rejection of the expert evidence by itself may not also warrant initiation of proceedings under Section 340 of CrPC.

It is significant to note that the appellant's opinion that the cartridges appeared to have been fired from different firearms was based on the court's insistence to give the opinion without examining the firearm. In other words, it was not even his voluntary, let alone deliberate deposition, before the court. Therefore, it is unjust, if not unfair, to attribute any motive to the appellant that there was a somersault from his original stand in the written opinion. As a matter of fact, even in the written opinion, appellant has clearly stated that a definite opinion in such a situation could be formed only with the examination of the suspected firearm, which we have already extracted in the beginning. Thus and therefore, there is no somersault or shift in the stand taken by the appellant in the oral examination before court.

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157. INDIAN PENAL CODE, 1860 – Sections 201 and 302

(i) Murder – Circumstantial evidence – Last seen theory – Applicability, requirement of – Theory of last seen together is important chain of circumstances pointing towards guilt of accused but it is hazardous to base conviction solely on the theory – Theory must be applied, taking into consideration all the facts and circumstances of the prosecution case that precede and follow the point of being so last seen – Where time gap is long, it would be unsafe to base conviction on the theory.

(ii) Murder – Circumstantial evidence, requirement and proof of – In a case of circumstantial evidence, Court has to examine entire evidence in its entirety and ensure that only inference that can be drawn from evidence, is guilt of accused – Non-establishment of links in the chain of circumstances and missing links, are fatal to the prosecution case.

भारतीय दण्ड संहिता, 1860 – धाराएं 201 और 302

(i) हत्या – परिस्थिति जन्य साक्ष्य – अंतिम बार साथ देखें जाने का सिद्धांत – लागू होना और अनिवार्यताएँ – अंतिम बार साथ देखें जाने का सिद्धांत परिस्थितियों की एक महत्वपूर्ण कड़ी है जो अभियुक्त के दोषी होने की ओर इंगित करती है किन्तु केवल इसी सिद्धांत के आधार पर दोषसिद्धि हानिकारक होती है – यह सिद्धांत अभियोजन के मामले के सभी तथ्यों और परिस्थितियों को जो कि अंतिम बार साथ देखें जाने के पूर्व और बाद की हो उन्हें विचार में लेकर लागू करना चाहिए – जहाँ समय का अंतर लंबा हो वहाँ इस सिद्धांत के आधार पर दोषसिद्धि असुरक्षित होगी।

(ii) हत्या – परिस्थितिजन्य साक्ष्य प्रमाण और आवष्यकता – श्रृंखला के प्रमाणित न होने या अनुपस्थित होने का प्रभाव बतलाया गया ।

Nizam and another v. State of Rajasthan

Judgment dated 04.09.2015 passed by the Supreme Court in Criminal Appeal No. 413 of 2007, reported in (2016) 1 SCC 550

Extracts from the Judgment:

The case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In ***Bodhraj @ Bodha and ors. v. State of J & K, (2002) 8 SCC 45,*** wherein this court quoted a number of judgments and held as under:-

> "It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. [See ***Hukam Singh v. State of Rajasthan (1977) 2 SCC 99, Eradu v. State of Hyderabad, AIR 1956 SC 316, Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Suppl. SCC 79, Balwinder Singh v. State of Punjab, (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P., 1989 Suppl. (1) SCC 560***].The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In ***Bhagat Ram v. State of Punjab, AIR 1954 SC 621*** it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

We may also make a reference to a decision of this Court in ***C. Chenga Reddy v. State of A.P. (1996) 10 SCC 193,*** wherein it has been observed thus:

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In ***Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681***, this court held as under:

> "In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those

> circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

The same principles were reiterated in ***Sunil Clifford Daniel v. State of Punjab, (2012) 11 SCC 205, Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124*** and ***Mohd. Arif @ Ashfaq v. State (NCT of Delhi), (2011) 13 SCC 621*** and a number of other decisions.

Based on the evidence of PWs 1 and 2, courts below expressed the view that motive for murder of Manoj was the lust for the money which Manoj was carrying. Courts below based the conviction of the appellants on the circumstances "last seen theory" as stated by PWs 1 and 2 along with recovery of bilty and receipt by PW-6 on which the name of the accused person (Nizam) was printed. The appellants are alleged to have committed murder of Manoj for the amount which Manoj was carrying. But neither the amount of Rs.20,000/- nor any part of it was recovered from the appellants. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

Apart from non-recovery of the amount from the appellants, serious doubts arise as to the motive propounded by the prosecution. By perusal of the evidence of Sudama Vithal Darekar (PW-17) it is clear that driver Raj Kumar came to the police station complaining that by five to seven people of other vehicle have robbed him and the money. However, after investigation it was discovered that Raj Kumar gave false information and a case under Section 182 IPC was registered against him. Raj Kumar was produced before the Court and court imposed fine of Rs.1,000/- on him. This fact was also verified from PW-16-investigating officer during his cross-examination.

The courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping

in mind the circumstances that precede and follow the point of being so last seen.

Elaborating the principle of "last seen alive" in ***State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254,*** this Court held as under:-

> "It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd. In Re. AIR 1960 Mad 218"

The above judgment was relied upon and reiterated in ***Kiriti Pal v. State of West Bengal , (2015) 11 SCC 178***.

In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the "last seen theory." From the evidence discussed above, deceased-Manoj allegedly left in the truck DL-1GA-5943 on 23.01.2001. The body of deceased-Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

During their questioning under Section 313 Cr.P.C., the accused-appellants denied Manoj having travelled in their truck No.DL-1GA-5943. As noticed earlier, body of Manoj was recovered only on 26.01.2001 after three days. The gap between the time when Manoj is alleged to have left in the truck No.DL-1GA-5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW-4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.

In case of circumstantial evidence, court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. In the case at hand, neither the weapon of murder nor the money allegedly looted by the appellants or any other material was recovered from the possession of the appellants. There are many apparent lapses in the investigation and missing links:–(i) Non-recovery of stolen money; (ii) The weapon from which abrasions were caused; (iii) False case lodged by PW-2 alleging that he was being robbed by some other miscreants; (iv) Non-identification of the dead body and (v) Non-explanation as to how the deceased reached Maniya village and injuries on his internal organ (penis). Thus we find many loopholes in the case of the prosecution. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts. The chain of circumstantial evidence cannot be said to be concluded in any manner sought to be urged by the prosecution.

Normally, this Court will not interfere in exercise of its powers under Article 136 of the Constitution of India with the concurrent findings recorded by the courts below. But where material aspects have not been taken into consideration and where the findings of the Court are unsupportable from the evidence on record resulting in miscarriage of justice, this Court will certainly interfere. The "last seen theory" seems to have substantially weighed with the courts below

and the High Court brushed aside many loopholes in the prosecution case. None of the circumstances relied upon by the prosecution and accepted by the courts below can be said to be pointing only to the guilt of the appellants and no other inference. If more than one inference can be drawn, then the accused must have the benefit of doubt. In the facts and circumstances of the case, we are satisfied the conviction of the appellants cannot be sustained and the appeal ought to be allowed.

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158. INDIAN PENAL CODE, 1860 – Section 302

Murder – Circumstantial evidence – Last seen theory, applicability of – Close proximity in between last seen evidence and death, must be clearly established with cogent evidence – Mere proof as to motive in absence of any positive evidence to conclude that accused and deceased were last seen together, is not safe to convict the accused.

भारतीय दण्ड संहिता, 1860 – धारा 302

हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार साथ देखें जाने का सिद्धांत लागू होना – अंतिम बार साथ देखे जाने की साक्ष्य और मृत्यु के बीच निकटता अकाट्य प्रमाण द्वारा स्थापित करना चाहिए – केवल हेतुक का प्रमाण बिना किसी अन्य सकारात्मक साक्ष्य के मृतक और अभियुक्त को अंतिम बार साथ देखें गये यह निष्कर्ष निकालना और अभियुक्त को दोषसिद्ध करना सुरक्षित नहीं है।

State of Karnataka v. Chand Basha

Judgment dated 18.09.2015 passed by the Supreme Court in Criminal Appeal No. 1547 of 2011, reported in (2016) 1 SCC 501

Extracts from the Judgment:

This Court in ***Bodhraj v. State of J & K, (2002) 8 SCC 45***, held that:

> "The last seen theory comes into play where the gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

Reiterating the above ratio, this Court recently in ***Krishnan @ Ramasamy and Others v. State of Tamil Nadu , (2014) 12 SCC 279***, held that:

> "There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no

other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased."

It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and deceased were last seen together.

The prosecution story relies upon the 'last seen together' theory, which resulted into the death of Ganesh. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established. Yet, the prosecution has failed to prove the evidence which establishes the 'last seen together' theory beyond reasonable doubt to prove the guilt of the accused. The prosecution merely proved the motive which could have compelled the accused, and that the accused went to the bar with one other person, but the identity of that other person is not clearly established at all. The post-mortem report fails to specify any approximate time of death and in light of the recovery of the dead body on 20.01.2001, after 4 days, which is not a small gap since the deceased disappeared on 16.01.2001, it is not appropriate to convict the accused when his role is not firmly established.

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***159. INDIAN PENAL CODE, 1860 – Section 302**

Murder – Circumstantial evidence, appreciation of and last seen theory – Applicability of.

Facts of the case:

Deceased 'G' got married to the accused two years before the incident – With the lapse of time, their relationship started souring and the accused started ill-treating her – Thereafter, deceased started living with her parents – On 05.08.2001, the accused visited his in-laws house and took the deceased for watching movie – Accused was last seen returning alone after midnight and dead body of the deceased was recovered in the morning from the village and death occurred due to asphyxia caused by strangulation with ligature mark – Accused fled away from his village – On trial being concluded, the accused was convicted and sentenced under section 302 IPC with L.I. and fine of Rs. 200/- – High Court allowed the appeal against conviction – The Supreme Court held that following chain of circumstances against the accused is complete and leads only to the conclusion that it was the accused alone who committed murder:

(a) admittedly the deceased was wife of the accused and they had strained relations;
(b) the accused was suffering from veneral disease which he suspected to have sexually transmitted through his wife;
(c) on 05.08.2001 the accused had gone to his in-laws house and took his wife with him;
(d) the deceased and the accused were last seen in the midnight going together from cinema hall after night show towards village Ayinavilli
(e) the accused was last seen returning alone from village Ayinavilli after midnight at about 12.30 a.m. on 06.08.2001;
(f) the dead body of the deceased was recovered on next morning i.e. 06.08.2001 from village Ayinavilli;
(g) the death of the deceased was homicidal caused by asphyxia due to strangulation; and
(h) it is also established that the accused absconded from the village after the incident.

It was further held that it is a fit case where order of acquittal recorded by the High Court requires interference – Allowing the appeal, order of conviction and sentence recorded by the Trial Court restored.

भारतीय दण्ड संहिता, 1860 – धारा 302

हत्या – परिस्थितिजन्य साक्ष्य का मूल्यांकन और अंतिम बार साथ देखें जाने का सिद्धांत लागू होना। मामले के तथ्यों के क्रम में स्पष्ट किया गया।

State of Andhra Pradesh v. Patchimala Vigneswarudu alias Vigganna alias Ganaapathi

Judgment dated 06.01.2016 passed by the Supreme Court in Criminal Appeal No. 436 of 2008, reported in 2016 AIR SCW 258

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160. INDIAN PENAL CODE, 1860 – Section 302

Murder – Evidence, appreciation of – Keeping in view the distance of 11 kms. between the place where the deceased was assaulted and the first hospital located and the fact from where he was referred to Military Hospital, the lodging of F.I.R. held to be without any delay or deliberation – Assertions in the reporting were well supported and corroborated by post mortem – The injuries so found in the post mortem were possible by the weapons recovered pursuant to the disclosure statements of the accused – Testimony of eye witnesses were also found to be cogent, consistent and trustworthy – The defence set out was not found reasonable and probable – Conviction and sentence of accused persons held,

proper – Further held, non-examination of two witnesses does not affect the prosecution case as they were not eye witnesses but had merely helped in taking deceased to the hospital.

भारतीय दण्ड संहिता, 1860 – धारा 302

हत्या – साक्ष्य का मूल्यांकन – जहाँ मृतक पर हमला किया गया वहाँ से प्रथम अस्पताल की दूरी 11 किलो मीटर को ध्यान में रखते हुए और यह तथ्य की उसे सेना चिकित्सालय को रेफर किया था, प्रथम सूचना प्रतिवेदन किसी विलंब या विचार विमर्ष की बिना दर्ज करवाना अभिनिर्धारित किया गया – प्रतिवेदन में किये गये अभिकथनों का समर्थन व पुष्टि शव परीक्षण द्वारा हुई – अभियुक्त के प्रकटन कथन पर बराबद हथियार से शव परीक्षण में पाई गई चोटें आना संभव थी – प्रत्यक्ष साक्षीगण की साक्ष्य भी अकाट्य, स्थिर और विष्वसनीय पाई गई – लिया गया बचाव युक्ति–युक्ति और संभाव्य नहीं पाया गया – यह भी अभिनिर्धारित किया गया कि दो गवाहों का परीक्षण न करवाना अभियोजन के मामले को प्रभावित नहीं करता है क्योंकि वे प्रत्यक्ष साक्षी नहीं थे बल्कि उन्होंने मृतक को अस्पताल ले जाने में मदद की थी।

Gurmit Singh and another v. State of Punjab

Judgment dated 30.09.2015 passed by the Supreme Court in Criminal Appeal No. 1178 of 2008, reported in AIR 2015 SC 3744

Extracts from the Judgment:

We have gone through the record and considered the rival submissions. The distance between the place where Kulbir Singh was assaulted and the first hospital where he was taken, was about 11 km. There he was given medical attention and then referred to Military Hospital, Jalandhar. Considering these facts, the lodging of the FIR in the present case cannot be called to have been delayed unnecessarily. In our view the reporting was without any delay or deliberation and sets out true account of the incident. The assertions in the reporting are well supported and corroborated by the post mortem conducted the next day. The injuries so found in the post mortem are possible by the weapons recovered pursuant to the disclosure statements of the accused. The eye witness account on record through the depositions of PW 2 Surinder Kaur and PW 3 Gurpreet Kaur is cogent, consistent and trustworthy. Though DW 1 Varinder Sharma stated that Appellant No, 2 was attached to him as a gunman, nothing was placed on record whether at the relevant time Appellant No. 2 was on duty. Furthermore, neither the doctor who had put the stitches on the palm of Appellant No, 1 was examined nor was there any other medical evidence on record suggesting that it was impossible for Appellant No. 1 to even hold the dagger as alleged. In any case, out of three blows suffered by the deceased Kulbir Singh, only one was attributed to Appellant No. 1 while the other two were dealt by Appellant No. 1. The non-examination of Gurdial Singh and Devinder Singh also does not fatally affect the case of the prosecution, as they were not eye witnesses but had merely helped Surinder Kaur in taking her husband to the hospital.

We do not find any infirmity in the view taken by the High Court. We, therefore, affirm the judgment on conviction and sentence as recorded against the appellants and dismiss the present appeal. The appellants shall serve out the sentence as awarded to them.

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***161. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part I**

(i) Murder and culpable homicide not amounting to murder, distinction between – Explained.

Accused persons fired at deceased by country made pistol at his head in the intervening night of 10/11.08.1998 – He was taken to hospital and was discharged on 25.09.1998 – Subsequently, deceased developed complications and died due to septicemia on 13.10.1998 – There was neither any medical opinion that head injury sustained by the deceased was sufficient in the ordinary course of nature to cause death nor any inference could be drawn about the same – Held, since death occurred 62 days after the occurrence due to septicemia and it was indirectly due to the injuries sustained by the deceased and as the bullet injury was on the vital organ i.e. head, the accused person obviously had the intention of causing such bodily injury as is likely to cause death – Therefore, Clause (3) of section 300 is not attracted and conviction of accused persons were altered from section 300 to 304 Part I IPC.

(ii) Common intention, how to be gathered? It is to be gathered from conduct and manner in which crime was committed.

Keeping in view the facts and circumstances of the case that the accused persons reached the spot together armed with pistol during late night and that they started firing, it can safely be held that the accused persons were sharing common intention and have acted in furtherance of it – Mere fact that one of the accused persons fired at wife of the deceased and another at deceased, cannot be said that the accused who shot the wife cannot be convicted for death of deceased with the aid of section 34 of the IPC.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 और 304 भाग –1

(i) हत्या व हत्या की कोटी में न आने वाले सदोष मानव वध के बीच अंतर – समझाया गया।

(ii) सामान्य आषय कैसे देखा जा सकता है ? यह आचरण और अपराध जिस तरीके से किया गया उससे भी देखा जा सकता है।

मामले के तथ्य के क्रम में स्पष्ट किया गया।

Sanjay v. State of Uttar Pradesh

Judgment dated 06.01.2016 passed by the Supreme Court in Criminal Appeal No. 11 of 2016, reported in 2016 AIR SCW 282

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***162. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part I**

(i) Murder or culpable homicide, proof of – Unimpeachable oral testimony corroborated with medical evidence is sufficient to establish that accused intended to cause the inflicted injury and that attack was pre-meditated – Sufficiency of injury to cause death must be proved and it cannot be inferred – Further held, absence of medical opinion as to the injury that it was sufficient in ordinary course of nature to cause death, warrants conviction under section 304 Part I and not under section 302.

(ii) Non-recovery of weapon, effect of – Mere non-recovery of weapon of offence is not fatal to prosecution case.

भारतीय दंड संहिता, 1860 – धाराएं 302 और 304 भाग 1

(i) हत्या और सदोष मानव वध का प्रमाण – उपहति प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिए पर्याप्त थी इस बारे में मेडीकल राय का अभाव होने पर दोषसिद्धि धारा 304 भाग 1 में की जा सकती है धारा 302 में नहीं इस बारे में विधि समझाई गई।

(ii) हथियार बरामद न होने का प्रभाव – केवल अपराध संबंधी हथियार बरामद न होना अभियोजन के मामले के लिए घातक नहीं होता है।

Nankaunoo v. State of U.P.

Judgment dated 19.01.2016 passed by the Supreme Court in Criminal Appeal No. 46 of 2016, reported in AIR 2016 SC 447 (3-Judge Bench)

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***163. INDIAN PENAL CODE, 1860 – Sections 302, 304 Part II and 376**

Rape – Consent, proof of and offence of murder or culpable homicide not amounting to murder, commission of.

Accused persons committed rape on deceased victim at her home who was aged 14-15 years – She immediately threatened accused with disclosure of incident to her mother – Thereafter, accused persons poured kerosene oil on her and set her ablaze – On her raising alarm, people assembled and she was taken to hospital – Her condition was serious as she sustained 55% burn injuries – After two months, during her treatment, she died – Trial Court convicted the accused persons under sections 454, 376 and 302 IPC – In appeal, High Court held that it was a case of consensual intercourse with accused and when the victim threatened him that incident would be disclosed by her to mother, on the spur of moment he poured kerosene oil on her so as to cause burn injuries – Hence,

High Court convicted the accused under section 304 Part II of IPC – In appeal, reversing the order of the High Court and restoring the conviction and sentence passed by the trial Court, the Apex Court held that High Court had erred in holding that it is a case of consensual sexual intercourse and also that the accused did not intend to cause death – Further held, the proved facts and circumstances of the case indicate that accused wanted to get rid of the victim by causing her death – Injuries caused to her were also dangerous to life – Therefore, the overall circumstances established to the hilt that the accused intended to cause death by setting her ablaze after committing forceable sexual intercourse.

भारतीय दण्ड संहिता, 1860 – धाराएं 302, 304 भाग –2 और 376

बलात्कार – सहमति का प्रमाण, हत्या या हत्या की कोटि में न आने वाले सदोष मानव वध का अपराध कारित करना।

मामले के तथ्यों के क्रम में समझाया गया।

State of Assam v. Ramen Dowarah

Judgment dated 11.01.2016 passed by the Supreme Court in Criminal Appeal No. 668 of 2011, reported in 2016 AIR SCW 341

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***164. INDIAN PENAL CODE, 1860 – Sections 302 and 436**

EVIDENCE ACT, 1872 – Sections 3, 9, 24 and 32

(i) Major contradictions, omission and improvement in statements, effect of – Material and major contradictions, omissions, dramatic improvements and wild exaggerations in evidence before the Court over statements given to police, shake the credibility of statements of witnesses and such discrepancies cannot be brushed aside lightly.

(ii) Identification of accused by voice, evidentiary value of – Where the witnesses are not closely acquainted with the accused and claims to have identified the accused from short replies given by him, evidence of identification by voice is not reliable.

(iii) Dying declaration – Absence of certification by medical expert as to the mental fitness, effect of – If the persons recorded the dying declaration is satisfied that the declarant was in fit mental condition to make the dying declaration, then such dying declaration would not be invalid solely on the ground that no such certificate had been given by doctor – However, normally in order to satisfy itself that the declarant was in a fit mental condition to make the dying declaration, the Court has to look for medical opinion.

(iv) Extra-judicial confession, evidentiary value of – Principles for determining its admissibility in evidence:

(a) it is a weak piece of evidence by itself and has to be examined with greater care and caution

(b) it should be truthful and made voluntarily

(c) it must inspire confidence

(d) it must not suffer from material discrepancies and inherent improbabilities

(e) the statement is required to be proved like any other fact and in accordance with law.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 और 436

साक्ष्य अधिनियम, 1872 – धाराएं 3, 9, 24 और 32

(i) कथनों में बड़े विरोधाभास लोप और सुधार का प्रभाव – तात्विक और बड़े विरोधाभास, लोप, नाटकीय सुधार और गंभीर अतिरंजना न्यायालय के समक्ष दी गई साक्ष्य और पुलिस को दिये गये कथनों के मध्य पाई गयी, यह साक्षीगण के कथनों की विष्वसनीयता को प्रभावित करता है और ऐसी विसंगति को हल्के तरीके से नहीं लिया जा सकता।

(ii) आवाज द्वारा अभियुक्त की पहचान का साक्ष्यिक मूल्य – जहाँ गवाह अभियुक्त से ठीक से परीचित नहीं थे उन्होंने अभियुक्त को उसके द्वारा दिये गये लघु उत्तर के आधार पर पहचानने का दावा किया, आवाज द्वारा पहचान की साक्ष्य विष्वासनीय नहीं है।

(iii) मृत्यु कालिक कथन – चिकित्सा विषेषज्ञ द्वारा मानसिक रूप से स्वस्थ्य होने संबंध प्रमाण पत्र के अभाव का प्रभाव – यदि वह व्यक्ति जिसने मृत्यु कालिन कथन अभिलिखित किये वह कथन देने वाले की मानसिक दषा ठीक होने के बारे में संतुष्ट था तब ऐसा मृत्युकालिन कथन केवल डॉक्टर द्वारा दिया गया प्रमाण पत्र न होने के एक मात्र आधार पर अवैध नहीं हो जायेगा – सामान्यतः न्यायालय चिकित्सक की राय की अपेक्षा इस संबंध में करते हैं कि कथन करने वाला उचित मानसिक अवस्था में था।

(iv) न्यायिकेत्तर संस्वीकृति का साक्षिक मूल्य – ऐसी साक्ष्य के ग्राह्य होने का निर्धारण करने के सिद्धांत बतलाये गये।

Gajraj Singh v. State of M.P.

Judgment dated 28.11.2014 passed by the High Court of M.P. in Criminal Appeal No. 1645 of 2003, reported in ILR (2015) MP 1507 (DB)

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165. INDIAN PENAL CODE, 1860 – Section 304-B

Dowry death:

(i) Dowry, what amounts to? Customary monetary gifts exchanged during different ceremonies and both families engaged in offering gifts to each other in accordance with the prevailing practice and traditions – Such gifts cannot be termed as 'dowry'.

(ii) 'Soon before death', connotation of – Demand of Rs. 20,000/- for the purchase of agricultural land made about two years before the occurrence – It is too remote to the occurrence, and therefore, does not satisfy the requirement of 'soon before her death' as contemplated under section 304-B (1) of IPC.

भारतीय दण्ड संहिता, 1860 – धारा 304–बी

दहेज मृत्यु:

(i) दहेज क्या माना जा सकता है ? सामाजिक, धन के रूप में उपहार विभिन्न समारोहों के दौरान एक दूसरे को दिये जाते हैं और दोनों परिवार एक दूसरे को ऐसे उपहार देते हैं यह प्रथा और परिपाठी के रूप में दिये जाते है – ऐसे उपहार को 'दहेज' नहीं माना जा सकता।

(ii) 'मृत्यु के ठीक पूर्व का अर्थ' – कृषि भूमि खरीदने के लिए घटना के दो वर्ष पूर्व 20 हजार रूपये की मांग की गई – यह (ऐसी मांग) घटना से काफी दूरवर्ती है इस कारण यह धारा 304बी (1) भा. द.सं. में वर्णित 'उसकी मृत्यु के ठीक पूर्व' की आवष्यकता को संतुष्ट नहीं करती।

State of Karnataka v. Dattaraj and others

Judgment dated 15.02.2016 passed by the Supreme Court in Criminal Appeal No. 326 of 2012, reported in 2016 AIR SCW 882

Extracts from the Judgment:

On a perusal of the statement of Tukkubai – PW-1, the mother of Savita, it is apparent that the monetary gifts given to Dattaraj and his family members, were in the nature of customary gifts exchanged during different ceremonies. But what is of extreme significance is the fact, that even the family of Dattaraj, the husband of Savita, had given four tonnes of sugarcane seeds and a bag of jowar to her family, when the family of Savita visited her matrimonial house, on the occasion of the birth of a female child. It is acknowledged by Tukkubai – PW-1, that the aforesaid gifts were taken by the family members of Savita to their own village, by hiring a "tum-tum" (a horse-drawn cart). This return gift by the family of Dattaraj was also in conformity with the customary tradition for such occasions. It seems that the two families celebrated all festivities in the spirit of their customary obligations. Both families engaged in offering gifts to each other, in accord with the prevailing practice and tradition. For this reason, the judgment rendered by this Court in the Rajinder Singh v. State of Punjab, AIR 2015 SC 1359 which was strongly relied upon by the learned counsel for the appellant, in our considered view, would be of no avail in the determination of the projection canvassed.

Insofar as the demand of Rs.20,000/- for the purchase of agricultural land is concerned, it is apparent that the same was allegedly made when Dattaraj was in Dubai. The said demand was allegedly made by Ningesh (respondent – accused no.2), the father of Dattaraj, when he had gone to leave Savita at her

maternal home. Dattaraj is stated to have returned to India from Dubai eight to ten months, after the above demand. A female child was born to Savita about a year after the return of Dattaraj to India. After the birth of the female child, Savita had remained in her maternal house, for about four to five months. Therefore, even if the above oral allegation is accepted as correct, it was a demand made about two years before the occurrence. The same was too remote to the occurrence, and therefore, would not satisfy the requirement of "soon before her death" contemplated under Section 304-B (1) of the Indian Penal Code.

The only remaining alleged dowry demand, besides those referred to above was, that of a sewing-machine. Yet again the position was clarified by Tukkubai – PW-1. During her cross-examination she stated, that Savita knew tailoring. And that, the sewing-machine was given to her for tailoring clothes. This was really a gift to Savita, and therefore, cannot be considered as a part of the demand made by Dattaraj, for himself or for his family members. This allegation, in our considered view, is inconsequential, with respect to the provisions under which the accused were charged.

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***166. INDIAN PENAL CODE, 1860 – Section 304-B**

EVIDENCE ACT, 1872 – Sections 32 and 113-B

(i) Dowry death – Offence under section 304-B, ingredients of.

(a) the death of a woman caused by any burn or bodily injury or otherwise than under normal circumstances;

(b) such death occurred within seven years of marriage;

(c) soon before her death, she was subjected to cruelty or harassment by her husband or any of his relatives;

(d) such cruelty or harassment was for or in connection with dowry.

(ii) Multiple (two) dying declarations, evidentiary value of – Dying declaration not recorded in question answer form – Seems to be given under influence as members of in-laws were also present – Both the dying declarations were contrary to each other – Such dying declarations held, unreliable.

(iii) Presumption under section 113-B of the Evidence Act, when can be drawn? On facts mentioned above being proved, presumption must be drawn.

भारतीय दण्ड संहिता, 1860 – धारा 304–बी

साक्ष्य अधिनियम, 1872 – धाराएं 32 और 113–बी

(i) दहेज मृत्यु – धारा 304–बी भांदसं के घटक।

(ए) एक महिला की मृत्यु जलने या शारीरिक उपहति या सामान्य से भिन्न परिस्थितियों में कारित की गई हो।

(बी) ऐसी मृत्यु विवाह के 7 वर्ष के भीतर कारित की गई।

(सी) मृत्यु के ठीक पूर्व उसके साथ उसके पति या पति के नातेदारों द्वारा क्रूरता की गई या उसे तंग किया गया।

(डी) ऐसी क्रूरता या तंग किया जाना दहेज के लिए या दहेज के संबंध में थी।

(ii) कई (दो) मृत्युकालिन कथन का साक्ष्यिक मूल्य – मृत्युकालिन कथन प्रष्न उत्तर के रूप में अभिलिखित नहीं किये गये – असम्यक असर से किया जाना दर्षित हुआ क्योंकि मायके वाले उपस्थित थे – दोनों मृत्युकालिक कथन एक दूसरे से विरोधित – ऐसे मृत्युकालिन कथन अविष्वसनीय होना अभिनिर्धारित किया गया।

(iii) धारा 113–बी साक्ष्य अधिनियम की उपधारणा कब ली जा सकती है? उपर उल्लेखित तथ्य प्रमाणित होने पर यह उपधारणा ली जा सकती है।

Srikant v. State of M.P.

Order dated 29.10.2014 passed by the Supreme Court in Criminal Appeal No. 318 of 2011, reported in ILR (2015) MP 1385 (SC)

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167. INDIAN PENAL CODE, 1860 – Sections 304-B and 498-A

EVIDENCE ACT, 1872 – Section 113-B

(i) 'Soon before death' – Proximity test, application of – Cruelty must be during close proximity of the time of death and continuous so as to compel the victim to commit suicide.

(ii) Dowry death, connotation of – Death otherwise than in normal circumstances including homicidal, accidental and suicidal, would be dowry death if all other ingredients of section 304-B are fulfilled – And husband or his relative shall be deemed to have caused the death of a woman.

(iii) 'Shall presume', effect of – Court is left with no option but to presume guilt of the accused – Presumption is, however, rebuttable.

भारतीय दण्ड संहिता, 1860 – धाराएं 304–बी और 498–ए

साक्ष्य अधिनियम, 1872 – धारा 113–बी

(i) ''मृत्यु के ठीक पूर्व'' – सन्ननिकटता परीक्षण का लागू होना – क्रूरता का मृत्यु के समय से सन्ननिकट होना चाहिए और सतत् होना चाहिए जो पीड़ित को आत्महत्या के लिए बाध्य करे।

(ii) दहेज मृत्यु का अर्थ – सामान्य से भिन्न परिस्थितियों में मृत्यु में मानव वध, दुर्घटना और आत्महत्या शामिल है और यह दहेज मृत्यु होगी यदि धारा 304–बी (भा.दंस.) के सभी अन्य घटकों की पूर्ति होती है – और पति या उसके रिष्तेदार ने महिला की मृत्यु कारित की है यह माना जायेगा।

(iii) ''उपधारणा करेगा'' का प्रभाव – न्यायालय के पास अभियुक्त के दोषी होने की उपधारणा करने के अतिरिक्त अन्य कोई विकल्प नहीं है – यद्यपि उपधारणा खण्डन योग्य है।

Maya Devi & anr. v. State of Haryana

Judgment dated 07.12.2015 passed by the Supreme Court in Criminal Appeal No. 1263 of 2011, reported in 2015 (4) Crimes 572 (SC)

Extracts from the Judgment:

To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for dowry". The expression "soon before her death" used in Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. In fact, learned senior counsel appearing for the appellants submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to while considering the evidence led in by the prosecution. Though the language used is "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

The aforesaid provisions were considered by this Court in ***Bansi Lal v. State of Haryana, (2011) 11 SCC 359*** wherein it was held that while considering the case under Section 304B cruelty has to be proved during the close proximity of the time of death and it should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide. This Court further held that where the cruelty has been proved during the close proximity of the time of death then the provisions of Section 113B of the Indian Evidence Act, 1872 providing for presumption that the accused is responsible for dowry death, have to be pressed in service. In paras 19 and 20 of the judgment, this Court has further held as follows:-

> "19. It may be mentioned herein that the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with any demand of dowry. It is unlike the provisions of Section 113-A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume abetment of suicide by a married woman.

> Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113-B relatable to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. The only requirements are that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry.
>
> 20. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. It may also be pertinent to mention herein that the expression "soon before her death" has not been defined in either of the statutes. Therefore, in each case, the Court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death."

The marriage of Kavita@Kusum (since deceased) was solemnized with Karamvir on 17.07.1994. Kavita died on 26.09.1996 after consuming some poisonous substance at her matrimonial home. The father of the deceased lodged a complaint against the accused persons that he had given dowry on the eve of marriage beyond his means but after 20-25 days of marriage, Karamvir-appellant No. 2 herein, Maya Devi-appellant No.1 herein and brothers Dharamveer and Paramveer and sister Sonika, started harassing his daughter for more money. When Kavita visited her father's house, she narrated the entire tale of woes to her parents and brother. When the complainant enquired about the matter, the appellants informed the complainant that the appellant No. 2 is in need of money and they also have to perform the marriage of Sonika. A sum of Rs. 20,000/- was paid to appellant No. 2 so that the daughter of the complainant is not harassed. It was further stated that the complainant received a letter of his daughter regarding continuous demand for dowry and sufferings meted out to her. The complainant paid a further sum of Rs. 25,000/- for the purchase of refrigerator and gold chain to the appellant No. 2. Kavita was sent with her husband on the assurance that the accused family would not harass her in future. Even on the day of 'sakrant', when the brother of the deceased visited her matrimonial home, the accused threatened them that the household articles of Kavita will be thrown out. A further demand of Rs. 30,000/- was made to meet the kitchen expenses by the appellants. Since that demand was not fulfilled, the deceased was left with her father at Delhi. Subsequently, the complainant requested to compromise the matter and tendered his apology in writing. In

June 1996, the deceased was brought to home by the accused persons. After some days, when the complainant visited her matrimonial home at Rohtak, he was informed that situation has not changed and whenever she brings money, the peace returns for 10-20 days otherwise she is beaten mercilessly by the accused persons. On 26.09.1996, the complainant got the information about the death of his daughter. The case was committed to the Court of Sessions and the accused were found guilty under Section 304B and 498A of the IPC. There is ample evidence that the deceased was harassed, maltreated and was subjected to cruelty, for and in connection with the demands for dowry by the accused. Admittedly, appellant No. 2 was present in his office on 26.09.1996 located at M.D. University Campus at Rohtak but he did not attend to his wife at the relevant time. The assertion made by learned senior counsel for the appellants that the deceased was suffering from moderate depressing episode and was having suicidal tendencies prior to her death is of no consequence. Dr. V.P. Mehla (DW-2) was apprised by the deceased about the harassment and the maltreatment by her in-laws a month prior to her death when she was taken to the aforesaid doctor for the alleged treatment. According to DW-2, the deceased was so much depressed as a result of the act of cruelty meted out to her at the hands of the appellants that she developed suicidal tendencies. The testimony of DW-2 shows that the accused had created such a charged environment in her matrimonial home that she developed suicidal tendencies. Except appellant No. 1 herein, all were living in the house at Rohtak. Appellant No. 1 herein was a frequent visitor to that house and she herself admitted this fact in her statement under Section 313 of the Code. Thus, it is very much clear that accused persons maltreated, harassed and subjected the deceased to cruelty, after the solemnization of her marriage with the appellant No. 2 herein, during her life time and soon before her death, for and in connection with the demands for dowry, who died at her matrimonial home within seven years of her marriage otherwise than in normal circumstances.

Section 304-B IPC does not categorise death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring “otherwise than under normal circumstances” can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304-B IPC are fulfilled, any death (homicidal or suicidal or accidental) whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a “dowry death” and the woman’s husband or his relative “shall be deemed to have caused her death”. The section clearly specifies what constitutes the offence of dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death.

The key words under Section 113-B of the Evidence Act, 1872 are "shall presume" leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113-B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case on hand, accused persons failed to prove beyond reasonable doubt that the deceased died a natural death. When Kavita allegedly committed suicide, her husband-appellant No.2, though he was not present in the house, was present in his office at M.D. University, Rohtak at the relevant time but he did not make any sincere effort to take her to the hospital which was very near to the place of the incident. Similarly, appellant No. 2 got the deceased examined by DW-2 in order to create an impression that she was struggling with chronic depression but the truth floated upon the surface when the deceased reveals that the accused persons were maltreating her and she had started picking up the ideas of suicide. Lastly, appellant No. 2 falsely informed the court that having learnt about the death of his wife Kavita, he left for Delhi to inform her family members. In fact, the accused never went to Delhi and the complainant received a telephonic message from an unknown person regarding the death of his daughter. So far as Maya Devi-appellant No. 1 herein is concerned, there is no denying the fact that she was working as a teacher in a government school and she was not present at the relevant time at the place of incident but it is very much clear from the evidence on record that both the accused persons had a dominating role in the entire episode and she had always accompanied her son-appellant No. 2 herein to the house of the complainant (PW-3) for the dowry demands. The presumption under Section 113B of the Act is mandatory may be contrasted with Section 113A of the Act which was introduced contemporaneously. Section 113A of the Act, dealing with abetment of suicide, uses the expression "may presume". This being the position, a two-stage process is required to be followed in respect of an offence punishable under Section 304-B IPC: it is necessary to first ascertain whether the ingredients of the Section have been made out against the accused; if the ingredients are made out, then the accused is deemed to have caused the death of the woman but is entitled to rebut the statutory presumption of having caused a dowry death. From the evidence on record, we are of the opinion that in the present case Kavita died an unnatural death by committing suicide as she was subjected to cruelty/ harassment by her husband and in-laws in connection with the demand for dowry which started from the time of her marriage and continued till she committed suicide. Thus, the provisions of Sections 304-B and 498-A of the IPC will be fully attracted.

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168. INDIAN PENAL CODE, 1860 – Section 354

Sentencing:

(i) Punishment, legality of – Courts neither create offences nor do they introduce or legislate punishment – It is the duty of the legislature – Court can only suggest in this regard to the legislature.

(ii) Distinction between 'girl child' and 'minor' and re-defining the term 'child' need therefor.

(iii) Prevention of child abuse – Need to take effective measures, reiterated.

भारतीय दण्ड संहिता, 1860 – धारा 354

दंडाज्ञाः

(i) दंड की वैधानिकता – न्यायालय न तो अपराधों का सृजन कर सकते हैं और न ही वे दंड संबंधी विधान बनाते हैं – यह विधायिका का कर्तव्य है – न्यायालय विधायिका को इस बारे में सुझाव दे सकते हैं।

(ii) 'बालक' शब्द को पुनः परिभाषित करने की आवष्यकता और मादा बालक और अवयस्क के बीच अंतर।

(iii) बालक के दुरूपयोग के रोकथाम – प्रभावकारी कदम उठाने की आवष्यकता दोहराई गई।

Supreme Court Women Lawyers Association (SCWLA) v. Union of India and another

Judgment dated 11.01.2016 passed by the Supreme Court in Writ Petition (Civil) No. 4 of 2016, reported in AIR 2016 SC 358

Extracts from the Judgment:

The Court has clearly taken note of the constitutional silence or constitutional abeyance and dealt with the constitutional obligation to protect the right of women at the workplace. The Constitution Bench in ***Manoj Narula v. Union of India, 2014 AIR SCW 5287***, while dealing with the said principle, has observed:-

> "... The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalisation of the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in ***Laxmi Kant Pandey v. Union of India, AIR 1987 SC 232***, or issuance

of guidelines pertaining to arrest in ***D.K. Basu v. State of W.B., AIR 1997 SC 610,*** or directions issued in ***Vishaka & Ors. v. State of Rajasthan & Ors., AIR 1997 SC 3011*** are some of the instances."

In the case at hand, the Legislature has enacted the law and provided the punishment and, therefore, we cannot take recourse to the Vishaka principle. There is no constitutional silence or abeyance.

In ***Sakshi v. Union of India & Ors., AIR 2004 SC 3566,*** the Court was dealing with a Public Interest Litigation filed by the Petitioner-Association to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particularly those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation. The Court took note of various statutory provisions and the constitutional command, referred to the international conventions, pronouncement in ***S. Gopal Reddy v. State of A.P., AIR 1996 SC 2184*** and the report of the Law Commission, and opined as follows:-

"The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required. These directions are in addition to those given in ***State of Punjab v. Gurmit Singh, (1996) 2 SCC 384*** : (***AIR 1996 SC 1393***)."

We shall refer the said authority at a later stage, but suffice to say here that the Court neither proceeded to legislate nor did it provide for a punishment.

In the case at hand, we are concerned with the rape committed on a girl child. As has been urged before us that such crimes are rampant for unfathomable

reasons and it is the obligation of the law and law makers to cultivate respect for the children and especially the girl children who are treated with such barbarity and savageness as indicated earlier. The learned senior counsel appearing for the petitioner has emphasized on the obtaining horrendous and repulsive situation.

In this context, we may usefully refer to Section 376 IPC, as amended with effect from February 3, 2013 which reads as follows:-

> "376.Punishment for sexual assault – (1)(a) whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to 10 years and shall also be liable to fine. (b) If the sexual assault is committed by a person in a position of trust or authority towards the complainant or by a near relative of the complainant, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.
>
> (2) Whoever,-
>
> (a) Being a police officer commits rape-
>
> (i) Within the limits of the police station to which he is appointed; or
>
> (ii) In the premises of any station house; or
>
> (iii) On a woman or minor in his custody or in the custody of a police officer subordinate to such officer; or
>
> (b) Being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
>
> (c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or
>
> (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place of institution; or
>
> (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation. – For the purposes of this sub-section.—

(a) armed forces' means the naval, military and airforces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) 'hospital' means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) 'police officer' shall have the same meaning as assigned to the expression 'police; under the Police Act, 1861(5 of 1861);

(d) 'women's or children's institution' means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the inception and care of women or children."

It is submitted by learned senior counsel for the petitioner that Section 376(2)(i) deals with a culprit who commits rape on a woman who is under 16 years of age but the instances are numerous where the girl children and babies are raped. Highlighting further, it is proponed by her that when the society faces perversion where the child abuse like rape is rampant, there is a warrant for specific provision for imposing higher and severe punishment on such culprits as there is a provision under Section 376B which deals with sexual intercourse by husband upon his wife during separation or Section 376C, sexual intercourse by a person in authority or Section 376E, punishment for repeated offender.

It is urged by learned senior counsel for the petitioner that the term "child" requires to be defined, regard being had to the situation obtaining in the present day society. Learned counsel would suggest that a woman below 16 years is definitely a minor but a child, though a minor, may stand in a different category. The pain and suffering of a child is a brutal assault on her physical frame, when she is raped. She has no idea about sex or rape. It is a nightmare. Therefore, concern expressed by the Petitioner-Association is justified. It is not a Utopian thought or "floating fancy" of unwarranted assumption. It is the demonstration of reality in concrete terms. When a society moves in this way, there has to be instillation of fear of law and the punishment has to be definitive in a different way. In such a situation the classical understanding of crime by Marcus Aurelius, the Roman Emperor of 2nd Century A.D., who had said that poverty is the mother of crime may not hold good, for the crimes committed on girl children has no nexus with the economic status of the perpetrator of crime; on the contrary, may have nexus with neurotic behavior. In fact, this is a crime which is a shameless demonstration and total insensitive exposition of attitude to a victim. It is a gross violation of the social values and a failure of an individual. It is an act of extreme depravity. Therefore, the situation that has emerged compels one to rethink.

We must appreciate the stand taken by Mr. Rohatgi, learned Attorney General for India, who has keenly expressed his concern relating to the child abuse. It can never be forgotten that it is duty of the society to make a child happy. In this regard, it is apt to quote a few lines from Buxton:-

"The first duty to children is to make them happy. – If you have not made them so, you have wronged them. – No other good they may get can make up for that."

This Court cannot provide a higher punishment. It can only suggest to the Legislature. We are absolutely conscious that IPC provides punishment for the offence of rape. There can be no doubt that a girl child is a minor but may be a time has come where a distinction can be drawn between the girl children and

the minor, may be by fixing the upper limit at 10 for the girl children. We are disposed to think so as by that age, a child, a glorious gift to mankind, cannot conceive of any kind of carnal desire in man. Once she becomes a victim of such a crime, there is disastrous effect on her mind. The mental agony lasts long. Sorrow and fear haunt forever. There is need to take steps for stopping this kind of child abuse and hence, possibly there is a need for defining the term "child" in the context of rape and thereafter provide for more severe punishment in respect of the culprits who are involved in this type of crime. In the light of the said decision, we part with the suggestion with the fond hope that Parliament would respond to the agony of the collective, for it really deserves consideration. We say no more on this score.

We have earlier stated that we shall refer to the authority in ***Sakshi*** (supra). In the said case, after issuing the directions, the Court has observed thus:-

> "The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves."

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169. INSURANCE ACT, 1938 – Section 38

(i) Unamended section 38 of the Act – Life Insurance Policy, assignment or transfer of – Section 38 of the Act is mandatory and if assignment or transfer of policy is effected in accordance with the procedure laid down therein, the insurer cannot question or raise dispute as to right to transfer or assign any policy.

(ii) Section 38 (as amended in 2015), effect of – Life Insurance Policy, assignment or transfer of – Amended provision of the section conferring discretion upon the insurer to decide whether to accept transfer or assignment of policy or not has no retrospective effect – It is neither declaratory nor clarifactory piece of legislation.

बीमा अधिनियम, 1938 – धारा 38

(i) असंषोधित धारा 38 अधिनियम – जीवन बीमा पॉलिसी का हस्तांतरण या अंतरण – धारा 38 अधिनियम आज्ञापक है और यदि पॉलिसी का हस्तांतरण या अंतरण उसमें बतलाई प्रक्रिया का पालन करते हुये प्रभावित किया गया है तब बीमाकर्ता पॉलिसी के अंतरण या हस्तांतरण के अधिकार को विवादित नहीं कर सकता।

(ii) धारा 38 (संषोधित 2015) का प्रभाव – संषोधित प्रभावधान बीमाकर्ता को यह विवेकाधिकार देता है की वह तय करे कि क्या पॉलिसी का अंतरण या हस्तांतरण भूतकालिक प्रभाव से स्वीकार करे या न करे – यह (धारा 38 का संषोधन) न तो घोषणात्मक न ही स्पष्टीकरण करने वाला विधान है।

LIC of India v. Insure Policy Plus Services Pvt. Ltd. and others

Judgment dated 29.12.2015 passed by the Supreme Court in Civil Appeal No. 8542 of 2009, reported in AIR 2016 SC 182

Extracts from the Judgment:

It is clear that on transfer or assignment of a policy and on the requisite procedure being complied with, the assignee alone has an absolute interest in the policy. The insurer was bound by the provisions of Section 38 to accept such a transfer or endorsement. The only limitations placed on transferring a policy were in terms of the procedure laid out in Section 38, and subject to the terms of policy itself. The Section left no scope for the insurer to dispute the right to transfer or assign the policy. Section 38 was thus clearly mandatory and substantive. The erstwhile Section 39(4) also deserves reproduction in this vein, as it further indicated the mandatory character of Section 38. It reads thus:

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination:

Provided that the assignment, of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its reassignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.

The Appellant has argued that Section 38 could result in scenarios where it was bound to accept fraudulent policies since it had not been bestowed with discretionary powers. We do not find any content in this contention, for the reason that in cases of fraud, the assignment could be challenged on that ground even after being recorded. Furthermore, when the Appellant encountered a fraud inter alia in reviving lapsed policies, such as in cases of reviving the policy of an insured who is already deceased, it could refuse to recognize the revival, which it is well within its rights to do as a contractual clause to this effect forms part of the policy.

The amendment to the Insurance Act by the Insurance Laws (Amendment) Act, 2015, is significant. As previously discussed, Section 38 as it now stands gives the insurer the discretion to decide whether or not to accept a transfer or assignment of an Insurance Policy. The Amendment Act, according to its Statement of Objects and Reasons, is

> "An Act further to amend the Insurance Act, 1938 and the General Insurance Business (Nationalisation) Act, 1972 and to amend the Insurance Regulatory and Development Authority Act, 1999."

It is thus neither a declaratory or clarificatory piece of legislation. The language of the extant Section 38 cannot be interpreted to mean that this is what Section 38 had meant all along. Furthermore, had the Legislature intended to amend Section 38 retrospectively, it would have said so explicitly. Instead, it has incorporated sub-section (9), which protects rights and remedies of assignees that arose prior to the commencement of the Amendment Act. It is thus clear that Parliament intended to allow all previous assignments and transfers provided that they complied with the requirements laid out in Section 38. In the face of this clear legislative intent, no other interpretation of Section 38 is possible. It is accordingly not incumbent for us to discuss whether insurance policies partake of the nature of social security, or whether the transfer of such policies tantamount to wagering contracts.

In our considered opinion it is not open to the Appellants to charter a course which is different to the postulation in the Insurance Act, by means of its own Circulars. We need not go beyond mentioning the decision of this Court in ***Avinder Singh v. State of Punjab, AIR 1979 SC 321*** wherein it has been held that the Legislature cannot efface itself by delegating its plenary powers unless the delegate functions strictly under its supervision. If the delegate is allowed to function independently it would tantamount to "usurpation of legislative power itself." This view came to be reiterated to decades later in ***Agricultural Market Committee v. Shalimar Chemical Works Ltd., AIR 1997 SC 2502.*** This Court held that

> "..... Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates".

The position that obtains today is diametrically opposite inasmuch as the statute permitted, at the relevant time, the assignment and/or transfer of life insurance policies, but the delegate, through its Circulars, has attempted to nullify that provision of law. We conclude, therefore, that the circulars are ultra vires the Statute and must therefore be made ineffectual.

We also think that it is not appropriate to import the principles of public policy, which are always imprecise, difficult to define, and akin to an unruly horse, into contractual matters. The contra proferentem rule is extremely relevant inasmuch as it is the Appellant who has drafted the insurance policy and was therefore well-positioned to include clauses making it specifically impermissible to assign policies. In the absence of any such covenant, the Appellant cannot be heard to say that such transfers or assignments violate public policy. In any event, as we have seen above, the general global practice is to permit assignments of insurance policies.

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***170. LIMITATION ACT, 1963 – Article 65**

Suit for declaration of title by adverse possession, pleading and proof of – Stray entries in respect of possession in Khasra panchsala does not bestow any right to claim title on the basis of adverse possession – It must be specifically pleaded and proved by the party asserting adverse possession on which date the possession was taken over, that possession was actually visible, exclusive, hostile and continues over the statutory period as contemplated under Article 65 of the Act.

परिसीमा अधिनियम, 1963 – अनुच्छेद 65

विरोधी आधिपत्य द्वारा स्वत्व की घोषणा के लिए वाद, अभिवचन और प्रमाण – खसरा पंचसाला में आधिपत्य के बारे में यदा–कदा के इंद्राज विरोधी आधिपत्य के आधार पर स्वत्व का दावा करने का कोई अधिकार नहीं देते है – इस बारे में विषिष्ठि अभिवचन और प्रमाण उस पक्षकार द्वारा देना चाहिए जो विरोधी आधिपत्य का दावा करता है कि किस तारीख को आधिपत्य लिया गया है, आधिपत्य वास्तविक, दृष्य, एकमेव, विरोधी और अनुच्छेद 65 अधिनियम के अधीन वर्णित वैधानिक अवधि तक लगातार रहा है।

Kaptan Singh (dead) through LRs Pappu and others v. State of M.P.

Judgment dated 19.11.2015 passed by the High Court of M.P. in Second appeal No. 226 of 2010, reported in 2016 RN 7 (HC)

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

CIVIL PROCEDURE CODE, 1908 – Section 11

(i) Doctrine of 'pay and recover', applicability of – Claimants were travelling as passengers after payment of fare to the driver of the vehicle which was overloaded and thus was being driven in contravention of the Insurance Policy – Claims Tribunal holding driver, owner and the Insurance Company jointly and severally liable for the accident and awarded compensation – Held, since there was breach of Insurance Policy, the Claims Tribunal was not justified in holding the Insurance Company liable – However, keeping in view that the Act is a law of social justice and it would not be possible for the claimants to recover the compensation from the owner, the Insurance Company was directed to pay and recover the compensation.

(ii) Doctrine of *res judicata*, applicability of – Claimants were travelling as passengers after payment of fare to the driver of the vehicle – Vehicle met with an accident – Several claim applications arose out of the incident – In a subsequently filed claim application, copy of the award passed in earlier claim

application was filed in support of the objection as to *res judicata* – Held, mere filing of copy of award passed in previous case is not sufficient to prove the objection – Further held, neither parties were same nor the evidence – Therefore, doctrine of *res judicata* cannot be applied in the present case.

मोटर यान अधिनियम, 1988 – धारा 166

सिविल प्रक्रिया संहिता, 1908 – धारा 11

(i) 'भुगतान करे व वसूले' का सिद्धांत का लागू होना – दावेदार यात्रियों के रूप में किराया देकर यात्रा कर रहे थे जिस वाहन में क्षमता से अधिक यात्री थे इस कारण वह बीमा पॉलिसी की शर्तो के उल्लंघन में चलाया जा रहा था – दावा अधिकरण ने चालक, मालिक और बीमा कंपनी को संयुक्त रूप से और पृथक रूप से प्रतिकर के लिए उत्तरदायी पाया गया – अभिनिर्धारित किया गया, क्योंकि बीमा पॉलिसी की शर्तों का भंग हुआ था अतः दावा अधिकरण बीमा कंपनी को उत्तरदायी ठहराने में न्याय संगत नहीं थी – इस तथ्य को ध्यान में रखते हुये की अधिनियम एक सामाजिक न्याय की विधि है और दावेदारों के लिए यह संभव नहीं होगा की वे स्वामी से प्रतिकर वसूल सके अतः बीमा कंपनी को पहले प्रतिकर भुगतान करने और फिर उसे (वाहन स्वामी से) वसूले के निर्देष दिये गये।

(ii) पूर्व न्याय के सिद्धांत का लागू होना – दावेदार किराया देकर वाहन में यात्री के रूप में यात्रा कर रहे थे – वाहन दुर्घटना ग्रस्त हुआ – घटना से कई क्लेम आवेदन प्रस्तुत हुए – बाद में प्रस्तुत क्लेम आवेदन में पूर्व में प्रस्तुत क्लेम आवेदन के अवार्ड की प्रतिलिपि रेस जूडीकेटा की आपत्ति के समर्थन में प्रस्तुत की गई – अभिनिर्धारित किया गया, केवल पूर्व प्रकरण में पारित अवार्ड की प्रतिलिपि प्रस्तुत कर देना पर्याप्त नहीं है – यह भी अभिनिर्धारित किया गया कि न पक्षकार समान है और न साक्ष्य – इस कारण रेस जूडीकेटा का सिद्धांत इस मामले में लागू नहीं होता है।

Oriental Insurance Co. Ltd. v. Subbaro Talashila and others

Order dated 14.10.2015 passed by the High Court of M.P. in Misc. Appeal No. 609 of 2007, reported in 2016 (1) JLJ 297

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***172. N.D.P.S. ACT, 1985 – Section 20 (b) (ii) (C)**

(i) Accused persons found in possession of 6 kg 200 gms. and 4 kg charas respectively containing more than 50 gms. of tetra hydrocannabinol – Held, contraband seized from the accused persons being more than intermediate quantity, falls under commercial quantity and the offence committed is punishable under section 20 (b) (ii) (C) and not under section 20 (b) (ii) (B).

(ii) Sentencing – Minimum punishment – Where the minimum sentence is provided, Court must not reduce the sentence on the ground of so called mitigating factors as it would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provisions that prescribes minimum sentence for a criminal act.

एन.डी.पी.एस. एक्ट, 1985 – धारा 20 (बी)(ii)(सी)

(i) अभियुक्तगण के आधिपत्य में 6 किलो 200 ग्राम और 4 किलो चरस पाई गई जिसमें 50 ग्राम से अधिक टेट्रा हाइड्रोकेनाबिनोल था – अभिनिर्धारित किया गया अभियुक्तगण से अभिग्रहित सामग्री मध्यम मात्रा से अधिक है और वाणिज्यिक मात्रा में आती है और अभियुक्त द्वारा कारित अपराध धारा 20 (बी)(ii)(सी) के अधीन दण्डनीय है धारा 20 (बी)(ii)(बी) के अधीन नहीं।

(ii) दण्डाज्ञा – न्यूनतम दण्ड – जहाँ न्यूनतम दण्ड का प्रावधान हो न्यायालय कथित शमनकारी कारकों के आधार पर उसे कम नहीं कर सकती क्योंकि यह वैधानिक आदेष को अनुपूरक करने के समान होगा और यह दाण्डिक कृत्य के लिए तात्विक वैधानिक प्रावधानों में निर्धारित न्यूनतम दण्ड को अनदेखा करने के समान होगा।

State through Intelligence Officer, Narcotics Control Bureau v. Mushtaq Ahmad etc.

Judgment dated 06.10.2015 passed by the Supreme Court in Criminal Appeal No. 1294 of 2015, reported in 2015 CriLJ 4935 (SC)

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173. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

The term 'debt or other liability', connotation of.

Facts of the case:

One 'N' had received an amount of Rs. 10 lakh from the complainant in connection with the agreement executed between the two – Upon termination of the agreement, the amount to 'N' was refundable to the complainant and that 'N' had agreed to refund the same within one month – The Promissory note executed by 'N' contained unequivocal acknowledgement of not only the debt/liability but promise to liquidate the same within one month with interest – Five cheques handed over were to be returned but only upon payment of amount in question – Held, the cheques were meant to discharge, in whole or part "any debt or other liability" within the meaning of section 138 of the Act.

परक्राम्य लिखित अधिनिमय, 1881 – धारा 138

शब्द 'ऋण या अन्य दायित्व' का अर्थ।

मामले के तथ्यों के क्रम में समझाया गया।

Don Ayengia v. The State of Assam and another

Judgment dated 28.01.2016 passed by the Supreme Court in Criminal Appeal No. 82 of 2016, reported in 2016 AIR SCW 740

Extracts from the Judgment:

It is not in dispute that the execution of the Promissory Note and the endorsement made by the Respondent has been satisfactorily proved at the trial. Concurrent findings recorded by the trial court and the first appellate court to that effect conclude the factual part of the controversy. The only question that survives in the above background is whether the cheques issued by the Respondent were meant to discharge, in whole or part, "any debt or other liability" within the meaning of Section 138 of the Negotiable Instruments Act, 1881.

We have no hesitation in answering that question in the affirmative. The facts as narrated above and as held proved by the trial Court and the appellate court, leave no manner of doubt, that Nazimul Islam had received an amount of rupees ten lakhs from the complainant in connection with the agreement executed between the two. It is also not in dispute that upon termination of the agreement, the amount paid to Nazimul Islam was refundable to the complainant and that Nazimul Islam had agreed to refund the same within one month. The promissory note executed by Nazimul Islam contained an unequivocal acknowledgment of not only the debt/liability aforementioned but promised to liquidate the same within one month with interest at the bank rate. Five cheques handed over were to be returned but only upon payment of the amount in question. Such being the fact situation, it cannot be said that the cheques had nothing to do with any debt or other liability. As a matter of fact, the existence of the debt or liability was never in dispute. On the contrary, it was acknowledged by Nazimul Islam who simply sought one month's time to pay up the amount. The cheques were post dated, only to give to the drawer the specified one month's time to pay the amount. There is thus a direct relationship between the liability and the cheques issued in connection therewith. Thus far there is no difficulty. The difficulty arises only because the promissory note uses the words "security" qua the cheques. This would ordinarily and in the context in which the cheques were given imply that once the amount of rupees ten lakhs was paid, the cheques shall have to be returned. There would be no reason for their retention by the complainant or for their presentation. In case, however, the amount was not paid within the period stipulated, the cheques were liable to be presented for otherwise there was no logic or reason for their having been issued and handed over in the first instance. If non-payment of the agreed debt/liability within the time specified

also did not entitle the holder to present the cheques for payment, the issue and delivery of any such cheques would be meaningless and futile if not absurd. It is important to note that it was not a case where no debt or liability was determined or acknowledged to be payable. If cheques were issued in relation to a continuing contract or business where no claim is made on the date of the issue nor any determinate amount payable to the holder, one could perhaps argue that the cheques cannot be presented or prosecution launched on a unilateral claim of any debt or liability. The present is, however, a case where the existence of the debt/liability was never in dispute. It was on the contrary acknowledged and a promise was made to liquidate the same within one month. Failure on the part of the debtor to do so could lead to only one result, viz. presentation of the cheques for payment and in the event of dishonour, launch of prosecution as has indeed happened in the case at hand.

The argument that the respondent had no liability to liquidate the debt owed by Nazimul Islam, has not impressed us. What is important is whether the cheques were supported by consideration. Besides the fact that there is a presumption that a negotiable instrument is supported by consideration there was no dispute that such a consideration existed in as much as the cheques were issued in connection with the discharge of the outstanding liability against Nazimul Islam. At any rate the endorsement made by the respondent on the promissory note that the cheques can be presented for encashment after 25-09-2007 clearly shows that the cheques issued by him were not ornamental but were meant to be presented if the amount in question was not paid within the extended period. The High Court in our view fell in error in upsetting the conviction recorded by the Courts below who had correctly analysed the factual situation and applied the law applicable to the same.

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174. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 142, 142-A and 142-A (1) (as inserted by Second Ordinance, 2015)

CRIMINAL PROCEDURE CODE, 1973 – Section 177

Words 'as if that sub-section had been in force at all material times', connotation of & amended section 142 and newly inserted sections 142-A and 142-A (1), effect of – Have retrospective effect and are applicable to the new as well as pending cases.

परक्राम्य लिखित अधिनियम, 1881 – धाराएं 142, 142–ए और 142–ए (1) (जैसा कि 2015 के द्वितीय अध्यादेष द्वारा जोड़ा गया)

दण्ड प्रक्रिया संहिता, 1973 – धारा 177

शब्द 'जैसे की उपधारा सभी तात्विक संबंधों पर प्रभावषील थी' का अर्थ और धारा 142 के संषोधन और नई समाविष्ट धाराएं 142–ए और 142–ए(1) का प्रभाव – ये (प्रावधान) भूतलक्षी है और नये प्रकरणों तथा लंबित प्रकरणों पर भी लागू होते है।

M/s Bridgestone India Pvt. Ltd. v. Inderpal Singh

Judgment dated 24.11.2015 passed by the Supreme Court in Criminal Appeal No. 1557 of 2015, reported in 2015 AIR SCW 6556

Extracts from the Judgment:

It is, however, imperative for the present controversy, that the appellant overcomes the legal position declared by this Court, as well as, the provisions of the Code of Criminal Procedure. Insofar as the instant aspect of the matter is concerned, a reference may be made to Section 4 of the Negotiable Instruments (Amendment) Second Ordinance, 2015, whereby Section 142A was inserted into the Negotiable Instruments Act. A perusal of Sub-section (1) thereof leaves no room for any doubt, that insofar as the offence under Section 138 of the Negotiable Instruments Act is concerned, on the issue of jurisdiction, the provisions of the Code of Criminal Procedure, 1973, would have to give way to the provisions of the instant enactment on account of the non-obstante clause in sub-section (1) of Section 142A. Likewise, any judgment, decree, order or direction issued by a Court would have no effect insofar as the territorial jurisdiction for initiating proceedings under Section 138 of the Negotiable Instruments Act is concerned. In the above view of the matter, we are satisfied, that the judgment rendered by this Court in ***Dashrath Rupsingh Rathod v. State of Maharashtra and another, AIR 2014 SC 3519*** would also not non-suit the appellant for the relief claimed.

We are in complete agreement with the contention advanced at the hands of the learned counsel for the appellant. We are satisfied, that Section 142(2)(a), amended through the Negotiable Instruments (Amendment) Second Ordinance, 2015, vests jurisdiction for initiating proceedings for the offence under Section 138 of the Negotiable Instruments Act, inter alia in the territorial jurisdiction of the Court, where the cheque is delivered for collection (through an account of the branch of the bank where the payee or holder in due course maintains an account). We are also satisfied, based on Section 142A(1) to the effect, that the judgment rendered by this Court in Dashrath Rupsingh Rathod's case (supra), would not stand in the way of the appellant, insofar as the territorial jurisdiction for initiating proceedings emerging from the dishonor of the cheque in the present case arises. Since cheque No.1950, in the sum of Rs.26,958/-, drawn on the Union Bank of India, Chandigarh, dated 02.05.2006, was presented for encashment at the IDBI Bank, Indore, which intimated its dishonor to the appellant on 04.08.2006, we are of the view that the Judicial Magistrate, First Class, Indore, would have the territorial jurisdiction to take cognizance of the proceedings initiated by the appellant under Section 138 of the Negotiable Instruments Act, 1881, after the promulgation of the Negotiable Instruments (Amendment) Second Ordinance, 2015. The words "...as if that sub-section had been in force at all material times..." used with reference to Section 142(2), in Section 142A(1) gives retrospectivity to the provision.

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***175. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 13 and 20**

Offences under sections 7 and 13, proof of – Presumption under section 20 of the Act – When can be drawn?

The ring of truth in the prosecution case is not shaken merely on account of Panch witness turned hostile particularly where testimony of complainant and other witnesses are credible and trustworthy – Further held, presumption can be drawn under section 20 of the Act regarding the motive of receiving the gratification unless it is rebutted.

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 7, 13 और 20

धारा 7 और 13 के अधीन अपराध का प्रमाण – धारा 20 अधिनियम की उपधारणा – कब ली जा सकती है ?

केवल पंच गवाह के पक्षविरोधी हो जाने के कारण अभियोजन के मामले की सत्यता प्रभावित नहीं होती है विषेषकर जहाँ परिवादी और अन्य गवाहों की साक्ष्य भरोसेमंद हो – यह भी अभिनिर्धारित किया गया कि धारा 20 अधिनियम के अधीन (अवैध) पारितोषण लेने की उपधारणा ली जा सकती है जब तक कि इसका खण्डन न किया जाये।

Indra Vijay Alok v. State of Madhya Pradesh

Judgment dated 31.08.2015 passed by the Supreme Court in Criminal Appeal No. 1917 of 2008, reported in AIR 2015 SC 3681

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176. PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 and 15

(i) Prevention of Corruption Act, 1988, object of – Is enacted to make the anti corruption law more effective and widen its coverage.

(ii) The term 'public servant', extent of – Over the general definition of 'public servant', even in section 21 of IPC, it is the definition of 'public servant' given in the Prevention of Corruption Act, 1988 r/w/s 46-A of the Banking Regulation Act, 1949 which holds the field for the purposes of offences under the said Act – Further held, Chairperson alongwith Managing Director and Executive Director of a Banking Company operating under the licence issued by RBI, are public servants – However, mere performance of public duties by holder of any office cannot bring the incumbent within the meaning of the expression 'public servant'.

भ्रष्टाचार निवारण अधिनियम, 1988 – धाराएं 13 और 15

(i) भष्टाचार निवारण अधिनियम, 1988 का उद्देष्य – यह अधिनियम भ्रष्टाचार को रोकने और प्रभावषील तरीके से और विस्तार पूर्वक (ऐसे) अपराधों को (अधिनियम में) शामिल करने के लिए है।

(ii) शब्द 'लोक सेवक' का विस्तार – धारा 21 भा.द.सं. से विस्तारित होना समझाया गया।

Central Bureau of Investigation, Bank Securities and Fraud Cell v. Ramesh Gelli and others

Judgment dated 23.02.2016 passed by the Supreme Court in Criminal Appeal No. 1077 of 2013, reported in 2016 AIR SCW 1063

Extracts from the Judgment:

In the light of law laid down by this court in ***Federal Bank Ltd. v. Sagar Thomas and others, AIR 2003 SC 4325, State of Maharashtra and others v. Brijlal Sadasukh Modani, 2015 SCC Online SC 1403, P.V Narasimha Rao v. State (CBI/SPE), AIR 1998 SC 2120, Statesman (P) Ltd. v. H.R. Deb, AIR 1968 SC 1495, Mahadeo v. Shantibhai, (1969) 2 SCR 422, Housing Board of Haryana v. Haryana Housing Board Employees' Union and others, AIR 1996 SC 434, Manish Trivedi v. State of Rajasthan, AIR 2014 SC 648 and Govt. of A.P. and others v. Venku Reddy, AIR 2002 SC 3346, it is clear that object of enactment of P.C. Act, 1988,*** was to make the anti corruption law more effective and widen its coverage. In view of definition of public servant in Section 46A of Banking Regulation Act, 1949 as amended the Managing Director and Executive Director of a Banking Company operating under licence issued by Reserve Bank Of India, were already public servants, as such they cannot be excluded from definition of 'public servant'. We are of the view that over the general definition of 'public servant' given in Section 21 of IPC, it is the definition of 'public servant' given in the P.C. Act, 1988, read with Section 46-A of Banking Regulation Act, which holds the field for the purposes of offences under the said Act. For banking business what cannot be forgotten is Section 46A of Banking Regulation Act, 1949 and merely for the reason that Sections 161 to 165A of IPC have been repealed by the P.C. Act, 1988, relevance of Section 46A of Banking Regulation Act, 1949, is not lost.

Be it noted that when Prevention of Corruption Act, 1988 came into force, Section 46 of Banking Regulation Act, 1949 was already in place, and since the scope of P.C. Act, 1988 was to widen the definition of "public servant". As such, merely for the reason that in 1994, while clarifying the word "chairman", legislature did not substitute words "for the purposes of Prevention of Corruption Act, 1988" for the expression "for the purposes of Chapter IX of the Indian Penal Code (45 of 1860)" in Section 46A of Banking Regulation Act, 1949, it cannot be said, that the legislature had intention to make Section 46A inapplicable for the purposes of P.C. Act, 1988, by which Sections 161 to 165A of IPC were omitted, and the offences stood replaced by Sections 7 to 13 of P.C. Act, 1988.

A law which is not shown ultravires must be given proper meaning. Section 46-A of Banking Regulation Act, 1949, cannot be left meaningless and requires harmonious construction. As such in our opinion, the Special Judge (CBI) has erred in not taking cognizance of offence punishable under Section 13(2) read

with Section 13(1)(d) of P.C. Act, 1988. However, we may make it clear that in the present case the accused cannot be said to be public servant within the meaning of Section 21 IPC, as such offence under Section 409 IPC may not get attracted, we leave it open for the trial court to take cognizance of other offences punishable under Indian Penal Code, if the same get attracted.

While there can be no manner of doubt that in the Objects and Reasons stated for enactment of the Prevention of Corruption Act, 1988 it has been made more than clear that the Act, inter alia, envisages widening of the scope of the definition of public servant, nevertheless, the mere performance of public duties by the holder of any office cannot bring the incumbent within the meaning of the expression 'public servant' as contained in Section 2(c) of the PC Act. The broad definition of 'public duty' contained in Section 2(b) would be capable of encompassing any duty attached to any office inasmuch as in the contemporary scenario there is hardly any office whose duties cannot, in the last resort, be traced to having a bearing on public interest or the interest of the community at large. Such a wide understanding of the definition of public servant may have the effect of obliterating all distinctions between the holder of a private office or a public office which, in my considered view, ought to be maintained. Therefore, according to me, it would be more reasonable to understand the expression "public servant" by reference to the office and the duties performed in connection therewith to be of a public character.

By virtue of Section 46A of the BR Act office bearers/employees of a Banking Company (including a Private Banking Company) were "public servants" for the purposes of Chapter IX of the I.P.C. with the enactment of the PC Act the offences under Section 161 to 165A included in Chapter IX of Code came to be deleted from the said Chapter IX and engrafted under Sections 7 to 12 of the PC Act. With the deletion of the aforesaid provisions from Chapter IX of the I.P.C. and inclusion of the same in the PC Act there ought to have been a corresponding insertion in Section 46A of the BR Act with regard to the deeming provision therein being continued in respect of officials of a Banking Company insofar as the offences under Sections 7 to 12 of the PC Act are concerned. However, the same was not done. The Court need not speculate the reasons therefor, though, perhaps one possible reason could be the wide expanse of the definition of "public servant" as made by Section 2(c) of the PC Act. Be that as it may, in a situation where the legislative intent behind the enactment of the PC Act was, inter alia, to expand the definition of "public servant", the omission to incorporate the relevant provisions of the PC Act in Section 46A of the BR Act after deletion of Sections 161 to 165A of the I.P.C. from Chapter IX can be construed to be a wholly unintended legislative omission which the Court can fill up by a process of interpretation. Though the rule of casus omissus i.e. "what has not been provided for in the statute cannot be supplied by the Courts" is a strict rule of interpretation there are certain well known exceptions thereto. The following

opinion of Lord Denning in ***Seaford Court Estates Ltd. v. Asher, (1949) 2 All ER 155*** noticed and approved by this Court may be taken note of.

> "The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were ....He (The Judge) must set to work in the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.....A judge should ask himself the question, how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

In ***Magor & St. Mellons Rural District Council v. Newport Corporation, (1950) 2 All ER 1226*** the learned judge restated the above principles in a somewhat different form to the following effect :

> "We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

The definition of section 2 (c) of P.C. Act, 1988 shows that under Clause (viii) contained in Section 2(c) of P.C. Act, 1988 a person who holds an office by virtue of which he is authorized or required to perform any public duty, is a public servant. Now, for the purposes of the present case this court is required to examine as to whether the chairman/managing director or executive director of a private bank operating under licence issued by RBI under Banking Regulation Act, 1949, held/holds an office and performed/performs public duty so as to attract the definition of 'public servant' quoted above.

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

Specific performance of contract, requirement for – The jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract – Specific performance will not be ordered if the contract itself suffers from some defect which makes it invalid or unenforceable.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 16 (सी) और 20

संविदा के विनिर्दिष्ट पालन के लिए आवष्यकता – संविदा के विनिर्दिष्ट पालन का क्षेत्राधिकार एक वैध और प्रवर्तनीय संविदा के अस्तित्व के होने पर आधारित होता है – यदि संविदा में कुछ कमी है जो उसे अवैध या अप्रवर्तनीय बना देती है तब विनिर्दिष्ट पालन का आदेष नहीं किया जायेगा।

Satish Kumar v. Karan Singh and another

Judgment dated 21.01.2016 passed by the Supreme Court in Civil Appeal No. 7385 of 2013, reported in 2016 AIR SCW 737

Extracts from the Judgment:

It is interesting to note that the High Court has noticed the fact mentioned in para 24 of trial court judgment that during the pendency of the lis DDA allotted the plot in question in favour of the deceased father of the defendant (original plaintiff) by executing a lease deed putting a condition that the plot in question will remain non-transferable for a period of ten years. Para 24 of the trial court judgment is quoted hereinbelow:-

> "It is stated on oath by Umed Singh (DW1) that the DDA allotted plot in dispute to his deceased father on certain terms and conditions, which were embodied in the lease deed. One of such conditions was that suit will remain non-transferable for a period of ten years."

In spite of the aforesaid fact noticed by the High Court,that the land so allotted to the defendant- is not transferable for a period of 10 years, the High Court failed to hold that a decree for specific performance cannot be passed.

We are sorry to hold that both the Trial Court and the High Court have completely misconstrued the facts of the case and misunderstood the law laid down by this Court in the matter of exercising discretionary power for granting a decree for specific performance.

After giving our anxious consideration to the matter, we are of the view that the impugned order passed by the trial court and affirmed by the High Court cannot be sustained in law inasmuch as no decree for specific performance can be passed on the basis of the alleged receipt-cum-agreement. We therefore, allow this appeal and set aside the judgments passed by the Trial Court and the High Court.

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178. SUCCESSION ACT, 1925 – Sections 61 to 63, 70, 73 and 372

EVIDENCE ACT, 1872 – Section 67

Multiple Will, validity of – Other things being equal and in proper order, latest Will supersedes previous Wills.

उत्तराधिकार अधिनियम, 1925 – धाराएं 61 से 63, 70, 73 और 372

साक्ष्य अधिनियम, 1872 – धारा 67

एक से अधिक वसीयत की वैधता – अन्य बाते समान और उचित प्रक्रम में होने पर अंतिम वसीयत पूर्व की वसीयत को अधिषिष्ठ (समाप्त) कर देती है।

Shakuntala Bai and others v. Mahaveer Prasad

Judgment dated 02.07.2015 passed by the Supreme Court in Civil Appeal No. 1630 of 2010, reported in (2015) 10 SCC 550

Extracts from the Judgment:

On a perusal of the evidence of AW 3, Mohan Lal and AW 4, Mangi Lal, it is apparent that these two witnesses have been able to satisfactorily prove the execution of the Will dated 15.11.1978 and the attestation thereof by two witnesses, as required in law. As adverted to herein above, the signature of the testator Kanhaiya Lal, on these documents has been endorsed by both the handwriting experts. The report of the Forensic Science Laboratory also corroborates this finding. The view expressed by Shri Achyut Narayan, NAW 1 that though the signatures are genuine, those had been obtained on blank papers, which later on were converted into the Will, in the face of the overwhelming testimony of AW 3, Mohan Lal and AW 4, Mangi Lal, had been rightly rejected by the High Court. The recitals of the Will, Exh. 2, also provide sufficient justification for the bequest in favour of Respondent No. 1, Mahaveer Prasad. The fact that wife and daughter of the testator had, at all relevant time, supported the Respondent No. 1 in his initiatives to obtain the succession certificate is also a formidable factor in his favour as well as in endorsement of the genuineness of the Will, 15.11.1978. Noticeably though, the Will dated 23.12.1974 had been registered, no steps had been taken by the non-applicants to obtain the probate thereof. It is not unlikely, that the testator, out of, some disappointment and reservations qua the adopted son, Respondent No. 1 had in the rush of moment and as advised by the persons interested, as recited in the Will dated 15.11.1978, did momentarily decide to disinherit the only son of the family. However, on an equanimous re-consideration and following indepth and dispassionate cogitation, he eventually decided again to bequeath all his properties to him. The approval of the mother and the sister to this bequest is a strong indicator to this effect. We are thus of the view, that in the above factual background, the dispensation made by the testator in favour of the Respondent No. 1 cannot be repudiated to be in defiance of logic or unfair vis-à-vis the other members of the family. We do not find as well, any vitiating or suspicious circumstance invalidating the bequest.

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179. TRADEMARKS ACT, 1999 – Section 9

Registration of trademark, permissibility of – Use of exclusive names of holy/religious books as trademarks for goods or services is impermissible – Another word or symbol is required to be added as suffix or prefix.

व्यापार चिन्ह अधिनियम, 1999 – धारा 9

व्यापार चिन्ह के पंजीकरण का अनुमत योग्य होना – वस्तुओं या सेवाओं के लिए पवित्र/धार्मिक पुस्तकों के एकमेव नाम का उपयोग अनुमत योग्य नहीं है – अन्य शब्द या चिन्ह उसके पूर्व या पष्चात् जोड़ना अनिवार्य है।

Lal Babu Priyadarshi v. Amritpal Singh

Judgment dated 27.10.2015 passed by the Supreme Court in Civil Appeal No. 2138 of 2006, reported in AIR 2016 SC 461

Extracts from the judgment:

The word "RAMAYAN" represents the title of a book written by Maharishi Valmiki and is considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book "RAMAYAN", for getting it registered as a trade mark for any commodity could not be permissible under the Act. If any other word is added as suffix or prefix to the word "RAMAYAN" and the alphabets or design or length of the words are same as of the word "RAMAYAN" then the word "RAMAYAN" may lose its significance as a religious book and it may be considered for registration as a trade mark. However, in the present case, we find that the appellant had applied for registration of the word "RAMAYAN" as a trade mark. We also find that in the photographs, after adding "OM's" to the word "RAMAYAN", at the top and in between "OM's and RAMAYAN", the sentence, "Three Top Class Aromatic Fragrance", is also written. Thus, it is not a case that the appellant is seeking the registration of the word "OM's RAMAYAN" as a trade mark. Further, from the photographs, we find that the photographs of Lord Rama, Sita and Lakshman are also shown in the label which is a clear indication that the appellant is taking advantage of the Gods and Goddesses which is otherwise not permitted.

In ***National Bell Co. v. Metal Goods Mfg. Co. (P) Ltd. and another, AIR 1971 SC 898***, this Court has held that the distinctiveness of the trade mark in relation to the goods of a registered proprietor of such a trade mark may be lost in a variety of ways e.g. by the goods not being capable of being distinguished as the goods of such a proprietor or by extensive piracy so that the marks become public juris. The principle underlying clause (c) of Section 32 is that the property in a trade mark exists so long as it continues to be distinctive of the goods of the registered proprietor in the eyes of the public or a section of the public. If the proprietor is not in a position to use the mark to distinguish his goods from

those of others or has abandoned it or the mark has become so common in the market that it has ceased to connect him with his goods, there would hardly be any justification in retaining it on the register.

It has also come on record that the word "RAMAYAN" is being used as a mark for the similar products by more than 20 traders in Patna and in different parts of the country, and therefore, it has become public juris and common to the trade.

There are many holy and religious books like Quran, Bible, Guru Granth Sahib, Ramayan etc., to name a few. The answer to the question as to whether any person can claim the name of a holy or religious book as a trade mark for his goods or services marketed by him is clearly 'NO'.

Moreover, the appellant has not been able to establish that the word "RAMAYAN" for which he has applied the trade mark had acquired a reputation of user in the market inasmuch as, we find that there are more than 20 traders in the city using the word "RAMAYAN" as a mark for the similar products and also in different parts of the country.

On a perusal of the artistic work said to have been created, there is no doubt that both the marks are identical in design, colour, scheme and the reproduction of photographs is in such a manner that an ordinary buyer would reasonably come to a mistaken conclusion that the article covered by one brand can be the article covered by the other. Both the parties have claimed to be manufacturing units engaged in certain goods.

Further, the respondent herein claimed that though he had been in the business since 1980, he had developed and published the artistic work in 1986 and has also been using the mark as a trademark and claiming use since 1986 whereas the appellant herein claimed use of the trademark since 1987. However, by filing an application to the concerned authority, the appellant has claimed the use since 1981. Further, in various pleadings in the Title Suits filed by the respondent herein, the appellant herein has admitted the use and publication of the artistic mark of the respondent before the date of claim of the first use by the appellant, that is, 1987. From these facts, it is clear that the respondent herein was using the artistic mark earlier in point of time to that of the appellant herein.

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180. WAKF ACT, 1995 – Sections 83 (4) and 85 (as amended by Act of 2013)

CIVIL PROCEDURE CODE, 1908 – Section 9

Sections 83 (4) and 85 (as amended by Act of 2013 of the Act), objective of – Objective is only to expand composition of Tribunal and to oust the jurisdiction of civil and revenue courts.

वक्फ अधिनियम, 1995 – धारा 83 (4) और 85 (2013 अधिनियम द्वारा संषोधित)

सिविल प्रक्रिया संहिता, 1908 – धारा 9

धारा 83 (4) और 85 (अधिनियम 2013 द्वारा संषोधित) का उद्देष्य – इसका उद्देष्य केवल अधिकरण के गठन का विस्तार करना और सिविल और राजस्व न्यायालय का क्षेत्राधिकार समाप्त करना है।

Lal Shah Baba Dargah Trust v. Magnum Developers and others

Judgment dated 15.12.2015 passed by the Supreme Court in Civil Appeal No. 14565 of 2015, reported in AIR 2016 SC 381

Extracts from the judgment:

From perusal of the statement of objects and reasons, it reveals that the single member of the Tribunal was working fine under the Waqf Act, 1995 (before 2013 amendment). The idea of expanding the composition by the 2013 Amendment seems to make improvement in the functioning of the Tribunal with the help of two more members in the Tribunal.

Even by the 2013 amendment in Section 85 of the Act, they have also ousted the jurisdiction of the revenue court or any other authorities along with the civil court. Meaning thereby the legislatures wanted to make sure that no authorities apart from the Tribunal constituted under Section 83 of the Act shall determine any dispute, question or other matter relating to a waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property under this Act.

As per the amendment, the three members Tribunal is to be constituted by the State Government by notification in the Official Gazette. However, the State has not done its mandatory duty as provided under Section 83 of the Act (as the Section 83 uses the word “shall”). Then the question is should any party suffer due to the inaction of the State. We should keep in mind that it is common practice that the old institution/member continues to exercise duty till the time any new institution/member takes charge of that duty. In the present case also, the one member tribunal will continue to exercise jurisdiction till the time the State constitutes three members tribunal by notification in the Official Gazette. The High Court erred in holding that the civil court will exercise jurisdiction in such situation as it is manifest by the intention of the legislature that they do not want any other authorities to exercise over the Waqf property matter under the Act.

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PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 16.02.2016 OF MINISTRY OF LAW AND JUSTICE (DEPARTMENT OF JUSTICE) REGARDING DECLARING CERTAIN SERVICES AS PUBLIC UTILITY SERVICES UNDER THE LEGAL SERVICES AUTHORITIES ACT, 1987

का. आ. 495 (अ). – केंद्रीय सरकार, विधिक सेवा प्राधिकरण अधिनियम, 1987 (1987 का 39) की धारा 22–क के खंड (ख) के अनुसरण में, लोकहित में, निम्नलिखित सेवाओं को राजपत्र में प्रकाषन की तारीख से जन उपयोग सेवाएं घोषित करती है, अर्थात् :–

(क) शैक्षिक या शैक्षणिक संस्थानों, या

(ख) आवास और भू–संपदा सेवा।

[फा.सं. ए–60011/37/2004–प्रषासन. III (एलएपी) –जेयूएस)]

अतुल कौषिक, संयुक्त सचिव

S.O. 495(E). – In pursuance of clause (b) of section 22A of the Legal Services Authorities Act, 1987 (39 of 1987), the Central Government, in the public interest, hereby declares the following services to be public utility services with effect from the date of publication of this notification in the Official Gazette, namely :-

"(a) education or educational institutions; or

(b) housing and real estate service".

[F. No. A-60011/37/2004-Admn.III (LAP)-JUS]

ATUL KAUSHIK, Jt. Secy.

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It is not the load that breaks you down, it's the way you carry it.

– Lou Holtz

Yesterday is gone.
Tomorrow may not come.
So make today special and live every minute like it is your last
Be kind, generous, warm and loving so that you have no regrets
Apologise if it is needed and forgive openly.
Lay the foundation for a better tomorrow
so that if it does come,
you will enjoy it all the more.
Leave the earth a better place,
Having touched the lives of others

– S.P. Novotney

Working hard for something we don't care about is called stress;
Working hard for something we love, is called patience.

– Anonymous

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, 2002

(The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)

Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the United Nations Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:

INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free there from.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:

IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5 (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5 (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5 (c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:

INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:

PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11 (a) write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.1 (b) appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.1 (c) serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;

or

4.1 (c) engages in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practice law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:

EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6:

COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge including law clerks.

"Judge" means any person exercising judicial power, however designated.

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

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