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OCTOBER 2017

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

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FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director Incharge

Respected Judges,

In India, from time immemorial, marriage is considered to be a perpetual and sacred bond. Family and marriage have been considered as two most sacrosanct institutions of society. Resurrection of family and continuation of matrimonial tie is essential for which is considered to be the foundation and vital crust of social organization.

When a wedding takes place between two individuals, they bring different hopes, aspirations, perspectives and goals into the marriage. These perspectives, aspirations and goals articulate to the expectations, they have had while growing up, their relationships and their social and educational upbringing. These aspects keep changing during the life span of marriage. Some of them are adjusted. Some of them are surrendered. Some of them create disagreement. When such disagreements become persistent, they give rise to envious attitude, suspicion and ultimately result into matrimonial discord.

Due to unfulfilled aspirations, hopes, goals, needs and desires, the matrimonial disputes occur which can destroy one's life. Such disputes leave profound impact on the life of people, their families and in turn, on the society in general.

We need to change our view point to look at the matrimonial disputes. Although marriage is a traditional concept but resolving a matrimonial dispute needs innovative thinking in tune with rapidly changing societal scenario. The legal fraternity is known for adherence to precedent, not innovation. While precedent remains a guiding principle in practice of law, innovation is transforming the methods of legal service. Legal innovation has lagged compared with other services. With advancement of Information Technology and its adaptation by the Courts, a paradigm shift is underway in justice delivery system. The Family Law is considered to be more traditional law than any other branch of law. Can we apply innovative thinking and find solutions within the given parameters for resolution of matrimonial disputes?

Let us now consider the provisions of law relating to matrimonial disputes and find innovative ways of their application to resolve a matrimonial dispute. Section 10 (3) of the Act of 1984 empowers the Family Court to lay down its own

procedure with a view to arrive at the truth of the facts alleged by the one party and denied by the other.

Section 14 of the Family Courts Act, 1984 permits receiving of any report, statement, documents, information as evidence, whether or not, the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

Rule 6 of the Madhya Pradesh High Court Family Court Rules, 1988 provides for association of Social Welfare Institutions and Organizations and also persons professionally engaged in promoting the welfare of the family to bring about amicable settlement between the parties.

Rule 7 of the Madhya Pradesh High Court Family Court Rules, 1988 provides for calling interim report and final report from such institutions, organizations and persons about amicable settlement of disputes as also suggesting future course of action and every such report shall form the record of suit or proceeding.

Rule 12 of the Madhya Pradesh Family Courts Rules, 2002 provides for assistance of medical experts and welfare experts. It also provides that the report submitted by such an expert shall be considered by the Court in deciding the dispute.

These provisions manifest that the procedure for resolution of matrimonial disputes is innovative in itself as compared to traditional court procedure. They permit indulgence by involving inquisitorial system of justice to arrive at the truth of matter and laying down own procedure for the same.

The Family Courts need to apply these provisions in true perspective and implement them in an innovative spirit to prove that “legal innovation is not an oxymoron”.

I wish to place on record an example of innovative and out of box thinking by our own fraternity of Family Court Judges. In a Regional Workshop on Family Laws various issues relating to problems facing the disposal of family matters were deliberated at length. The Family Court Judges shared their experiences that whenever a copy of application annexed to notice to appear and answer reaches the respondent, the chances of settlement of dispute get diminished. Exaggerated allegations and assertions, sometimes aimed at intentionally harming the sentiments of other party, are made in the application. The respondent also makes equally hurting allegations in the reply. Having taken a stand in pleadings, the efforts of amicable settlement between the contesting

spouses often fail. It was suggested that instead of sending a notice with a copy of the application, a simple notice to appear and to explore the feasibility of amicable settlement may be sent. Accordingly, an amendment in the Madhya Pradesh High Court Family Court Rules, 1988 was proposed by the Academy to the Rule Making Committee of the High Court.

The High Court Rule Making Committee generously accepted the proposal and Rule 9 (3) is added to Madhya Pradesh High Court Family Court Rules, 1988, which is being published in Part III of this issue. I, on behalf of the Madhya Pradesh State Judicial Academy, express my sincere gratitude to all concerned.

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

In case of ***Bhargavi Constructions***, the Supreme Court explaining the expression "law" in Order 7 Rule 11 (d) CPC, held that law includes decision of the Apex Court. It was further held that challenge to an award passed by Lok Adalat on the ground of fraud and misrepresentation can only be done by way of Writ under Article 226 or 227 before the High Court and civil suit, in this regard, would be barred by the law.

In case of ***Syeda Rahimunnisa***, while dealing with the powers of an Appellate Court to remand a case, it was observed that the Appellate Court must record reasons for remand and it must be shown that trial in the suit was unsatisfactory which caused prejudice to the appellant.

In case of ***P. Kartikalakshmi***, it was held that any party to a criminal proceeding cannot take recourse to Section 216 of Cr.P.C. for amendment of charge as a matter of right. The power is always vested in the Court.

In case of ***Virupakshappa Gouda***, explaining the concept of change of circumstances, the Apex Court held that enlargement on bail by the Court of Session after rejection from the Supreme Court is absolute impropriety. Filing of chargesheet means investigation agency has found sufficient material to put accused on trial.

The Supreme Court in the case of ***Vikram Singh*** considered the requirement of certificate under Section 65-B of the Evidence Act for the audio tapes and held that original tape-recorded conversation of ransom calls is primary evidence and admissible without certification under section 65-B of the Act.

In ***Amardeep Singh***, the Supreme Court considering the requirement of minimum period of six months for decree of divorce on the ground of mutual consent, laid down that the Court may waive statutory period on an application subject to certain conditions being fulfilled.

In the case of ***Karunanidhi***, it was held that the right of an heir to claim succession is to be worked out on the basis of law in force, when the succession opens and when the suit is filed. Subsequent amendment shall have a prospective effect and will not benefit the heir who was not entitled, when the succession opened.

In a landmark judgment of the Apex Court, in the case of Independent Thought, marital rape was considered.. Exception 2 of Section 375 permitting sexual intercourse with wife, not being under the age of 15 years, was held to be discriminatory and violative of Article 14 of the Constitution of India.

In the case of Meters and Instruments Private Limited, the Apex Court laid down the procedure relating to the cases u/s 138 of Negotiable Instruments Act. The law laid down by the Apex Court, if followed in stricter sense, will have far reaching effect in early disposal of these cases. Therefore, the readers are requested to go through the related note for better understanding.

In the last two months, the Academy conducted Induction Course programme for the newly appointed Civil Judges of 2017 Batch, Colloquium on Issues and Challenges relating to cases under theft of Electricity at Bhopal, Course on Cyber Laws & Electronic Evidence and Workshop on Key issues and challenges under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for the Judges of District Judiciary.

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

Keep blessing our pursuit for judicial excellence.

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Success is a journey, not a destination. The doing is often more important than the outcome.

– Arthur Ashe

APPOINTMENT OF HON'BLE MR. JUSTICE DIPAK MISRA AS CHIEF JUSTICE OF INDIA

Hon'ble Mr. Justice Dipak Misra was sworn in as 45th Chief Justice of India by His Excellency President of India at Rashtrapati Bhawan on August 28, 2017.

His Lordship was born on 3rd October, 1953. His Lordship completed Graduation with Honours in English Literature in the year 1973. Passed Post-graduation in English in 1976. Obtained LL.B. degree in the year 1976. Enrolled as an Advocate on 14th February, 1977 and practiced in Constitutional, Civil, Criminal, Revenue, Service and Sales Tax matters in the Orissa High Court and the Service Tribunal. Was Member of the Executive Body of the Orissa High Court Bar Association. Was also Member of the Bar Council of Orissa. Appointed as an Additional Judge of the Orissa High Court on 17th January, 1996 and transferred to the Madhya Pradesh High Court on 3rd March, 1997. Became permanent Judge on

19th December, 1997. Was also Member of Advisory Board under the National Security Act and other Enactments.

His Lordship occupied the august office of Judge of High Court of Madhya Pradesh for more than 12 ½ years. During Judgeship tenure in the High Court of Madhya Pradesh, His Lordship rendered valuable services as Chairman, High Court Training Committee and also Executive Chairman, M.P. State Legal Services Authority.

His Lordship assumed charge of the office of Chief Justice, Patna High Court on 23rd December, 2009 and charge of the office of the Chief Justice of Delhi High Court on 24th May, 2010. Elevated as a Judge, Supreme Court of India w.e.f. 10th October, 2011 and appointed as Chief Justice of India on 28th August, 2017.

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

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

Workshop – on Key issues relating to Protection of Animals

12.08.2017 & 13.08.2017

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

Workshop on - Cyber Law & Electronic Evidence
06.10.2017 & 07.10.2017

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

Workshop on-Key Issues and Challenges under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
13.10.2017 & 14.10.2017

PART – I

PARITY IN BAIL MATTERS

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Introduction

As per **Black's Law dictionary** the term 'parity' implies "Maintaining equality between two entities." The **Merriam-Webster's Law Dictionary** defines 'Parity' as "the quality or state of being equal or equivalent". In **'Shorter Oxford English Dictonary'** 'parity' has been stated to mean, 'the state or condition of being equal or on a level, Equality, Equality of rank or Status'. In context of bail matters, the word 'parity' implies that if an accused is previously granted bail by the Court, the other identically placed accused or an accused whose case is better, should also be entitled to have the same relief. However, the 'parity' rule is not of universal application and there are certain exceptions to this rule. In this article it is intended to examine as to how far the principle of parity can be invoked in bail matters.

Origin and Object of 'parity' rule

As observed by Hon'ble Shri Justice R.C. Lahoti, in ***Dain @ Raju v. State of M.P., 1989 MPJR 187***

> ***"Bail jurisdiction under the Criminal Law is an extraordinary one. The jurisdictional provisions are to be found statutorily enacted in sections 436 to 439 of the Code of Criminal Procedure, 1973 and at times in other enactments as well. However, what has been codified is a negligible part of the law, more or less relegated to theory only, while major part of the law, the law in practice, is totally unwritten."***

"Law of parity" or "Parity Rule" or "Doctrine of Parity", whatever we may call it, is an uncodified principle of law relating to bail which is fortified by judicial precedents. The origin of the law of parity in bail matters can be traced in the concept of "equality" because 'equality among equals' is the sine qua non of every judicial system. Article 14 of our Constitution proceeds on the premises that a citizen had legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be discriminated to deny the same benefit. Equity and fairness demands that on the same set of facts there should not be divergent views of the Courts.

Bail in non-bailable offence is not the right of the accused and while considering such bail application, a Judge has to excercise his discretion keeping in mind two competing factors, namely; the interest of the society as whole and

the personal liberty of the accused as an individual. However, this task is not as easy as it appears. For one Judge, a case may be the most appropriate one to grant bail while for other, it might not be so. Judicial propriety demands that once a Court, whether the higher Court or an equivalant Court, has granted bail to an accused, the other accused having similar or identical case should also be extended the same benefit. Therefore, the rule of "Parity" is evolved by the Courts to maintain the consistency in judicial orders relating to bail matters.

Normally Parity should be followed as between the accused having similar or better case

As a general rule, 'Parity' should be followed where the case of accused is identical with the co-accused, who is already enlarged on bail. In other words, where a co-accused has been granted bail by a Court considering all the material on record, the other accused standing on the same footing cannot be denied bail unless there are some additional factors which can distinguish his case.

In ***Badri Nihale and others v. State of M.P., 2006 (1) MPLJ 166***, the Court observed :-

> *"It is a well established principle that when an accused has been granted bail, the other identically placed accused or an accused whose case is better, shall also be entitled to have the same relief."*

In ***Manohar v. State of Madhya Pradesh, ILR (2007) M.P. 837,*** the Court held that even if the bail of an accused has been previously rejected by the trial Court, the order granting bail to other co-accused amounts to change in circumstances and therefore, ***"it is duty of the Presiding Judge to consider on the basis of principle of parity whether the case of applicant is identical to the case of co-accused or not."*** It has also been held that order passed against the principles settled by higher Courts amount to contempt of Court.

In ***Smt. Vimla Bai v. State of M.P. (Judgment dated 10.11.2005 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 7393 of 2005*** *(*published in JOTI Journal Dec. 2005 Part II Case note 400)* it was held that :-

> *"When an order, passed by a higher Court with regard to a particular accused is produced before the lower Court with an application of another accused claiming that his case is identical to the case of an accused who has been granted bail then, while rejecting the said application, it is necessary for the lower Court to distinguish the case of accused whose application is in hand, from the case of another accused who has already been granted bail by the higher Court or even by the Court of similar jurisdiction. This Court is of the opinion that where a higher Court passes an order in favour of particular accused and if an application*

of similar placed accused is filed in the Court then, it is for the Court to take similar view on this ground that the case of the accused who has been enlarged on bail, is similar to the case of applicant on whose behalf, the application for bail has been filed or if it is not possible to take similar view, then it is the duty of the Court to distinguished the cases of both the accused person and then disallow the bail application."

In ***Pendhari v. State of M.P., 1994 (I) MPWN 202,*** it has been held that where similarly placed accused granted bail, bail to other accused should not be refused. No doubt, the lower Court has discretion to decide the bail application either way but, if a person is granted bail by a higher Court then, as a matter of judicial propriety, it is necessary for the lower Court to take the similar view with regard to that accused whose case is identical to the case of other accused who has been enlarged on bail.

It is interesting to mention here that the Supreme Court has never endorsed the view that an accused will have the right to be released on bail on the ground of parity but there are few cases in which the Apex Court granted the bail to the accused on the ground that the other co-accused has already been granted the benefit of bail. These cases are ***Kamaljit Singh v. State of Punjab, (2005) 7 SCC 226, Surinder Singh @ Shingara Singh v. State of Punjab, (2005) 7 SCC 387*** and ***Izharul Haq Abdul Hamid Shaik v. State Of Gujarat, (2009) 5 SCC 283***.

Parity 'alone' can not be the sole basis to grant bail

Though parity should normally be followed in bail matters among the accused standing on the same footing but it should be kept in mind that parity 'alone' can never be a sole ground to release an accused on bail. Here the word 'alone' is of much importance because it means that an accused can not claim bail as a matter of right simply because the other co-accused has been granted bail either by the same Court or higher Court. All the accused of a case always do not stand on the same footing. While considering bail of different accused the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing.

Even in case of ***Manohar v. State of M.P.*** (supra) or ***Badri Nihale and others v. State of M. P.*** (supra) mentioned above, it is nowhere directed that once bail is granted by the High Court, the trial Court should necessarily grant the same to all the remaining accused. The only thing, laid down in those cases was that, once bail is granted to an accused, it amounts to a change in circumstances and therefore, the trial Court can not straightaway reject the bail application of other accused but it must consider whether that accused has similar or identical case as that of his co-accused released on bail. The case of ***State v. Captain Jagjit Singh, AIR 1962 SC 252,*** is an illustration wherein the Supreme Court

distinguished the case of ***Capt. Jagjeet Singh*** (supra) on the ground that he was in touch with foreign agency and leaking out secrets. The Court observed :

> *"It is true that two of the persons who were prosecuted along with the respondent were released on bail prior to the commitment order; but the case of the respondent is obviously distinguishable from their case inasmuch as the prosecution case is that it is the respondent who is in touch with the foreign agency and not the other two persons prosecuted along with him. The fact that the respondent may not abscond is not by itself sufficient to induce the court to grant him bail in a case of this nature."*

In ***Vishnu Ram Chandra Maheshwari v. State of MP, 1999 (1) MPLJ 516,*** the Court observed that:-

> *"Generally the rule of consistency requires that if a co-accused has been granted bail by the Court and the case against the applicant before the Court is similar and identical, he should also be granted bail but the mere fact that the case is at par cannot be said to be a ground on the basis of which the subsequent accused has to be granted bail. The Court has to go through the facts and if there are circumstances to show that the accused-applicant who claims bail on parity ground, cannot be granted bail on other grounds his bail can be rejected. To illustrate it, I may point out that if it is brought on record that he will not be available, if released on bail or he will terrorise the witnesses or has been terrorising the witnesses or he has suppressed the fact which was within his knowledge, he can be refused bail. I may reiterate that mere parity cannot be said to be sole ground to grant bail."*

This legal position has been very well explained by Hon'ble Justice ***G. Dube*** in ***Nanha v. State of U.P., 1993 Cr.L.J 938 (All.) (DB)*** wherein, after referring various case laws on the point, particularily ***State v. Captain Jagjit Singh, AIR 1962 SC 253 : 1962 (1) Cr.L.J 215*** and ***Sunder Lal v. State of U.P., 1983 AUWC 148 : 1983 Cr.L.J. 736*** their Lordship observed :-

> *"From the cases discussed above, we find that parity alone had not been considered as a ground for release on bail. A Full Bench of this Court as well as the Supreme Court had refused to release an applicant on bail simply because the other co-accused had been released on bail. In the cases of Captain Jagjit Singh and Sunder Lal, the Supreme Court and High Court examined the case of each applicant on its own footing, even though co-accused had been released on bail."*

The Court further summed up the legal position as follows:-

> *"My answer to the points referred to us is that parity cannot be the sole ground for granting bail even at the stage of second or third or subsequent bail applications when the bail applications of the co-accused whose bail application had been earlier rejected are allowed and co-accused is released on bail. Even then the court has to satisfy itself that, on consideration of more materials placed, further developments in the investigations or otherwise and other different considerations, there are sufficient grounds for releasing the applicant on bail. If on examination of a given case, it transpires that the case of the applicant before the court is identically similar to the accused on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should be also released on bail. As regards the second part of the referred question my answer is that it is not at all necessary for an accused to state in his application that the application of a co-accused had been rejected previously."*

In ***Preeti Bhatia v. Republic of India, 2015 (I) OLR 662,*** the Orissa High Court observed as follows :

> *"Parity cannot be the sole ground for grant of bail. It is one of the grounds for consideration of the question of bail. There is no absolute hidebound rule that bail must necessarily be granted to the co-accused, where another co-accused has been granted bail. Even at the stage of subsequent bail application when the bail application of the co-accused whose bail had been earlier rejected is allowed and co-accused is released on bail, even then also the Court has to satisfy itself that, on consideration of more materials placed, further developments in the investigations or otherwise and other different considerations, there are sufficient grounds for releasing the applicant on bail. If on careful scrutiny in a given case, it transpires that the case of the applicant before the Court is identically similar to the accused on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail."*

In ***Ashok v. State of M.P., 2000 (3) MPHT 486,*** our own High Court further clarified that merely because an accused has been granted bail, it can not be a ground to grant bail to other co-accused. The Court observed:-

"Shri Hemant Kumar further submitted that other co-accused have been released on bail, therefore, this accused be also released on bail. Parity on such ground cannot be claimed by each accused. The strength of the material which has been collected by the investigating agency against the particular accused has to be considered. In a crime where there is participation of mind then one accused or more accused are likely to get the benefit of weaker link of the prosecution case. But that does not mean that every accused is entitled to have the benefit of that. If the Court is in a position to focus its attention to the crime against a particular accused, he has to face the consequence of that."

How to ascertain "parity" or "non-parity"?

As discussed above, simply because the co-accused has been granted bail cannot be the sole criteria for granting bail to an accused. Even at the stage of second or third bail the court has to examine whether on facts, the case of the applicant before the Court is distinguishable from other released co-accused and the role played by the applicant is such which may disentitle him to bail ? Now the question arises as to how a Court should determine the parity or non-parity in a given case?

In ***Gur Charan Singh v. Delhi Administration, AIR 1978 SC 179 : 1978 Cr.L.J. 129*** and ***State of U.P. v. Amarmani Tripathi, AIR 2005 SC 3490,*** the Supreme Court laid down the following norms which should be taken into account by the Court at the time of granting bail :-

(i) the nature and gravity of the circumstances in which offence is committed;

(ii) the position and the status of the accused with reference to the victim and witnesses;

(iii) the likelihood of;
  (a) the accused fleeing from justice;
  (b) of repeating the offence;
  (c) of jeopardising his own life being faced with grim prospect of possible conviction in the case;
  (d) of tampering the witnesses;

(iv) the history of the case as well as of its investigation; and

(v) other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out, have to be considered even at the time of consideration of bail at a subsequent stage of second or third application.

Since the aforesaid factors should necessarily be considered by the Court while deciding a bail application as per the dictum of the Apex Court, these factors can also be taken into account to determine the 'parity' or 'non-parity' in a given case. In particular, the case of the accused can be distinguished on the following grounds:-

(1) Criminal antecedents of the accused:

Criminal antecedents or criminal background/history of an accused has always been recognised as a ground to be considered by the Court while granting bail. Where the accused previously granted bail had no criminal background while the accused seeking bail on parity had a criminal history, the benefit of parity can be refused considering the matter on record.

In ***Babu Singh v. State of U.P., AIR 1978 SC 527,*** it was held as follows in para 16 of the reports :

> *"Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals it is part of the criminological history that a thoughtless bail order has enabled bailee to exploit the opportunity to inflict further crimes on the members of the society. Bail discretion, on the basis of evidence about the criminal record of a defendant is, therefore, not an exercise in irrelevance."*

In ***Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : 2014 (14) SCALE 59,*** the accused seeking bail on ground of parity was a history sheeter. The Allahabad High Court granted bail to the accused without considering his criminal antecedents. The Apex Court, while cancelling the bail order of the High Court observed that –

> *"Coming to the case at hand, it is found that when a stand was taken that the 2nd respondent was a history sheeter, it was imperative on the part of the High Court to scrutinize every aspect and not capriciously record that the 2nd respondent is entitled to be admitted to bail on the ground of parity. It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order clearly exposes the non-application of mind. That apart, as a matter of fact it has been brought on record that the 2nd respondent has been charge sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this*

court would tantamount to travesty of justice, and accordingly we set it aside."

Again in ***Neeru Yadav v. State of U.P., 2015 (10) SCALE 234 : AIR 2015 SC 3703,*** the question before the Apex Court was that whether an accused of various heinous criminal antecedents could be enlarged on bail merely on the basis of parity? The Court answered the question in negative and observed :-

> *"This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner."*

(2) Seriousness of the charges against the accused:

In majority of serious and heinous offences a number of accused are involved. All the accused of a case always do not stand on the same footing. The role of each and every accused will not necessarily be same or similar. Even if role assigned to various accused is same yet they may stand on different footing.

In ***Vikash Raghuvanshi v. State of Madhya Pradesh, 2014 (1) MPHT 279,*** an FIR was registered by 'R' against accused 'A' and others for commission of offences u/ss. 294, 324, 451 & 506/34 of IPC. In that case 'A' was released on bail subject to certain conditions u/s. 437 (3) of CrPC. It was alleged that 'A' in violation of conditions of bail, along with 'B' and others again attacked 'R' with weapons and caused his death. Complainant died in the second incident and a criminal case was registered both against 'A' and 'B' and others. The Court granted bail to 'B' and thereafter on the basis of parity 'A' was also enlarged on bail. Prosecution moved an application for cancellation of bail granted by the Court to 'A' on the ground of 'parity'.

The Court held that it was not a case of parity because the case of 'A' was clearly distinguishable with the case of 'B' because 'B' was not involved in earlier crime and so no parity could be claimed. It was 'A' who earlier assaulted the complainant and thereafter violated the conditions of bail by committing another offence. Since accused 'A' is an accused in two criminal incidents, gravity of offence on his part is much higher. In view of conduct of 'A', there is every

likelihood of misuse of freedom by him as he would tamper evidence and material on record and so his bail should be cancelled.

In ***Arjun Sahu v. State of Madhya Pradesh, 2008 Cr.L.J. 2771,*** applicant, a practicing advocate in order to earn easy money allegedly prepared false accident claim cases by taking advantage of position of poor illiterate persons who were suffering from Gangrene or like other disease and in pursuance of that scheme he used to get their limbs amputated in hospital. Applicant who being planner had implemented scheme and was main accused. The Court held that the case of applicant is apparently distinguishable from other accused-doctors, police officials and junior advocates. It was further held that applicant being influential person may prejudice prosecution case, if he is released. Therefore, rejection of his bail application was held to be proper.

In ***Sheeba Khan v. State of M.P., 2009 Cr.L.J 4276 (M.P.),*** where the applicant was charged under Sections 381, 420, 467, 468 and 471 read with S. 34 of IPC, the co-accused were granted bail on the ground that they were being charged with offence punishable u/s. 411 of IPC, which was punishable with maximum sentence of three years imprisonment and both of them have completed period of nearly two years as under trial prisoners. Respective subject matters of offence comprising amounts of Rs.2,25,000/- and Rs.4,65,000/- had already recovered from co accused. It was held that applicant could not claim parity with co-accused because she was charged with more serious offences and out of subject-matter thereof, only Rs.34,000/- could be seized from her bank account. The Court distinguished the case of the accused on the ground that she was charged with more serious offences and secondly, out of the subject-matter thereof, only an amount of Rs. 34,000/- could be seized from her Bank Account.

(3) Discovery of new material pointing out more heinous crime:

When, at the time of granting bail to co-accused, the offence was simpliciter but subsequently, during the course of investigation it turned out to be more heinous crime, the bail to other co-accused can be denied and even the bail previosly granted to co-accused can be rejected on this ground. For example, ‘A’ and ‘B’ were charged for an offence under Section 307 and 325 IPC for attempt to murder ‘X’ and causing grievious injury to him. Previously ‘A’ was granted bail u/s 307, 325 IPC. Subsequently, co-accused ‘B’ also filed an application for bail on the basis of parity but in the meantime the injured ‘X’ died of the injuries caused in the same incident. Since the offence of Section 307 IPC is converted into an offence u/s 302 IPC, the other co-accused ‘B’ could not be released by applying the rule of parity. In ***Kalyan Singh v. State of M.P., 1988 MPLJ 759,*** the accused were let out on bail because till then they were accused only under S. 365 IPC, but later on the offence was converted into those under Sections 364, 387 and 120-B I.P.C. They sought bail on basis of parity and placed reliance on two unreported

decisions namely, ***Munnibai v. State of M.P. 1978-1 MPWN 437*** and ***Om Prakash Patil v. State of M.P. 1988-1 MPWN 123,*** but the Court rejected their prayer by holding that:-

> *"The two decisions relied on by the learned counsel for the applicants cannot be read as laying down a rule of universal application that once an accused has been enlarged on bail for a non-bailable offence and thereafter, if he is found to have committed a more serious offence to which the accusation or charge is altered, he must necessarily be bailed out. The considerations which prevail with a Judge granting bail at an earlier point of time when the accusation was of a comparatively minor and less heinous offence would naturally be different from the considerations which would prevail in the mind of the Judge when the question of enlarging an accused on bail in connection with a comparatively more serious offence is posed before him."*

In ***Mahesh Mannal v. State of Jharkhand 2004, Cr.L.J (NOC) 192 (Jhar***), it was held that applicant accused can not claim parity in bail where the bail of the co-accused was allowed at the time when no material was available against him.

(4) Previous order passed in ignorance of Law:

An order passed in contravention of the express provisions of any law or in derogation of the preposition settled by the Supreme Court or High Court is non-est in the eyes of law and therefore can never be the basis of parity for other accused. In ***Surendra Kumar Agrawal v. State of Madhya Pradesh, 2001 (1) MPLJ 683***, the co-accused namely Banwari Lal was granted anticipatory bail in spite of the clear mandate of Section 18 of the Atrocities Act as well as the law laid down in ***State of M.P. and another v. Ram Krishna Balothia, AIR 1995 SC 1198.*** The Court held that doctrine of parity would not be applicable in the case where an order is passed ignoring the provisions of law and the decision of the Apex Court.

The Orissa High Court in ***Preeti Bhatia v. Republic of India*** (supra) reiterated the same principle in the following words:

> *"A Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well settled principle of law and ignores to take into consideration the relevant facts essential for granting bail. Such an order can never form the basis for a claim of parity. It will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency. The grant of bail is not a mechanical act. Merely because some*

of the co-accused, whom similar role has been ascribed, has been released on bail earlier and State has not moved the higher Court against the order in question for cancellation, the power of the Court cannot be fettered to act against conscience."

The Allahabad High Court in ***Chander v. State of U.P., 1998 Cr.L.J. 2374 (All.),*** goes to the extent of holding that if the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity. The Court further observed that the law recognises only a speaking order of a finding which are in fact reasons in support of the order and they only give a right to the party to claim that the proceedings which have attained finality should not be reopened. *A fortiori* an accused claiming bail on the ground of parity can do so only on the basis of an order which contains reasons. It is, therefore, clear that failure of justice may be occasioned if bail is granted to an accused on the basis of parity with another co-accused whose bail order does not contain any reason. The Court further held that:-

"A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail."

In my humble opinion, the Supreme Court and High Courts are the Court of records and therefore the judgments/orders passed by them have binding force on the subordinate Court. A judgment ***per incurium*** passed by the higher Courts can be declared to be so by their superior Courts themselves and not by the subordinate Court.

(5) Accused remained absconded for long time:

Where the accused remained absent or absconded for long time and thereby obstructed the proper investigation or trial, it may also be a ground to differentiate the case of the accused from the accused who co-operated with the investigation.

In ***Lata Bhargava alias Hemlata v State of M.P., 2015 (3) MPHT 93 (DB),*** the Court observed that :-

"From mere perusal of the papers of the charge sheet, it is apparent that the petitioner remained absconded for more than three years and thereby she has held up the investigating process and after making various efforts, she could be arrested. In view of such conduct of the petitioner, her case is distinguishable from the cases of other co-accused persons of the impugned crime who have been extended the benefit of bail. So ground of parity is not available to the petitioner."

(6) Suppression of material facts or pleading incorrect facts:

It is the duty of the accused, while applying for bail to make a faithful and true statement and discosure of all the relevant facts and circumsatnces before the Court. Where the co-accused, while making bail application had suppressed the material facts or has pleaded some false grounds, as a result of which the bail application was allowed by the previous Court. It was held that the other accused will not be eligible for bail on parity ground. In ***Yusuf Khan v. State Of M.P., 2005 (1) MPLJ 437,*** where the accused sought bail on the ground that the co-accused has been granted bail in the same case, the Court found that the accused has suppressed the material fact that the prosecutrix, a minor girl had already committed suicide and the police had also registered the offence under Section 306 against all the accused. The fact of rejection of previous bail applications on merit by the H.C. was also not disclosed by them. It was held that the accused is not entitled to bail and the previous bail granted to other co-accused was also cancelled.

In ***Sabir Hussain v. State of U.P., 2000 Cr. L.J 863 (All),*** it was held that when the allegation against the applicant accused and co-accused were specific of firing from point blank range at deceased, the accused can not be released on bail merely because co-accused has been previously granted bail, particularly when bail by co-accused was obtained by misrepresentation of facts. In ***Abdul Rahman v. State of U.P., 2009 Cr.L.J. (NOC) 1219 (All),*** it was held that where bail has been granted to the co-accused on misrepresentation of facts, the applicants can not be granted bail on the ground of parity.

(7) Other special factors especially mentioned in the previous bail order:

Where the court, which previously granted the bail to other co-accused, has specifically noted down its special reasons for granting bail to that accused, the other accused can not take the benefit of such order because parity is itself excluded by the Court. For example, where the Court specifically mentions that the accused is granted bail because of his young or old age, health conditions or because of the accused being a lady or a pregnant women etc, the other accused can not be granted bail unless he/she also qualifies the said criteria.

In ***Ravindersingh @ Ravi Pavar v. State of Gujarat, AIR 2013 SC 1915,*** the Apex Court distinguished the case of the accused on the ground that the accused, who was previously granted bail was woman. The Court made the following observation:-

> *''In so far as the order granting bail to A-27 is concerned, we were taken through the reasons appended to in her bail application and also of the fact that she being a lady, we are of the view that the appellant cannot claim parity with the said accused in claiming bail."*

The factors mentioned above to determine 'parity' or 'non-parity' in a given case are only illustrative in nature and the Court, while dealing with a case, may distinguish the case of the applicant-accused on other 'reasonable' grounds. The order of the Court must contain the reasons as to why it cosidered the case of the accused as 'identical' or 'non-identical'. The order of the court must be based on some ***intelligible differentia*** and merely 'superficial differentiation' must be avoided. As observed by Hon'ble Justice Vinod Prasad in ***Subash v. State Of U.P. (All. High Court order dated 08/09/2006),*** parity means similarly situated based on relevant considerations. If any relevant consideration had escaped the notice of the Judge on the earlier occasion while granting bail to the co- accused the said consideration can be a valid ground to refuse bail to the co- accused even though the role assigned to the two of them may be similar in the incident.

Applicability of 'parity' rule for offences under M.P. Excise Act and NDPS Act involving 'commercial quantity'

As per Section 59-A of Excise Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973 –

> (i) no application for an anticipatory bail shall be entertained by any Court in respect of a person accused of an offence punishable under Section 49-A or in respect of a person not being a person holding a licence under the Act or rules made thereunder who is accused of an offence covered by clause (a) or clause (b) of sub-section (1) of Section 34 with quantity of liquor found at the time or in the course of detection of such offence exceeding fifty bulk litres.
>
> (ii) a person, accused of an offence punishable under Section 49-A or a person not being a person holding a licence under the Act or rules made thereunder who is accused of an offence covered by clause (a) or clause (b) of sub-section (1) of Section 34 with quantity of liquor found at the time or in the course of detection of such offence exceeding fifty bulk litres shall not be released on bail or on his own bond unless:-
>
> - the Public Prosecutor has been given an opportunity to oppose the application for such release and;
> - in case such an application is opposed by the Public Prosecutor, ***unless the Court is satisfied that there are reasonable grounds for believing that***
>   - ***the accused is not guilty of such offence; and***
>   - ***he is not likely to commit any offence while on bail.***

According to Section 59-A(iii) of Excise Act, the limitations for grant of bail specified in clause (ii) are in addition to limitations prescribed under the Code of Criminal Procedure, 1973 or any other law for the time being in force regarding grant of bail. Therefore, before granting regular bail to an accused u/s 49-A or u/s 34(1) (a) or (b) of Excise Act, the satisfaction of the Court regarding these two factors is necessary. Similar provisions have been made under Section 37 of NDPS Act regarding offences under Section 19, 24 or 27-A of that Act or an offence involving commercial quantity of narcotic or psychotropic substance.

Now a pertinent question arises as to whether an accused can claim parity in relation to these offences? The answer to this question will be simply 'No' for the reasons mentioned herein –

In ***Union of India v. Rattan Mallik alias Habul, (2009) 2 SCC 624,*** the Apex Court held as under:

> *"It is plain from a bare reading of the non obstante clause in S. 37 of the NDPS Act and sub-s. (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed u/s. 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by cl. (b) of sub-s. (1) of S. 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".*

Section 21 (4) of the Maharashtra Control of Organised Crimes Act (in short MCOCA) also contained similar restrictions as mentioned u/s 59-A Excise Act and Sec. 37 of NDPS Act. Regarding Sec. 21 (4) of MCOCA, the Apex Court in State of ***Maharashtra v. Vishwanath Maranna Shetty, (2012) 10 SCC 561,*** observed:-

> "In view of the above, we also reiterate that when a prosecution is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising there under, these provisions cannot be ignored while dealing with such an application. Since the respondent has been charged with offence under MCOCA, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the

> offences under the IPC, the relevant provision in the said statute, namely, sub-s. (4) of S. 21 has to be kept in mind. It is also further made clear that a bare reading of the non obstante clause in sub-s. (4) of S. 21 of MCOCA that the power to grant bail to a person accused of having committed offence under the said Act is not only subject to the limitations imposed u/s. 439 of the Code of Criminal Procedure, 1973 but also subject to the restrictions placed by clauses (a) and (b) of sub-s. (4) of S. 21. Apart from giving an opportunity to the prosecutor to oppose the application for such release, the other twin conditions, viz., (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The satisfaction contemplated in clauses (a) and (b) of sub-s. (4) of S. 21 regarding the accused being not guilty, has to be based on "reasonable grounds". Though the expression "reasonable grounds" has not been defined in the Act, it is presumed that it is something more than prima facie grounds. [We reiterate that recording of satisfaction on both the aspects mentioned in clauses (a) and (b) of sub-s. (4) of S. 21 is sine qua non for granting bail under MCOCA.]

Therefore, it is clear that the provisions of Section 59-A of Excise Act and Section 37 of NDPS Act are mandatory in nature and consequently the satisfaction of the Court that the accused 'has not committed such offence' and 'will not commit any offence' is necessary before granting bail. Since these two factors are peculiar to every accused involved in an offence, it can never be said with precise certainty that the other accused will also not commit any offence if released on bail. In the same manner, if no case is found to be made out against one accused, it does not necessarily mean that there is no case against the other accused also. Therefore, regarding these two factors, the Court had to arrive on an independent conclusion without being influenced by the order granting bail to the other co-accused. In ***Pushpendra Yadav @ Raja v. State of M.P. (MP High Court MCRC No. 19086/2015, Order dated 03-12-15)*** the Court did not grant the benefit of parity to an accused from whose possession 225 bulk litres liquor was seized.

Recently in ***Karan Kumar v. State of Punjab (P&H High Court, CRM-M No. 45674 of 2017),*** Judgment dated 23 January, 2018, the Court expressly ruled out the applicability of parity and made the following order–

> "Learned counsel for the petitioner has stated that co-accused of the petitioner has been granted bail by this Court, therefore, petitioner be given bail on the ground of parity. However, learned State counsel resisted the request stating that in view of the bar of Section 37 of the NDPS Act, since it is a case of commercial quantity, bail should not be granted to the petitioner. After hearing the rival contentions, I find that grant of bail on parity is based upon principle of equity but then the statutory provisions cannot be given go bye while considering the question of parity. Here the public prosecutor is opposing the petition and I do not find any reason to record the satisfaction that there are reasonable grounds for believing that petitioner is not guilty of such offence for that he is not likely to do any offence while on bail. Therefore, finding no merit in the petition, the same stands dismissed."

Parity cannot be a basis for rejection of bail

It is important to note that parity rule can be adhered for granting bail to similarly situated accused but it can not be a basis for rejection of bail of other accused. In ***Nanha v. State of U.P.*** (supra) the court made the following observation:-

> "The prior rejection of the bail application of one of the accused cannot preclude the court from granting bail to another accused whose case has not been considered at the earlier occasion. The accused who comes up with the prayer for bail and who had no opportunity of being heard or placing material before the court at the time when the bail of another accused was heard and rejected, cannot be prejudiced in any other manner by such rejection."

Release of co-accused on default bail under S.167 (2) Proviso-no ground for anticipatory bail.

In ***Directorate of Enforcement v. P.V. Prabhakar Rao, AIR 1998 SC 696,*** the High Court had granted anticipatory bail to the respondent in the case known as "urea scam" running into crores of rupees. On appeal, the Supreme Court held that the High Court had taken into account the fact that all other accused arrested in connection with this case had been released on bail; but they were released on bail only due to non-completion of the investigation within the time prescribed in the proviso to S.167 (2) of the Code. Wondering how could the respondent take advantage of that fact, the Supreme Court observed that the respondent too had contributed to the non-completion of the investigation. Completion of investigation could be achieved only by interrogating all the persons involved as well as

acquainted with the matter and after collecting all material evidence procurable. The Supreme Court held that the High Court should never have counted this point in favour of granting anticipatory bail to the respondent. The Supreme Court further observed that the most glaring feature was the magnitude of the criminal conspiracy hatched, the ingenuity with which the cabal was orchestrated and the meticulousness with which it was implemented and the colossal amount of foreign exchange siphoned off from the country, and that whomsoever perpetrated such grave economic offence deserved to be dealt with sternly under law. The Supreme Court also observed that when the High Court itself felt, after going through the records in the case, that the materials already collected were capable of stretching accusing finger towards the respondent, it was not at all a proper exercise of the discretion by favouring him with an order of anticipatory bail under S.438 of the Code. Accordingly, the order of the High Court granting anticipatory bail was set aside.

Bail pending appeal to repeat offender on ground of parity:

In ***Union of India v. Mahaboob Alam, 2004 Cr.L.J. 1789,*** the respondent was convicted by the trial Court under S.21 of the NDPS Act, 1985, and since he was a previous offender, the trial Court awarded him the enhanced punishment provided under S.31 of the said Act. A co-accused, being a first-time offender, was sentenced under S.21 of the said Act. The High Court, on entertaining the appeal against the said conviction, granted bail to the respondent accused on the second application being made on the sole ground that the co-accused from whom the contraband was recovered was released on bail while no such contraband was recovered from the respondent accused. On appeal, the Supreme Court noticed that the High Court did not advert to any other aspect of the case nor to the legal restriction imposed by the statute under Section 32-A of the said Act. The Supreme Court further observed that in the impugned judgment there had been absolutely no application of mind to the above requirement of law while granting bail to the respondent, that the High Court seriously erred in granting bail to repeat offender merely on the ground that a co-accused had been granted bail, and that while doing so, the High Court had totally ignored the legislative intent of the Act. Accordingly, the order granting bail was set aside.

Recently, in the case of ***Lt. Col. Prasad Shrikant Purohit v. State of Maharashtra, 2017 Indlaw SC 633,*** the Apex Court was dealing with this issue where the appellant sought bail mainly on the ground of parity. The Supreme Court granted the bail on the merits but circumscribed its finding by the following observation :-

> "It is further made clear that the grant of bail to the appellant herein shall be no consideration for grant of bail to other accused persons in the case and the prayer for bail by other accused persons (not before us) shall be considered on its own merits. We also make it clear that the Special Court shall decide the bail applications, if filed by the other accused persons, uninfluenced by any observation made by this Court."

The abovementioned observations of the Apex Court impliedly suggest that in henious crimes, while granting bail to an accused, the Higher Courts should itself make it clear that their order should not be taken as a ground for claiming bail to other accused in subordinate Courts on the basis of parity. The order of the higher Court is regarded as a command to the subordinate Courts. Making express reservations in bail orders relating to henious crimes will not only act as clear guidance for subordinate Courts but also curb the misuse of the 'parity' rule in serious cases. The Session Court may take note of it.

Conclusion

From above discussion, it is crystal clear that parity is not an absolute rule and it applies only where the co-accused has been granted bail on similar set of circumstances. To put it in simple words, where an accused is granted bail by some higher Court, it does not necessarily mean that all the co-accused in that case ought to be released on bail. The Court, dealing with the bail application of the co-accused should apply its judicial mind to ascertain as to whether there is 'parity of circumstances' between the accused who is being granted bail by the higher court and the accused who is seeking bail on the basis of parity. While doing so, the Court should consider all the facts and circumstances of the case in totality. If on scrutiny and examination of records in a given case it transpires that the case of the petitioner before the Court is identically similar to the accused, who has already been granted bail, then it would be desirable that applicant should also be enlarged on bail. However, if material placed by the prosecution and further developments in the investigation unraveling changed circumstances, this aspect also requires to be taken into consideration and in such circumstances the principle of parity cannot be applied. The order of the Court should reflect the application of judicial mind to arrive on a conclusion as to whether there is 'parity' or 'non-parity' in a given case.

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ADMINISTRATION OF COURTS*

I have been requested by the Conveners of the Judicial Officers Conference to address you on matters affecting the administration of Courts. I wish to make use of the opportunity thus afforded to me to place before you those aspects of a Judicial Officers work which by their very nature are hidden from the public eye and which though they may not be so prominent as those aspects which are connected with the judicial side of his work are nonetheless equally important for they make up together with the judicial work, what is known as "The Administration of Justice".

To discharge his duties efficiently a judicial officer must possess not only legal knowledge, but also administrative experience and ability. A judicial officer passes orders and pronounces judgments and decrees in accordance with the provisions of the law. That is his judicial work. The "machinery of justice" which has to be set in motion for the purpose of the execution of those orders and decrees involves the maintenance and preservation of files, the collection of fines, services of summons and various other matters connected therewith. It is incumbent on a Judicial Officer not only to have mastery over the relevant rules and orders but also to exercise proper control over the staff under him which is trained, to be able to carry out efficiently the various instructions, circulars and rules emanating from the High Court from time to time. This is his administrative work and with the more important aspects of it, I propose to deal briefly on this occasion.

The Court of a judicial officer is divided as you all know into various sections and is usually located in a rented building or in a Government-owned property. It is most important that the building in which the Court is housed should have a decent appearance, and be clean, neat and well maintained.

The Record-room, the property room, the Nazarath and other rooms should be strong and secure. The Court hall should be well-furnished with chairs, tables and almirahs and the arrangements for seating of the clerks and ***Sheristedar*** and for various other matters connected with the office should be properly made. The exigencies of the administration have made it necessary to increase the number of courts. We have virtually brought justice to the door of the litigant by establishing 'Munsif-Magistrates' Courts in each Taluk and a District Judge's Court in each district of the State. This increase in the number of Courts has brought in its wake the problem of housing them. The Hon'ble Chief Justice has made an intensive tour of the districts, seen almost every taluk court as well as the district courts and has been, with his Lordships usual thoroughness, ensuring

* Extracted from ***'Quest of Justice'*** – A select Anthology of articles, essays and speeches by Hon'ble (Late) Shri Justice P. Jaganmohan Reddy (23.01.1910 to 09.03.1999) which was published by Madras Law Journal Office in 1969. His Lordship practiced in the High Courts of Bombay, Madras and Hyderabad (1937-1946) and was also Additional District & Sessions Judge & Additional Judge, High Court, Hyderabad (25.02.1945 to 16.11.1946). Was former Chief Justice of Andhra Pradesh (1966-1969) and Judge, Supreme Court of India (1969-1975).

that Courts in this State may have good court-houses, furniture and other amenities to provide the administration of justice with a congenial, calm and awe-inspiring atmosphere. His Lordship's initiative, persuasiveness and intense zeal in this behalf, will I am confident, secure for this State in the shortest possible time the essential basis of sound judicial administration. While these efforts are made at a higher level, the initiative and enterprise of judicial officers in each taluk and in each district will, if properly utilized, go a long way in satisfying the need for acquiring good court buildings.

I lay considerable emphasis upon the manner in which the courts should function. It should not be forgotten that the human mind is impressed by the calmness, serenity and the quiet dignity of a Judge or a Magistrate and when litigants or those that have something to do with the courts step into the court-house, they should be impressed by the atmosphere of orderliness, cleanliness and quietness which prevails therein and the calm and serene dignity of the judicial officer and the manner in which he administers justice. This can only be achieved, if the Judicial Officer show initiative and drive. Experience has shown that the clerical staff and the litigant public do not keep the court premises and administrative section clean. Spitting, throwing cigarette-ends or dropping ink indiscriminately are practices which make the court premises dirty and filthy. Judicial Officers should not allow these practices to continue but should ensure by their personal supervision that the court premises are kept clean, neat and congenial for their judicial work. Making surprise inspections by going round the court at any odd time during the working hours of the court and pointing out to the clerical and menial staff the various steps to be taken to achieve this object, would have the desired effect and in a short time, the litigant public, the non-gazetted as well as the menial staff will soon acquire the wholesome habit of keeping the premises clean.

As you all know, the three important ministerial offices of a Court are the ***Sheristedar,*** the Record-keeper and the Nazir. The ***Sheristedar*** should have experience and ability as a very necessary pre-requisite for an efficient and well-managed office because on him rests the responsibility for general supervision of the office and for ensuring that the staff attend regularly, discharge their functions and maintain registers and files in accordance with rules and that the papers filed are in order, bear sufficient stamp and are within time and that the decrees of courts have been properly prepared and authenticated. He has to see to many other things such as maintenance and verification of Service Books, Leave Accounts, etc. Every external manifestation of the courts orders bears the impress of this officer. Apart from this, he has to see whether the clerks in the criminal and civil sections are maintaining the prescribed registers properly and issuing processes. He has to authenticate the affidavits sworn before him and check and verify accounts presented by the Nazir before they are put up to the Presiding Judge.

The Record-keeper is in charge of the Record-room which is set apart for the storage of records in decided cases and is the ministerial officer in charge of such records. The record room should be so arranged as to have only one combined entrance and exit and the Record-keeper's table should be so placed as not to permit anyone to enter or pass papers out of the Record room unseen by him. All outer windows, doors or openings in the walls of the record room and all inner and outer windows doors or openings giving access to and from the record-room should be protected by iron railings and wire-netting to render it impossible for papers to be passed through them. The Record-keeper should be directed to satisfy himself by periodical inspection that the railings and wire-netting are in good order so as to render it impossible for papers to be passed through them. The Judicial Officer also should see to it that these instructions are carried out. There are rules made by the High Court relating to the Record-Keeper and it is his function along with the staff given to him to see that the records are neatly tied up in bundles labelled and placed on racks and well cared for. There should be a plan of the Record-room hung up in a conspicuous place and it should show the number of rooms, racks and the shelves and age of papers to be found on each rack. It is the duty of the Record-Keeper to see that destruction work is done up-to-date in accordance with the destruction rules and that the records are received into his custody with all the relevant files, registers, papers etc. and are divided into A-File and B-File, properly indexed and the index containing the papers and the file is properly paginated. In short, the maintenance of records, their preservation and destruction according to rules, circulars and instructions received from the High Court from time to time is the duty of the Record-keeper. It has been observed that experienced clerks have not been put in charge of this section. The defect found in the recent inspection of Hon'ble the Chief Justice regarding this Section is that the files received for consignment to Records and consigned by them to Records abound in mistakes such as improper indexing and numbering done by the concerned clerks, non-realization of the necessary court fee stamps and stamp duties and penalties imposed on documents filed by the parties, non-compliance with the concerned rules in preparation of decrees and non-disposal of amounts and properties relating to those files which were retained in the Nazarath. The clerks in charge of the sections mechanically accept such defective files and consign them to Records by attaching cheek-slips of theirs to them or even without them. In some of the courts it has been observed that hundreds of court-fee stamps and process labels are allowed to remain unpunched in the files consigned to Records. Another common defect in this section is that the Record-keepers do not bother to attend to the work of destruction of files and registers. Even if they do, the work done is only nominal i.e. only five to six files are destroyed daily and this too is done very haphazardly in some courts. In the course of inspection of bundles in this Section, it was noticed that many of the flies were not in their proper places nor were any slips kept in their places to indicate their whereabouts. The Record-keepers were also found remiss in reporting to the

Superintendents or Sheristedars whenever certified copies applied for by parties were not issued within the dates fixed for doing so. They have been warned to exercise due care in checking up each file and to consign the files to Records only when they were found to be free from defects of all sorts, whether small or big, and where they are defective to return them for rectification or the defects to the Sections concerned. They have been instructed to start the work of destruction of obsolete files where they had not attended to it and were asked to speed-up this work, and also to do it regularly where they were found to be doing it only occasionally or irregularly. They were also instructed to put up reports for further action in accordance with the concerned circulars whenever parties do not turn up to receive certified copies. They were also asked to trace out all such files as were not in their proper places and to insert slips of particulars in places from which files are removed so as to indicate their whereabouts.

One of the duties of the Record-keeper is to keep a strict supervision over the copying branch which is under his control. It has been found that a great many irregularities occur in this branch. I am now dealing with a case where a copy of a judgment dismissing an appeal has been given as being one where the appeal was allowed. The Copyists also make a lot of money by giving uncertified copies or charging, ordinary rates for urgent copies etc. Once the folio system is introduced and Copyists become Government employees, many of these malpractices will come to an end. This scheme is also under active consideration.

The Nazir is in charge of the accounts. Payments, receipts, processes, property room, establishment, acquittance roll, register of service, postage stamps, permanent advance accounts, receipt of attachment money, maintenance of register of forms, stationery, furniture and other sundry things. Large amounts and case properties have been found lying undisposed of, some of them since as long a time as 1340 Fasli. These amounts consist of decretal sum, remittances in Redemption and Pre-emption suits, income received mostly from the lands attached under Section 145, Cr.P.C., other collections in criminal cases, sale-proceeds or unclaimed properties, daily allowances of witnesses remitted by parties, cash received due to non-availability of court-fee stamps. etc. No systematic effort is made to dispose of them although the cases concerned have been disposed off long ago. Large sums have been spent from different heads either towards diet charges of under-trials or towards the T.A. and Batta of Witnesses. Adequate steps are not being taken to get the bills sanctioned and the amounts readjusted. The courts are forced to spend amounts from other heads, sometimes when witnesses come from distant places or when the number of prisoners in Jails awaiting trial is considerable as the imprest amounts allotted to them do not suffice even for the expenditure of one day. The above-mentioned practice of utilizing amounts from other heads can be abandoned by suitably increasing the imprest amounts. Fixation of this amount for each court should be done after taking into consideration the average expenditure over a period of three months. All courts should then be required to get the amount spent by them, readjusted within a period of three months.

It is needless to stress the importance of constant supervision of the work done by the staff for the efficient management of the office. Judicial Officers are apathetic to this side of their work. The High Court has had occasion to observe that this part of the work does not always receive from them the care and attention it deserves. Years ago, a circular was issued that biennial inspections should be made by Judicial Officers, but no heed appears to have been paid to these instructions. When I took charge of the Secunderabad Sessions Court, I remember having called for the inspection reports to acquaint myself with the condition of the office, but was surprised to be told that no regular inspection had been made for years previously and there were no inspection reports. I at once decided to make a thorough inspection of my court and all the courts under me because I felt that the first duty of a Judicial officer is to make himself acquainted with the manner in which his office is working or being run, the regularity with which the judicial proceedings are being maintained, the defects or irregularities which are occurring in the maintenance of the various official records, registers, paper etc. and the degree of diligence or negligence of the staff of the Court. It is only then that a judicial officer will be able to take the initiative and see that the work of the court is properly carried out.

As soon as Judicial Officer takes charge of his new assignment he should make it a point to study all the available previous inspection reports, the circulars, orders and instructions received from time to time with respect to the various matters pertaining to the administrative machinery. This will enable him to get an overall picture of the various aspects of the office which he is to run and conduct efficiently. I cannot emphasise too strongly that judicial officers must pay a great deal of attention to this aspect of their duties because failure to do so will exhibit their administrative incapacity and thus will tell against them in the long run. No one should underestimate the importance attached by the High Court to this aspect of administrative work. Inspection has to be done according to the prescribed questionnaire and you are conversant with the manner in which this has been done by the High Court whose inspection reports have been sent to you. It is well to remember that the inspection note is not only a commentary on the Court inspected but, more often than not, is also an index of the ability of the officer inspecting it. The Hon'ble the present Chief Justice in his tours having noticed the general apathy of the judicial officers to inspections and to maintaining the offices efficiently, formulated a scheme whereby each Hon'ble Judge of the High court was to be put in charge of two districts and detailed instructions were once again given to make regular and intensive inspections. It would, however, appear that even now generally personal inspections are not being carried out and it was observed in the surprise visits made recently by Hon'ble the Chief Justice that some of the judicial officers had not made any personal inspection, but had been merely sitting in their Chambers and making entries on the basis of the Sheristedar's noting which very often is

a routine observation that, everything is in order. This is not what we expect of Judicial Officers. Instructions, Circulars and Orders are designed to achieve salutary results and are not to be brushed aside in this way. It is well to remember that you, who are charged with the administration of law, with seeing that the law of the land is enforced, and are engaged in punishing those who have not observed the law, should not, at any rate, be found wanting in obeying implicitly the rules, orders and circulars of the High Court or in following, both in letter and in spirit, the instructions which they contain. It is upto you to generate within yourselves an enthusiasm for this kind of work, because I assure you, that once you start taking interest in it, you are bound to be amply rewarded by the resulting improvements, for the office over which you preside would be maintained efficiently and the interests of the litigant public and the administration of justice would be well served.

There is nothing ***infra dig*** in a judicial officer going into the office rooms, picking up a few files at random and inspecting them. Often, papers are not properly checked, court-fee is insufficiently paid, process-fee labels have not been punched or have been removed. Although the register shows that process was filed, orders have not been issued or delayed for an unreasonably long time.

Summons have not been issued in time, the papers are not properly indexed, they are not paginated and are liable to be removed from the files. There are many matters which can be easily rectified if the judicial officer himself personally inspects. When the Nazir presents the accounts each day, the judicial officer must verify the accounts with the vouchers and actually make test additions and write in his own hand each day the certificate that he has checked the accounts and found the balance correct. I find that this responsibility is often treated as formal and judicial officers generally append the certificate without actually checking them with the vouchers. Sometimes, I have also found that they merely sign under the certificate of the Superintendent. This is not proper and the practice must be discontinued. When I went to the Secunderabad Court, on the very first day the accounts were presented by the Nazir which I checked and after that went into the Nazarath and checked the cash. I discovered that there was an excess of 0-2-0. So I immediately called for a report. It turned out that about an year and half ago, the then Nazir could not tally the accounts and finding a deficiency of 0-2-0 immediately made good the amount out of his pocket but actually there was no deficiency for there was only a faulty addition which escaped notice. That 0-2-0 therefore, now figured as the excess amount. It should not be forgotten that excess under cash balance is just as bad as a deficit because both indicate incorrect maintenance of accounts. The second experience I had was that on the same day I took charge, the Superintendent asked me for permission to repair a cash box for which he got Rs.10 sanctioned. The next day when the accounts were presented to me, I discovered that an amount of Rs.12 was debited as an expense on this account. I asked for the

explanation of the Nazir as to why he debited Rs.12 instead of Rs.10 and he said that the sanction was for Rs.12. I was surprised and I called for the voucher and discovered that the sanction which I had given for Rs.10 was altered to Rs.12 and the Nazir's report was also altered to Rs.12. I discovered that the Sheristedar on his own responsibility manipulated this sanction because he had found in the meantime that the repair of the office box would cost Rs.12. There was of course no intention to defraud the Government or to fudge accounts for his benefit. The Sheristedar assumed that he could behave in that way as I was new. I only draw your attention to these personal experiences of mine just to indicate how anything may happen unless there is a strict supervision over the accounts. The principle of supervision should be that "it should be little and often." The judicial officer will find it beneficial to look into files and registers casually in the daily handling of the papers or when records are brought before him or during a chance visit to the office or whenever there is an idle moment in a day's work as this will prevent the commission of many errors or irregularities.

A judicial officer can do much to check venality and corruption by keeping a strict eye over the doings of his subordinates and not leaving in their hands things which require personal attention for e.g. selecting guardians ***ad litem*** and Commissioners, fixing dates of hearing, transferring appeals, seeing that cause lists and information books etc., are regularly and punctually made available to the public and that payment orders, copies, information sheets, sales certificates, succession certificates, probates, letters of administration, documents for return etc. are made ready and delivered within the time prescribed (if any) or without unreasonable delay. The result of such occasional inspection and the directions given from time to time in respect of errors, irregularities or wrong practices should be recorded in a note-book kept for the purpose. It is impossible to give an exhaustive list of the items over which Judicial Officers should exercise their supervision owing to the varied nature of the work and the possibility of errors in each item of it. The High Court merely desires to indicate the manner in which supervision may be effected. It is the duty of the Judicial Officer to keep himself fully informed of the arrears of work, the instructions, the delays that are taking place and he should try to rectify them.

It has been the experience of this High Court that officers are indifferent to correspondence. We are unable to deal promptly with several matters only because the answer to some query addressed to them is not forthcoming. Reminders are sent and even then we do not get replies or the replies to the queries are not sufficient or complete.

It need hardly be said that in the interests of efficient administration of civil justice, satisfactory and expeditious service of process is essential. The illiteracy or ill-informed condition of the Process-servers necessitates proper guidance as to the manner of service and verification of returns. The sharp practices of these employees should be checked by the controlling authority. The Process-

servers should be required to make themselves familiar with the rules and it shall be the duty of the Nazir to explain to them these rules in the vernacular. It should be impressed upon them that in all cases of doubt or difficulty arising in discharging their duties, they must obtain the direction of the court whose processes they have been entrusted with for service. Complaints against Process-servers should be promptly enquired into and adequate remedial steps taken. The processes may be distributed equally and the Presiding Judge should call for the monthly statements of the number of Processes served and wherever he finds that any person has not served processes properly or regularly and that his percentage is below 75%, he should call that Process-server to order and see to it that they are served properly.

We are fully aware that the Process-servers in this State are ill-paid and their economic condition is so bad that they can be tempted by interested parties not to effect summons properly, thereby, causing delay in dispensing justice. When I was a Sessions Judge, I had occasion to address the High Court on their behalf and I described them as a pivot of the Judicial machinery because on them lies the duty of bringing to the Court the parties without whose presence, no justiciable cause can be adjudicated and determined. The persons who play this important role as well as the shroffs who handle thousands of rupees are so ill-paid that it often surprises me how the majority of them in spite of these drawbacks carry on their duties without a murmur. We, on our side, are trying to do everything possible to move the Government to make them Government Servants with a decent pay and pension and we expect that the efforts of our Hon'ble Chief Justice for improving their service conditions will ultimately fructify.

The Bailiffs or Amins also are in the same position as Process servers and are equally amenable to malpractices. The Bailiff can successfully prevent execution of a decree of the court for years for this reason and to maintain strict vigilance, the Nazir has to be a person of very high integrity and efficiency. The Nazir is also in charge of the property room. It is needless for me to say that the proper maintenance of the property room is very important in that the material objects in criminal cases and the movables in civil cases are kept in this room and consequently there is opportunity for a great deal of mischief on the part of the person in charge of this room. It has been our experience that property either disappears and some spurious replica is substituted or it is tampered with to the advantage of one of the parties. Supposing gold ornaments are attached or seized and brought to the court, the weight given in the ***panchanama*** may be approximate or it may even be manipulated with ulterior object. If the Nazir merely accepts it and passes it as correct and later some other jewel with much less weight is substituted, there is no way in which it can be found out. Take again a criminal case where the material object with which the murder is alleged to have been committed has been sent to the Court. If due precautions are not taken, some other instrument with which it can be easily proved that it was impossible

to have committed the murder, may easily be substituted. It is for this reason, important that a full and sufficient description of the articles and the weight be noted when these article are received. When I am on this subject of property room, I am compelled to observe that our courts have been converted into property godowns and our judicial officers have become virtually godown keepers. All sorts of property are brought and dumped in these rooms and in the Court premises. One has only to go into any court in the city to see lorries, motor cars, machines, etc. dumped under trees, rotting for years, their tyres destroyed, their parts removed and stolen. In the property rooms, bags of peppermint and other perishable commodities are some times brought and dumped with the result that the peppermints become liquefied and then congeal into one solid block and the perishable goods are destroyed or changed beyond recognition. There are hundreds of other defects in the maintenance of the property room and it will take a great deal of time to detail them. You may ask what has to be done in such circumstances. My simple answer is that judicial officers should use their discretion and see that these goods are attached and left in the custody of the person in whose behalf they are attached after taking sufficient precautions and security from him. Where the nature of the property attached does not admit of this course or it is not convenient or just to leave it in his hand or where the parties cannot rely upon the thing being kept in the custody of the person even though security is given the judicial officer should appoint a receiver to be the custodian thereof. There is no reason why the court should take upon itself the burden of becoming the godown keeper and attracting to itself the odium of mismanagement.

We find also that in cases pertaining to breach of peace, judicial officers have become managers of immovable properties, granting leases by auction year after year collecting rents and generally administering the estate. There is no compelling reason for them to take upon themselves this burden. Wherever there is an apprehension of breach of peace and they have to keep the property under the supervision of the Court, they can appoint a Receiver who will be paid out of the income. The Hon’ble the Chief Justice was telling me only yesterday of a case where certain buffaloes were attached and made over to a third party and for over three years nothing more was done and nothing was heard of about the buffaloes or what happened to them. When he inspected the file, he was shocked to find this apparently incredible state of affairs. A buffalo could have died or calved or the man into whose custody it was given could have disposed of it. It is quite likely that if a claim were made against its custodian, he may make a counter-claim for the maintenance of the animal. My whole object in pointing out these things is to emphasise that Judicial Officers should not dispose of these matters mechanically or lightly divest themselves of the responsibility for the maintenance and safe custody of these things. They should direct their minds to the nature of the property and the object to be achieved and then

decide the best manner of safeguarding the property and achieving the object without in any way converting their property room into a godown or making their court compound a veritable eye-sore.

In due course, it is quite likely that the Government will have to maintain a property godown in each district under independent supervision where such properties in criminal cases can be lodged without any apprehension in regard to their safety.

Another matter to which I would like to advert is the sending of monthly statement of disposals. We have invariably found that the figures furnished in these statements do not tally with the actual disposals and this is obviously due to the preparation of these statements in a slip-shod manner. Some years ago, in order to show speedy disposals, a practice arose of dismissing cases for default in the last month of the year and again restoring these cases as soon as the succeeding year commenced. In fairness it must be said that not all the judicial officers had recourse to this practice but some of them certainly adopted it. The former Chief Justice directed discontinuance of this practice and happily, this practice at least as far as I know, is no longer prevalent. The High Court is only interested in real disposals and in reducing pendency duration. How that should be achieved has already been indicated most lucidly by My Lord the Chief Justice. I do not propose to add to it. The whole trouble arises when Judicial Officers fail to acquaint themselves with the suits and causes before them and allow the Bench Clerks to control the progress of the proceedings and adjournments. This system is not conducive to justice and will only encourage malpractices in courts. One of the reasons for this failure to keep proper control over the judicial work is non-compliance with the requirement of preparing a weekly cause list and a daily cause-list. In some of the courts, it was found during the inspection of His Lordship the Chief Justice that no cause-lists were prepared at all and even where they were prepared, judicial officers had not scrutinised them. If sufficient work, in each category, namely original (Civil), Execution, Criminal and Small Causes is kept for each day, the list being arranged according to the pendency duration, the judicial officer examining the cause-list will at a glance be able to ascertain every morning before commencing his work the stage which each case has reached and control his work easily and effectively.

Laxity in granting adjournments, I fear occasions serious waste of time of the Court and great inconvenience to the suitors especially to those suitors whose means are limited or who come from a distance and cannot afford to forego frequently a day's earnings by attendance at the Court. Order 17, Rule 1 requires that the reasons for adjournments should be recorded. This direction of the Code is frequently overlooked. Day costs to the other party should be insisted upon when one party asks for an adjournment unless there are compelling reasons for granting an adjournment without costs. I found this practice to be effective and prayers for adjournments diminished considerably.

At any rate adjournments on mere oral representation that an appeal or revision or stay application has been filed or is about to be filed should not be encouraged, when a stay order from an Appellate Court has not been actually received.

Adjournments for preparing arguments after the evidence is closed, normally should never be granted. Some judges hear arguments piecemeal on different dates. It is not possible for any judge to appreciate arguments or to arrive at a just decision in this way.

Much delay and injustice is occasioned by interlocutory *ex parte* injunctions. In most cases, these are obtained to blackmail the rival parties. Serious responsibility therefore, rests with the judges especially the junior officers, to exercise proper discretion in such matters.

You are all aware that the High Court has issued a comprehensive set of Rules of Criminal Practice for the guidance of the Judicial Officers. I do not wish to dilate on them because all of you must have studied them with due care and attention. The rules prescribe for submission of calendar statements of cases disposed of. The object of these calendar statements is to enable the superior Courts to scrutinize the judgments and orders of conviction or acquittals, sentences passed and fines inflicted and satisfy themselves that those orders are prima facie proper and according to law. As soon as these calendar statements are received, the District Magistrate or the Sessions Judge, as the case may be will be in a position to know whether the accused has had a speedy and fair trial and whether the charge against him has been dealt with according to law.

If the District and Sessions Judges scrutinize these calendar statements, they will be able to fully and effectively supervise and control the judiciary subordinate to them. These Officers and more so the Sessions Judges who are on-the-spot officers and heads of the judiciary in the districts have a very heavy responsibility cast upon them for the efficient and proper management of the Magistracy. Of course all this means great toil but the life of a judicial officer is a hard one and I can offer you no easy way to success in this sphere of work.

When I am on the topic of complaints, I may assure you that we receive complaints only against 10% of the judicial officers while the other 90% have given no cause for any complaint. Of these 10%, some have given rise to complaints only by their indiscreetness. As a general principle, judicial officers should not talk loosely, whether in Court or out of Court. It is, I fear, this loose talk which creates a lot of trouble for them. When I was a practicing lawyer, I have often known judicial officers say things against their superior officers, the High Court generally, and against individual judges, in utter defiance of propriety and discipline. Persons who hear such things are not all persons who mind their own business and are likely to carry tales and in doing so, exaggerate or misrepresent the original remarks. It is well to remember that every party in a

litigation is a potential complainant, if he happens to lose his case. So, in the day-to-day discharge of your duties, as judicial officers, you should be cautious in saying or doing anything which may be or is likely to be treated as partiality. I have often had occasion to hear about some judicial officers who have a penchant for criticizing adversely and even fiercely any scheme of the High Court so as to give the impression that they are going to sabotage the implementation of the policy by putting forward more often than not imaginary grievances and chimerical objections. We cannot, too strongly emphasise that when the Hon'ble the Chief Justice and the Administrative Bench make up their mind to implement any given scheme, they do so only after matured consideration and will see to it that it is carried out. It is therefore, futile and even puerile to advance groundless criticism or to create difficulties. Any real hardship or difficulty will be surmounted, if it is made known to us. If without taking this course, one carries on a kind of running commentary before all and sundry, he is bound to land himself in difficulties.

As citizens, judicial officers have their part to play in the general progress of the country and its social advancement. They are in the position of Nyayamurthis. By their conduct, bearing and example, they should draw to themselves respect rather than compel it by relying upon the powers with which they are invested. If two parties have a dispute and want it to be amicably settled, they choose as umpires, persons most respected in the community, in whom they have confidence. It is that respect for integrity and impartiality of the chosen umpires that induces the disputing parties to repose implicit confidence in them. A judicial officer since he is not chosen by the parties but by the High Court, should be more so in a position to inspire confidence and respect. He must conduct himself in such a way as to win the confidence of the people of the district and make him appear to be an umpire chosen voluntarily by the litigants themselves.

I have spoken so much regarding the existing faults and defects of our system that you may be feeling that I only look at the faults. My primary object is, however, to bring to your notice the various defects which the High Court notes from time to time, in the hope that you may attend to them and remedy them. I speak of these matters only in a spirit of constructive criticism.

I wish you all success and hope that your ability and energy will always be directed with singleness of purpose to providing this State an efficient and honest judiciary such as can earn for it the unstinted admiration of our countrymen.

Editor's note:

The above speech, although published in the year 1969, was based on the working of the District Courts in Andhra Pradesh. It still holds relevance and is applicable to the working of the Courts in Madhya Pradesh.

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PART – II

NOTES ON IMPORTANT JUDGMENTS

201. ACCOMMODATION CONTROL ACT (M.P.), 1961 – Sections 2 (i) and 13

Whether sub-tenant liable to pay arrears of rent as per section 13 (1) of the Act? As per Section 2(i) of the Act tenant includes sub-tenant also – Hence, sub-tenant liable to pay rent under section 13(1) of the Act.

[*Saqib Khan v. Ravindra Suri, 2014 (4) MPLJ 607* differentiated with reference to object and scope of Madhya Bharat Sthan Niyantraran Vidhan, 1955 and M.P. Accommodation Control Act, 1961.]

स्थान नियंत्रण अधिनियम (म.प्र.), 1961 - धाराएं 2 (झ) एवं 13

क्या अधिनियम की धारा 13 (1) के अनुसार उप-अभिधारी पर बकाया किराया जमा करने का दायित्व है ? अधिनियम की धारा 2 (झ) के अनुसार अभिधारी के अंतर्गत 'उप-अभिधारी' भी शामिल है - अतः, उप-अभिधारी पर अधिनियम की धारा 13(1) के अधीन किराया जमा करने का दायित्व है।

[मध्य भारत स्थान नियंत्रण विधान, 1955 एवं म.प्र. स्थान नियंत्रण अधिनियम, 1961 के उद्देश्य एवं क्षेत्र के दृष्टिगत *साकिब खान वि. रविन्द्र सूरी, **2014 (4) MPLJ 607*** को विभेदित किया गया]

Parmanand v. Damini V. Mahadik & others

Order dated 16.05.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 2712 of 2017, reported in 2017 (4) MPLJ 458

Relevant extracts from the Order:

The opening sentence in the definition of Section 2 of the Act states, "in this act unless the context otherwise requires". In view of this clarification, the Court has not only to look at words but also to examine the context and collocation in the light of the object of the Act and the purpose for which a particular provision was made by the legislature. The apparent purpose of Section 13 of the Act of 1961 is to give the benefit of protection to the tenant against eviction. If the benefit of protection against eviction has been given to the tenant, then impliedly it is the protection given to sub-tenant also therefore, once the benefit is enjoyed by the sub-tenant against the eviction then it is his liability to pay the rent during interregnum period, therefore, legislative protection cannot be narrowly tailored. Here, the context does not requires otherwise. It requires that tenant includes sub-tenant also with all privileges and liabilities as enjoyed and burdened by tenant. Thus for the purpose of Section 13 of the Act of 1882, tenant includes sub-tenant. This aspect assumes importance in the present set of facts, wherein alleged tenant (defendants No.1 to 4) proceeded *ex parte*. Plaintiffs/landlord cannot be denuded from the benefits of Section 13 of the Act of 1882, on the ground of

sub tenancy. Plaintiffs/landlord deserves receipt of arrears of rent from defendant No.5, who is allegedly sub-tenant in the present case.

The same spirit has been echoed by this Court in the matter of ***Gajra Bevel Gears Ltd. (M/s.) v. Manohar and others, 1997 (2) JLJ 127,*** as well as ***Mohammad Nasir v. Smt. Rabiyabai and another, 1998 (1) MPLJ 249*** and in both the cases, this Court while relying upon the judgment rendered by Hon'ble Apex Court in the matter of ***Pushpa Devi and others v. Milkhi Ram (dead) by his LRs., AIR 1990 SC 808*** has reiterated that tenant includes sub tenant also.

This Court in the matter of ***Saqib Khan v. Ravindra Suri, 2014 (4) MPLJ 607*** has relied upon the judgment rendered by this Court in the case of ***Daryanumal v. Sohanlal, 1961 JLJ 1417 (C.N.373)*** and opined that for the purpose of Section 13(1) of the Act of 1961, tenant does not include sub-tenant. The judgment rendered in the matter of ***Daryanumal*** (supra) was in respect of Madhya Bharat Sthan Niyantraran Vidhan, 1955, whereas the judgments of this Court in the matter of ***Gajra Bevel Gears*** (supra) and ***Mohammad Nasir*** (supra) have been delivered while interpreting provisions of Section 13(6) of the Act of 1961. It is the governing statute for the present controversy also. The aims and objects of Madhya Bharat Sthan Niyantraran Vidhan, 1955 and M.P. Accommodation Control Act, 1961 are slightly different and said statute operated in different social and contextual milieu.

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***202. CIVIL PROCEDURE CODE, 1908 – Sections 2 (2), 47, 54, Order 20 Rule 18 and Order 23 Rule 3**

(i) Distinction between decree in a contested suit and compromise decree, if any? Judicial determination of the rights of the parties which is conclusive in nature in a civil suit, tantamounts to decree – Hence, no distinction is carved out in CPC of decree in respect of contested suit and compromise decree.

(ii) Maintainability of application under Section 47 CPC in respect of re-determination of share in partition suit – Once Civil Court passed Preliminary decree for partition and has referred matter to the Collector under section 54 CPC for effecting partition, it becomes *functus officio* – Civil Court is not under an obligation to decide application under section 47 for re-determination of share alloted by Collector. (Relied on *Tripti Pathak v. B.C. Vaidya, 2008 (1) MPLJ 200* and *Mst. Hironda v. Mst. Anti, 1970 MPLJ 91*)

सिविल प्रक्रिया संहिता, 1908 - धाराएं 2 (2), 47, 54 आदेश 20 नियम 18 एवं आदेश 23 नियम 3

(i) क्या प्रतिवादित वाद में पारित आज्ञप्ति एवं समझौता आज्ञप्ति में कोई अन्तर है? व्यवहार वाद में पक्षकारों के अधिकारों का निश्चयात्मक रूप से न्यायिक निर्धारण, आज्ञप्ति उत्पन्न करता है - अतः प्रतिवादित मामलों में पारित आज्ञप्ति एवं समझौता आज्ञप्ति में कोई अन्तर व्यवहार प्रक्रिया संहिता में नहीं है।

(ii) विभाजन के वाद में अंश के पुनर्निर्धारण के संबंध में व्य.प्र.सं. की धारा 47 के अधीन आवेदन की प्रचलनशीलता - विभाजन हेतु प्रारंभिक आज्ञप्ति पारित करने एवं विभाजन को प्रभावी करने हेतु व्य.प्र.सं. की धारा 54 के अधीन कलेक्टर को निर्देश जारी कर देने के बाद व्यवहार न्यायालय कार्य निवृत्त हो जाता है - व्यवहार न्यायालय पर बाध्यता नहीं है कि वह कलेक्टर द्वारा आवंटित अंश के पुनर्निर्धारण हेतु धारा 47 व्य.प्र.सं. के आवेदन का निराकरण करे। (*तृप्ती पाठक विरूद्ध बी.सी. वैद्य*, ***2008 (1)*** *एमपीएलजे* ***200*** एवं *मुस. हिरोंडा विरूद्ध मुस. अंटी*, ***1970*** *एमपीएलजे* ***91*** अवलंबित)

Kailash K. Paliwal v. Umesh Kumar Paliwal and others
Order dated 01.05.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 20488 of 2014, reported in 2017 (4) MPLJ 264

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203. CIVIL PROCEDURE CODE, 1908 – Section 47

Scope of Executing Court under Section 47 of the Code – Microscopic and very narrow inspection hole for Executing Court – Only when the decree is *void ab initio* or nullity or where it suffers from jurisdictional error/infirmity, objection to it can be allowed – Also, erroneous decree must not be misunderstood to be decree which is nullity – Court's power is much narrower than that in appeal/revision or review.

सिविल प्रक्रिया संहिता, 1908 - धारा 47

धारा 47 के अधीन निष्पादन न्यायालय का कार्यक्षेत्र - निष्पादन न्यायालय को सूक्ष्म एवं अत्यंत संकीर्ण निरीक्षण अनुज्ञात है - मात्र तब जबकि डिक्री प्रारंभतः शून्य हो या अकृत हो या जहां वह अधिकारिता की त्रुटि/दुर्बलता से ग्रसित हो, आपत्ति अनुज्ञात की जा सकती है - यह भी कि त्रुटिपूर्ण डिक्री को अकृत डिक्री नहीं समझा जाना चाहिए - न्यायालय की शक्ति अपील/पुनरीक्षण या पुनर्विलोकन की शक्तियों से अधिक संकीर्ण है।

Brakewel Automotive Components (India) Pvt. Ltd. v. P.R. Selvam Alagappan
Judgment dated 21.03.2017 passed by the Supreme Court in Civil Appeal No. 4313 of 2017, reported in (2017) 5 SCC 371

Relevant extracts from the judgment:

It is no longer res integra that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus in-executable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening developments as well as to render the decree in-executable.

As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.

Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in ***Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others, (1971) 1 SCR 66*** in essence enunciated that only a decree which is a nullity can be the subject matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts.

The following extract from this decision seems apt:

> "A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.
>
> When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

Though this view has echoed time out of number in similar pronouncements of this Court, in ***Dhurandhar Prasad Singh v. Jai Prakash University and others, 2001 AIR (SC) 2552,*** while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the

exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is *void ab initio* and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree in-executable after its passing. None of the above eventualities as recognised in law for rendering a decree in-executable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.

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204. CIVIL PROCEDURE CODE, 1908 – Section 96 and Order 41 Rule 31

Jurisdiction of first Appellate Court – Very wide like that of trial court – Duty of the appellate court to appreciate entire evidence – Also, right to file first appeal being valuable legal right of the litigant, he is entitled to full, fair and independent consideration of the evidence – Looking into the duty of the appellate court, appeal should not be disposed of in *limine*.

सिविल प्रक्रिया संहिता, 1908 - धारा 96 एवं आदेश 41 नियम 31

प्रथम अपीलीय न्यायालय का क्षेत्राधिकार - विचारण न्यायालय की तरह विस्तृत है - संपूर्ण साक्ष्य का मूल्यांकन करने का अपीलीय न्यायालय का कर्तव्य - प्रथम अपील प्रस्तुत करना पक्षकार का मूल्यवान अधिकार है, वह साक्ष्य के स्वतंत्र, उचित एवं पूर्व पुनः मूल्यांकन का भी हकदार है - प्रथम अपीलीय न्यायालय के कर्तव्यों के दृष्टिगत अपील को प्रारंभिक बिन्दु पर निराकृत नहीं किया जाना चाहिये।

Union of India v. K.V. Lakshman and ors.

Judgment dated 29.06.2016 passed by the Supreme Court in Civil Appeal No. 920 of 2008, reported in (2016) 13 SCC 124

Relevant extracts from the judgment:

As rightly argued by the learned counsel for the appellant, the High Court should not have dismissed the appeal in *limine* but in the first instance should have admitted the appeal and then decided finally after serving notice of the appeal on the respondents.

We also find from the record that on the one hand, the learned Judge observed that the appeal has “absolutely no arguable point” and on the other hand to support these observations, the learned Judge devoted 50 pages. This itself indicated that the appeal involved arguable points.

It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate Court to

appreciate the entire evidence and may come to a conclusion different from that of the Trial Court.

Similarly, the powers of the first appellate Court while deciding the first appeal are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra. It is apposite to take note of the law on this issue.

As far back in 1969, the learned Judge V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in ***Kurian Chacko v. Varkey Ouseph, 1969 AIR (Ker) 316***, reminded the first appellate Court of its duty to decide the first appeal. In his distinctive style of writing with subtle power of expression, the learned judge held as under:

> "1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.
>
> 2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation .."

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Again in ***Jagannath v. Arulappa & anr., (2005) 12 SCC 303,*** while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court (at pp. 303-04) observed as follows: (SCC para 2)

> "2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion ..."

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

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

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

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide ***Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756*** at p. 758, para 5)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

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***205. CIVIL PROCEDURE CODE, 1908 – Section 144 and Order 9 Rule 13**

Effect of *ex-parte* decree – Same force as decree passed on contest – Also, mere execution does not disentitle the defendant from applying for setting aside *ex parte* decree – Once *ex parte* decree is set aside, restitution or restoration can also be ordered by the court passing the decree.

सिविल प्रक्रिया संहिता, 1908 - धारा 144 एवं आदेश 9 नियम 13

एक-पक्षीय आज्ञप्ति का प्रभाव - प्रतिवाद के आधार पर प्राप्त आज्ञप्ति के समान ही बल होगा - इसके अतिरिक्त, केवल निष्पादन प्रतिवादी को एक पक्षीय आज्ञप्ति अपास्त करने के लिये आवेदन प्रस्तुत करने के हक से वंचित नहीं करता है - एक बार एक पक्षीय आज्ञप्ति को अपास्त कर दिया जाता है तो आज्ञप्ति पारित करने वाले न्यायालय द्वारा प्रत्यास्थापन या प्रत्यावर्तन का आदेश भी दिया जा सकता है।

Vijay Singh v. Shanti Devi and another
Judgment dated 08.09.2017 passed by the Supreme Court in Civil Appeal No. 2062 of 2009, reported in (2017) 8 SCC 837

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***206. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 and Order 22 Rules 3 and 4**

(i) Suit for specific performance of the contract – Heirs of the original vendee are necessary party, to be substituted in suit – Subsequent purchasers are not legal representatives of the deceased original vendee – If after death of the original vendee, heirs of the deceased original vendee are not substituted, suit shall be abated.

(ii) The provisions of order 22 rule 4 CPC would apply only when the name of the deceased party has not been deleted without substitution – Once name of the deceased party is deleted, LRs. cannot be brought on record under order 22 rule 4 CPC.

सिविल प्रक्रिया संहिता, 1908 - आदेश 1 नियम 10 एवं आदेश 22 नियम 3 एवं 4

(i) संविदा के विर्निदिष्ट पालन हेतु वाद- दावे में प्रतिस्थापित करने के लिए मृतक मूल विक्रेता के वारिस आवश्यक पक्षकार हैं - पश्चातवर्ती क्रेता मृतक मूल विक्रेता के विधिक प्रतिनिधि नहीं हैं - अतः यदि प्रकरण में मृतक मूल विक्रेता के वारिसों को मूल विक्रेता के स्थान पर प्रतिस्थापित न किया जाये तो वाद उपशमित हो जायेगा।

(ii) आदेश 22 नियम 4 व्य.प्र.सं. के प्रावधान केवल तब लागू होंगे जब प्रतिस्थापन पूर्व मृतक पक्षकार का नाम विलोपित नहीं किया गया - यदि मृतक पक्षकार का नाम ही विलोपित कर दिया गया तब आदेश 22 नियम 4 व्य.प्र.सं. के अधीन उसके विधिक प्रतिनिधियों को अभिलेख में नहीं लाया जा सकता है।

Kishorilal (Dead) through L.Rs. v. Gopal and ors.
Judgment dated 12.09.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in First Appeal No. 213 of 2000, reported in 2017 (IV) MPJR 182

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***207. CIVIL PROCEDURE CODE, 1908 – Order 2 Rules 2 and 4**
Bar of Suit – Earlier suit filed for ejectment and mesne profits/arrears of rent – Relinquishment of claim as to mesne profit – Subsequent suit cannot be brought for mesne profit – Order 2 rule 2 read with rule 4 will bar the subsequent suit.

सिविल प्रक्रिया संहिता, 1908 - ओदश 2 नियम 2 एवं 4

वाद का वर्जन-पूर्ववर्ती वाद निष्कासन एवं अंतःवर्ती लाभ/अवशेष किराये के लिये प्रस्तुत किया गया था - अंतःवर्ती लाभ के दावे का त्याग किया गया - पश्चातवर्ती वाद अंतःवर्ती लाभ के लिये नहीं लाया जा सकता है - आदेश 2 नियम 2 सहपठित नियम 4 पश्चातवर्ती वाद को वर्जित करता है।

Raptakos Brett and Company Limited v. Ganesh Property
Judgment dated 05.09.2017 passed by the Supreme Court in Civil Appeal No. 1464 of 2008, reported in (2017) 10 SCC 643

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208. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 (d)
LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 21

(i) Whether the expression "law" in Order 7 Rule 11 (d) C.P.C. includes decision of the Apex Court? Held, Yes.

(ii) Challenge to the award passed by Lok Adalat on the ground of fraud and misrepresentation – Can be done only by way of Writ under Article 226 or 227 before the High Court – Suit in the Civil Court challenging the same – Barred by law and liable to be rejected under Order 7 Rule 11 (d).

(*State of Punjab & anr. v. Jalour Singh & ors. (2008) 2 SCC 660,* relied upon)

सिविल प्रक्रिया संहिता, 1908 - आदेश 7 नियम 11 (घ)

विधिक सेवा प्राधिकरण अधिनियम, 1987 - धारा 21

(i) क्या आदेश 7 नियम 11 (घ) सिविल प्रक्रिया संहिता में अभिव्यक्ति ''विधि'' में सर्वोच्च न्यायालय का निर्णय भी शामिल है? अभिनिर्धारित, हाँ।

(ii) कपट एवं दुव्र्यपदेशन के आधार पर लोक अदालत द्वारा पारित अधिनिर्णय को चुनौती - उच्च न्यायालय के समक्ष अनुच्छेद 226 या 227 के तहत केवल याचिका के माध्यम से ही किया जा सकता है - सिविल न्यायालय में उक्त संबंध में चुनौती करते हुये वाद - विधि द्वारा वर्जित है और आदेश 7 नियम 11 (घ) में नामंजूर किये जाने योग्य है।

(*पंजाब राज्य एवं अन्य विरूद्ध जालौर सिंह एवं अन्य*, ***(2008) 2*** *एस.सी.सी.* ***660*** अवलंबित)

Bhargavi Constructions and anr. v. Kothakapu Muthyam Reddy and ors.

Judgment dated 07.09.2017 passed by the Supreme Court of India in Civil Appeal No. 11345 of 2017, reported in AIR 2017 SC 4428

Relevant extracts from the judgment:

The question arose before this Court (Three Judge Bench) in the case of ***State of Punjab & anr. v. Jalour Singh & ors., (2008) 2 SCC 660,*** as to what is the remedy available to the person aggrieved of the award passed by the Lok Adalat under Section 20 of the Act. In that case, the award was passed by the Lok Adalat which had resulted in disposal of the appeal pending before the High Court relating to a claim case arising out of Motor Vehicle Act. One party to the appeal felt aggrieved of the Award and, therefore, questioned its legality and correctness by filing a writ petition under Article 226/227 of the Constitution of India. The High Court dismissed the writ petition holding it to be not maintainable. The aggrieved party, therefore, filed an appeal by way of special leave before this Court. This Court, after examining the scheme of the Act allowed the appeal and set aside the order of the High Court. This Court held that the High Court was not right in dismissing the writ petition as not maintainable. It was held that the only remedy available with the aggrieved person was to challenge the award of the Lok Adalat by filing a writ petition under Article 226 or/and 227 of the Constitution of India in the High Court and that too on very limited grounds. The case was accordingly remanded to the High Court for deciding the writ petition filed by the aggrieved person on its merits in accordance with law.

This is what Their Lordships held in Para 12:

> "12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under

> Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

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Similarly, this very issue was again examined by the Bombay High Court (Single Judge) in ***Shahid S. Sarkar & ors. v. Usha Ramrao Bhojane, 2017 SCC On Line 3440*** (Bom). The learned Judge placed reliance on the decisions of the Allahabad High Court in ***Virender Kumar Dixit v. State of U. P., 2014 (9) ADJ 1506*** and the Gujarat High Court in ***Hermes Marines Limited v. Cafeshore Mari time Partners FIC & 1*** (unreported), ***Civil application (OJ) No. 144 of 2016 dated 22.04.2016*** and held as under:

> "The law laid down by the highest court of a State as well as the Supreme Court, is the law. In fact, Article 141 of the Constitution of India categorically states that the law declared by the Supreme Court shall be binding on all Courts within the territories of India. There is nothing even in the C.P.C. to restrict the meaning of the words "barred by any law" to mean only codified law or statute law as sought to be contended by Mr. Patil. In the view that I have taken, I am supported by a decision of the Gujarat High Court in the case of ***Hermes Marines Limited*** (supra)"
>
> "One must also not lose sight of the purpose and intention behind Order VII Rule 11(d). The intention appears to be that when the suit appears from the statement in the plaint to be barred by any law, the Courts will not unnecessarily protract the litigation and proceed with the hearing of the suit. The purpose clearly appears to be to ensure that where a Defendant is able to establish that the Plaint ought to be rejected on any of the grounds set out in the said Rule, the Court would be duty bound to do so, so as to save expenses, achieve expedition and avoid the court's resources being used up on cases which will serve no useful purpose. A litigation, which in the opinion of the court, is doomed to fail would not further be allowed to be used as a device to harass a Defendant .."

Similarly, issue was again examined by the High Court of Jharkhand (Single Judge) in ***Mira Sinha & ors. v. State of Jharkhand & ors., 2015 SCC On Line 4377 (Jhar)***. The learned Judge, in paragraph 7 held as under:

> "7. In the background of the law laid down by the Hon'ble Supreme Court, it is apparent that Order VII Rule 11(d) C.P.C. application is maintainable only when the suit is barred by any law. The expression "law" included in Rule 11(d) includes Law of Limitation and, it would also include the law declared by the Hon'ble Supreme Court "

We are in agreement with the view taken by Allahabad, Gujarat, Bombay and Jharkhand High Courts in the aforementioned four decisions which, in our opinion, is the proper interpretation of the expression "law" occurring in clause (d) of Rule 11 of Order 7 of the Code.

So far as the second submission of learned counsel for the respondents is concerned, it also has no merit. In our view, the decision rendered in the case of ***State of Punjab*** (supra) is by the larger Bench (Three Judge) and is, therefore, binding on us. No efforts were made and rightly to contend that the said decision needs reconsideration on the issue in question. That apart, when this Court has laid down a particular remedy to follow for challenging the award of Lok Adalat then in our view, the same is required to be followed by the litigant in letter and spirit as provided therein for adjudication of his grievance in the first instance. The reason being that it is a law of the land under Article 141 of the Constitution of India (see - ***M. Nagaraj & ors. v. U.O.I. & ors., (2006) 8 SCC 212***). It is then for the writ court to decide as to what orders need to be passed on the facts arising in the case.

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209. CIVIL PROCEDURE CODE, 1908 – Order 11 Rules 12 and 21

(i) Effect of Non-production of documents under Rule 12 *vis-a-vis* scope of Rule 21 of Order 11 – Suit cannot be dismissed, due to non-compliance of provision under Rule 12 of Order 11 – *Sine qua-non* for Rule 21 is non-compliance of orders of interrogatories, discovery or inspection of documents.

(ii) Nomenclature of document *vis-a-vis* content of document – Contents of documents are to be considered to ascertain nature of document – Nomenclature of document is of no significance (Relied on – *Prakash Roadlines (P) Ltd. v. Oriental Fire and General Insurance Co. Ltd. (2000) 10 SCC 64*)

व्यवहार प्रक्रिया संहिता, 1908 - आदेश 11 नियम 12 एवं 21

(i) नियम 12 के अधीन दस्तावेज प्रस्तुत न करने का प्रभाव एवं आदेश 11 नियम 21 की परिधि - आदेश 11 नियम 12 के प्रावधान के अपालन के कारण वाद निरस्त नहीं किया जा सकता है - नियम 21 की प्रयोज्यता के लिये आवश्यक यह है कि परिप्रश्नों का उत्तर देने, दस्तावेज के प्रकटीकरण या निरीक्षण के आदेश का अपालन किया गया हो।

(ii) दस्तावेज का नामकरण एवं अंतर्वस्तु - दस्तावेज की प्रकृति निश्चित किये जाने हेतु दस्तावेज की अन्तर्वस्तु पर विचार किया जाना चाहिये - दस्तावेज का नामकरण महत्वहीन है। (*प्रकाश रोड लाईन्स (प्रा.) लि. विरूद्ध ओरिएंटल फायर एवं जनरल इंश्योरेंस कंपनी लि.*, ***(2000) 10*** *एससीसी* ***64*** अवलंबित)

Durgesh Singh & others v. Narendra Kante
Order dated 18.05.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Civil Revision No. 114 of 2016, reported in 2017 (4) MPLJ 422

Relevant extracts from the Order:

The first question relates to the ambit under Order XI Rule 21 of CPC ***vis-a-vis*** non production of documents. In this regard, it is appropriate to refer to the judgment of this Court in case of ***Archdiocese of Bhopal v. Hasan Kabir, 2009 (4) M.P.L.J 530***, in which while dealing with the aforesaid question of non-production, the Division Bench of this Court has recorded its observation in the following manner:-

> "8. A bare reading of Rule 21 of Order 11, Civil Procedure Code makes it clear that the provision entails noncompliance of the order to answer interrogatories. Interrogatories are dealt with under Rule 1 to Rule 11 of Order 11. Rule 12 of Order 11, Civil Procedure Code deals with application for discovery of documents. Inspection of the documents which is referred to in Rule 21 is again dealt with in Rule 15 to 18 of Order 11, Civil Procedure Code. The Order 11 Rule 1, Civil Procedure Code enables party to a suit to make discovery by interrogatories by leave of Court. Rule 2 of Order 11, Civil Procedure Code provides that particular interrogatories to be submitted to the Court, and factors to be taken into consideration. Order 11 Rule 11 provides that when any person omits to answer or answer insufficiently, the Court may on application, direct to answer or further answer. The Court orders discovery of document under Rule 12 of Order 11, Civil Procedure Code. The Rule 18 of Order 11, Civil Procedure Code provides that where the party served with notice under Rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit. In case plaintiff fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, be liable to have his suit dismissed for want of prosecution. In case of defendant not complying with the provision, his defence can be struck off and he may be placed in the same position as if he had not defended. It is further required that party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and by way of amendment which has been inserted with effect from 1- 2-1977 the order may be made under Order 11, Rule 21, Civil Procedure Code after notice to the parties and after giving them reasonable opportunity of being heard. The sine qua non for exercising the power under Rule 21 is failure to answer the interrogatories, order of discovery or inspection of

documents. Noncompliance of Rule 14 which is with respect to production of document is not covered under Rule 21, Civil Procedure Code. Legislature has thought it appropriate in case of plaintiff, if he fails to comply with the order relating to interrogatories, discovery or inspection of documents, a suit be dismissed or in case of defendant his defence may be struck off. Legislature in its wisdom has not included in Rule 21 of Order 11, Civil Procedure Code such a penal consequence due to non-compliance of order passed under Order 11, Rule 14 Civil Procedure Code. Moreover, in the instant case, it is not in dispute that no application was filed for dismissal of suit under Order 11, Rule 21, Civil Procedure Code which is condition precedent for exercise of the power under the aforesaid provision, thus, even assuming for a moment that aforesaid provision was applicable, it was not open for the trial Court to have passed the order dismissing the suit. An order under Order 11, Rule 21, Civil Procedure Code can be passed only on an application and that too after giving notice to the parties and giving them reasonable opportunity of being heard. It is also provided in sub-rule (1) of Rule 21 of Order 11, Civil Procedure Code, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action. This dire consequence is not provided with respect to noncompliance of Order 11, Rule 14, Civil Procedure Code."

In view of above, we hold that due to non-compliance of provision under Order XI, Rule 14 of Civil Procedure Code suit cannot be dismissed under Order XI, Rule 21 of Civil Procedure Code. It can be dismissed only in the exigencies such as due to noncompliance of orders of interrogatories, discovery of inspection as envisaged under Order XI, Rule 21 of Civil Procedure Code.

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Lastly, with regard to the question as to whether the contention of the applicants/ defendants that the affidavit is captioned as one under Order 11 Rule 13 of CPC and therefore, the same cannot be given a colour of the one under Order 11 Rule 12 of CPC, suffice it to observe that the law is well settled that nomenclature of the document is of no significance and the contents of the document are to be considered to ascertain the nature of the document. In this regard, Hon'ble Supreme Court in the case of ***Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd., (2000) 10 SCC 64*** held in the following manner :-

"3. It is settled law that a document has to be interpreted not by its nomenclature but what is contained in the said document. A reading of the document shows that it was a deed of assignment in favour of the Insurance Company.

We are, therefore, in agreement with the view taken by the High Court. Consequently, we do not find any merit in the appeal. It is accordingly dismissed. There shall be no order as to costs."

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***210. CIVIL PROCEDURE CODE, 1908 – Order 27 Rule 5B**

Suit against Government – Duty of the Court to assist the parties in arriving at a settlement – Only after recording failure of such settlement, the case should be finally decided on merits.

सिविल प्रक्रिया संहिता, 1908 - आदेश 27 नियम 5ख

शासन के विरूद्ध वाद - न्यायालय का कर्तव्य है कि वह पक्षकारों की सहायता समझौते पर पहुंचने के लिये करे - मात्र ऐसे समझौते के विफल होने को लेखबद्ध किये जाने पर वाद को अंततः गुण दोषों पर निर्णीत किया जाना चाहिये।

Haryana State and anr. v. Gram Panchayat Village Kalheri
Judgment dated 29.06.2016 passed by the Supreme Court in Civil Appeal No. 2516 of 2008, reported in (2016) 11 SCC 374

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211. CIVIL PROCEDURE CODE, 1908 – Order 41 Rules 23, 23A and 25

Exercise of power to remand a case – Order of remand cannot be made in absence of plea by the appellant – It must be shown that trial in the suit was unsatisfactory which caused prejudice to the appellant – Also, appellate Court must record reasons as to why it has taken recourse to any of the rules mentioned for remand.

सिविल प्रक्रिया संहिता, 1908 - आदेश 41 नियम 23, 23क एवं 25

प्रकरण के प्रतिप्रेषण की शक्ति का प्रयोग - अपीलार्थी के अभिवाक् के बिना प्रतिप्रेषण का आदेश पारित नहीं किया जा सकता है - यह दर्शित किया जाना आवश्यक है कि विचारण जिससे अपीलार्थी को पूर्वाग्रह कारित हुआ है असंतोषजनक रहा है - यह भी आवश्यक है कि अपीलीय न्यायालय कारण दर्शित करे कि किन नियमों के अधीन और क्यों प्रकरण प्रतिप्रेषित किया गया है।

Syeda Rahimunnisa v. Malan Bi (Dead) By L.Rs. and anr.
Judgment dated 03.10.2016 passed by the Supreme Court in Civil Appeals No. 2875 of 2010, reported in (2016) 10 SCC 315

Relevant extracts from the judgment:

Having formulated the questions (though wrongly), the High Court went on to discuss all the issues in 59 pages as if it was hearing first appeals and instead of answering the questions, set aside the judgment/decree of the two courts below and proceeded to remand the cases to the trial court for *de novo* trial in all civil suits. In our opinion, the High Court had no jurisdiction to remand the case to the trial court inasmuch as no party to the appeal had even raised this ground

before the first appellate court or/and the High Court as to why the remand of the case to the trial Court is called for and nor there was any finding recorded on this question by the first appellate court.

We also find that no party to the appeals complained at any stage of the proceedings that the trial in the suits was unsatisfactory which caused prejudice to them requiring remand of the cases to the trial court to enable them to lead additional evidence. In any event, we find that the High Court also did not frame any substantial question of law on the question as to whether any case for remand of the case to the trial court has been made out and if so on what grounds?

Section 100 empowers the High Court to decide the second appeal only on the questions framed. In other words, the jurisdiction of High Curt to decide the second appeal is confined only to questions framed. When the High Court did not frame any question on the question of remand, to the trial court ***a fortiori*** it had no jurisdiction to deal with such question much less to answer in respondent's favour.

The High Court, in our view, further failed to see that if the first appellate court could decide the appeal on merits without there being any objection raised for remanding of the case to the trial court, we are unable to appreciate as to why the High Court could not decide the appeal on merits and instead raised the issue of remand of its own and passed the order to that effect.

It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits.

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***212. CRIMINAL PROCEDURE CODE, 1973 – Section 154**

Second FIR, permissibility – Second FIR can be registered only when it relates to different allegations in substance and different transactions altogether – Receiving of information after charge sheet has been filed – If it relates to same transaction or occurrence, then second FIR is not permissible.

दंड प्रक्रिया संहिता, 1973 - धारा 154

द्वितीय प्रथम सूचना रिपोर्ट की अनुज्ञेयता - द्वितीय प्र.सू.रि. मात्र तभी पंजीबद्ध की जा सकती है जब वह सारतः भिन्न अभिकथनों एवं संव्यवहारों से संबंधित हो - अभियोग पत्र प्रस्तुत कर दिये जाने के पष्चात् प्राप्त सूचना - यदि समान संव्यवहार एवं घटना पर आधारित हो तो द्वितीय प्र.सू.रि. अनुज्ञेय नहीं है।

Awadesh Kumar Jha @ Akhilesh Kumar Jha v. State of Bihar Judgment dated 07.01.2016 passed by the Supreme Court in Criminal Appeal No. 15 of 2016, reported in (2016) 3 SCC 8

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213. CRIMINAL PROCEDURE CODE, 1973 – Sections 161 and 319 Relevance of statements under section 161 recorded during investigation at the time of deciding application under section 319 – Cannot be relied as independent evidence – Only corroborative material for that purpose – Substantive evidence led before Court must be taken into consideration at first instance.

दंड प्रक्रिया संहिता, 1973 - धाराएं 161 एवं 319

धारा 319 के तहत आवेदन निर्णीत करते समय अनुसंधान के दौरान लेखबद्ध धारा 161 के कथनों की सुसंगतता - स्वतंत्र साक्ष्य के रूप में भरोसा नहीं किया जा सकता है - उस प्रयोजन के लिये केवल संपोषक सामग्री है - सर्वप्रथम न्यायालय के समक्ष प्रस्तुत सारभूत साक्ष्य को विचार में लिया जाना चाहिये।

S. Mohammed Ispahani v. Yogendra Chandak and others Judgment dated 04.10.2017 passed by the Supreme Court in Criminal Appeal No. 1720 of 2017, reported in AIR 2017 SC 4994

Relevant extracts from the judgment:

The High Court, in the impugned judgment, has been influenced by the fact that names of the appellants were mentioned in the FIR and even in the statement of witnesses recorded under Section 161 of the Cr.P.C. These appellants were named and such statements under Section 161 Cr.P.C. would constitute ‘documents’. In this context, the High Court has observed that ‘evidence’ within the meaning of Section 319 Cr.P.C. would include the aforesaid statements and, therefore, the appellants could be summoned.

The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in ***Hardeep Singh v. State of Punjab, (2014) 3 SCC 92,*** case that the word ‘evidence’ has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In paragraph

105 of the judgment, however, it is observed that 'only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner. This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the 'evidence', on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

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

In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 Cr.P.C. as independent evidence. It could only be corroborative material. In the first instance, 'evidence' led before the Court had to be taken into consideration. As far as deposition of PW-1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the appellants/landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellants/landlords were admittedly not present at the site when the alleged incident took place, we do not find any 'evidence' within the meaning of Section 319 Cr.P.C. on the basis of which they could be summoned as accused persons. PW-1 and PW-4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW-4, he has alleged that "Subsequently I came to know the said people is not police officials the people was sent by landlords of the building...". That statement may not be enough for roping in the appellants/ landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in ***Hardeep Singh's case*** (supra) namely, 'strong and cogent evidence', is lacking.

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214. CRIMINAL PROCEDURE CODE, 1973 – Section 216

Whether any party can seek an order under Section 216 Cr.P.C. for amendment of charge as a matter of right? Held, No.

दंड प्रक्रिया संहिता, 1973 - धारा 216

क्या कोई भी पक्षकार, धारा 216 दं.प्र.सं. के तहत आरोप में संशोधन की माँग अधिकार के रूप में कर सकता है? अभिनिर्धारित, नहीं।

P. Kartikalakshmi v. Sri Ganesh and anr.

Order dated 12.08.2014 passed by the Supreme Court in Criminal Appeal No. 1709 of 2014, reported in (2017) 3 SCC 347

Relevant extracts from the Order :

Having heard learned counsel for the respective parties, we find force in the submission of learned senior counsel for respondent no.1. Section 216 Cr.P.C. empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr.P.C. to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

We were taken through Sections 221 & 222 of the Cr.P.C. in this context. In the light of the facts involved in this case, we are only concerned with Section 216 Cr.P.C. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 Cr.P.C. is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C. If such a course to be adopted by the parties is allowed, then it will be well nigh impossible for the Criminal Court to conclude its proceedings and the concept of speedy trial will get jeopardized.

In such circumstances, when the application preferred by the appellant itself before the Trial Court was not maintainable, it was not incumbent upon the Trial Court to pass an order under Section 216 Cr.P.C. Therefore, there was no question of the said order being revisable under Section 397 Cr.P.C. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 Cr.P.C. To that extent having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the Trial Court.

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***215. CRIMINAL PROCEDURE CODE, 1973 – Sections 306 and 319**

Prosecution can cite persons/accused involved in crime as witnesses to strengthen their case without recourse to Section 306 – At the same time, the Court is not bound by such decision of the prosecutor – Court can consider taking cognizance against them too – Court is required to weigh the interest of justice in having them as accused instead of their utility as witnesses.

दंड प्रक्रिया संहिता, 1973 - धाराएं 306 एवं 319

अभियोजन धारा 306 के बिना भी अपना मामला सुदृढ़ करने के लिये साक्षी के रूप में, अपराध में शामिल व्यक्तियों/अभियुक्त को उद्धृत कर सकता है - साथ ही, न्यायालय अभियोजन के ऐसे निर्णय से बाध्य नहीं है - न्यायालय उनके विरूद्ध भी संज्ञान लेने पर विचार कर सकती है - न्यायालय को न्याय हित में साक्षी के रूप में उनकी उपयोगिता के स्थान पर अभियुक्त के रूप में होने के संबंध में तुलना करनी चाहिये।

Girish Sharma and ors.v. State of Chhattisgarh and ors.
Order dated 23.08.2017 passed by the Supreme Court in Criminal Appeal No. 939 of 2017, reported in AIR 2017 SC 4973

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216. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439

(i) Filing of Charge sheet – Does not amount to change of circumstances – Rather it means that investigation agency has found sufficient materials to put accused on trial – Principles to be considered while deciding bail enunciated in *Charan Lal v. State of U.P., (2004) 7 SCC 525* reiterated.

(ii) Enlargement on bail by Court of Sessions after rejection from the Supreme Court – Held, absolute impropriety – Precedential law discussed.

दण्ड प्रक्रिया संहिता, 1973- धाराएं 437 और 439

(i) अभियोग पत्र की प्रस्तुति - परिस्थितियों में परिवर्तन नहीं है - अपितु यह अभिप्राय है कि अन्वेषण अभिकरण ने अभियुक्त का विचारण करने के लिए उपयुक्त सामग्री पायी है - जमानत आवेदन निराकृत करते समय चरनलाल विरूद्ध उ.प्र. राज्य, (2004) एस.सी.सी. 525 में विहित सिद्धांतों को दोहराया गया।

(ii) उच्चतम न्यायालय द्वारा अस्वीकार किए जाने के पश्चात् सत्र न्यायालय द्वारा जमानत पर छोड़ा जाना - अभिनिर्धारित, सर्वथा अनुचित है - न्यायनिर्णीत विधि की विवेचना की गई।

Virupakshappa Gouda and anr. v. State of Karnataka and anr. Judgment dated 28.03.2017 passed by the Supreme Court in Criminal Appeal No. 601 of 2017, reported in (2017) 5 SCC 406

Relevant extracts from the judgment:

On a perusal of the order passed by the learned trial Judge, we find that he has been swayed by the ***factum*** that when a charge-sheet is filed it amounts to change of circumstance. Needless to say, filing of the charge-sheet does not in any manner lessen the allegations made by the prosecution. On the contrary, filing of the charge-sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons. As is further demonstrable, the learned trial Judge has remained absolutely oblivious of the fact that the appellants had moved the special leave petition before this Court for grant of bail and the same was not entertained. Be it noted, the second bail application was filed before the Principal Sessions Judge after filing of the charge-sheet which was challenged in the High Court and that had travelled to this Court. These facts, unfortunately, have not been taken note of by the learned trial Judge. He has been swayed by the observations made in ***Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694***, especially in paragraph 86, the relevant part of which reads thus:-

> "The courts considering the bail application should try to maintain fine balance between the societal interest vis-a-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court."

The proposition expounded above, has to be accepted, but that has to be applied appositely to the facts of each case. A bail application cannot be allowed solely or exclusively on the ground that the fundamental principle of criminal jurisprudence is that the accused is presumed to be innocent till he is found guilty by the competent court. The learned trial Judge has also referred to the decision in ***Sanjay Chandra v. CBI, (2012) 1 SCC 40***, wherein a two-Judge Bench while dealing with bail applications, observed thus:-

> "In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.
>
> From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.
>
> Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

Be it noted, though the aforesaid passages have their relevance but the same cannot be made applicable in each and every case for grant of bail. In the said case, the accused-appellant was facing trial for the offences under Sections 420-B, 468, 471 and 109 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Thus, the factual matrix was quite different. That apart, it depends upon the nature of the crime and the manner in which it is committed. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of the factual score and understanding of the pronouncements in the field.

The court has to keep in mind what has been stated in ***Chaman Lal v. State of U.P. and another, (2004) 7 SCC 525***. The requisite factors are:

(i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
(ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and
(iii) ***prima facie*** satisfaction of the court in support of the charge. In ***Prasanta Kumar Sarkar v. Ashis Chatterjee and another, (2010) 14 SCC 496***, it has been opined that while exercising the power for grant of bail, the court has to keep in mind certain circumstances and factors. We may usefully reproduce the said passage:-

> "9....among other circumstances, the factors which are to be borne in mind while considering an application for bail are:
> (i) whether there is any ***prima facie*** or reasonable ground to be believed that the accused had committed the offence.
> (ii) nature and gravity of the accusation;
> (iii) severity of the punishment in the event of conviction;
> (iv) danger of the accused absconding or fleeing, if released on bail;
> (v) character, behaviour, means, position and standing of the accused;
> (vi) likelihood of the offence being repeated;
> (vii) reasonable apprehension of the witnesses being influenced; and
> (viii) danger, of course, of justice being thwarted by grant of bail."

xxx xxx xxx

In the instant case, as is demonstrable, the learned trial Judge has not been guided by the established parameters for grant of bail. He has not kept himself alive to the fact that twice the bail applications had been rejected and the matter had travelled to this Court. Once this Court has declined to enlarge the appellants on bail, endeavours to project same factual score should not have been allowed. It is absolute impropriety and that impropriety call for axing of the order.

That apart, as we find from the narration of allegations from the order of the High Court, it is not a case where the trial court could have entertained a bail application by elaborate dissection of facts and appreciation of statements recorded under Section 161 Cr.P.C. The gravity of the crime should have been taken note of by the learned trial Judge. The deceased and his wife (the daughter

of the accused-appellant No.1) were staying in peace away from the acrimonious community, but due to some kind of ***"misconceived class honour"***, the vengeance reigned and awe for law went on a holiday. They thought that their perception mattered and as alleged, they put an end to the life spark of the young man. The choice of the daughter was allowed no space. Her identity was crushed and her thinking was crucified by parental dominance which has roots in an unfathomable sense of community honour. Though the lovers became fugitive, the anger founded on anachronistic values prompted the accused persons to annihilate the life of a young man. In such a situation, the factors that have been highlighted by this Court from time to time were required to be adverted to and the accused persons should not have been granted liberty on the grounds that have been thought appropriate by the learned trial Judge. The perversity of approach by the learned Additional Sessions Judge, who has enlarged the appellants on bail, is totally unacceptable. It is reflective of sanctuary of errors. In such a situation, we are obligated to say that the High Court has performed its legal duty by lancinating the order passed by the learned trial Judge.

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***217. CRIMINAL PROCEDURE CODE, 1973 – Section 439**
EXCISE ACT, 1915 (M.P.) – Sections 34 and 59-A
Bail – Principle of parity; applicability of – An accused of offence punishable under Section 34(2) of Madhya Pradesh Excise Act, 1915 prayed for bail in his subsequent application before High Court on the basis of parity as co-accused was granted bail by a co-ordinate Bench of High Court – The first bail application of the same accused was dismissed as withdrawn having considered the provisions of section 59-A of the M.P. Excise Act, as the quantity of the seized liquor was found to be 225 bulk liters – Held, the provisions of Section 59-A of the M.P. Excise Act has a rider to grant bail in those cases where the quantity of the seized liquor is found to be more than 50 bulk liters – The fact has not been considered by the co-ordinate Bench of High Court in the referred order of co-accused – Also, quantity of the seized liquor has also not been considered by the court whereas the huge quantity of the liquor i.e. 225 bulk liters was seized from the applicant-accused and the co-accused – Applicant-accused was the main accused who was carrying the said liquor – Hence, in the said circumstances, the parity claimed by the applicant-accused cannot be considered – The application for bail on the basis of parity with co-accused was dismissed.
दंड प्रक्रिया संहिता, 1973 - धारा 439
आबकारी अधिनियम, 1915 (म.प्र.) - धाराएं 34 एवं 59-क
जमानत - समानता के सिद्धांत की प्रयोज्यता - धारा 34(2) मध्यप्रदेश आबकारी अधिनियम, 1915 के तहत दंडनीय अपराध के अभियुक्त द्वारा पश्चातवर्ती आवेदन में

समानता के आधार पर जमानत की प्रार्थना उच्च न्यायालय के समक्ष की गई क्योंकि सह-अभियुक्त को उच्च न्यायालय की समसंख्यक पीठ ने जमानत दे दी थी - उसी अभियुक्त के प्रथम जमानत आवेदन को वापस लिये जाने के आधार पर धारा 59-क म.प्र. आबकारी अधिनियम के प्रावधान के अनुसार जप्त शराब की मात्रा 225 बल्क लीटर होने के आधार पर निरस्त किया गया था - अभिनिर्धारित, धारा 59-क म.प्र. आबकारी अधिनियम के प्रावधान उन मामलों में जहां जप्त शराब की मात्रा 50 बल्क लीटर से अधिक है में, जमानत प्रदान किये जाने पर एक राइडर लगाते हैं - इस तथ्य को सह-अभियुक्त के संदर्भित आदेश में उच्च न्यायालय की समन्वयित पीठ ने विचार में नहीं लिया - इसके अतिरिक्त, जप्त की गयी शराब की मात्रा को भी न्यायालय ने विचार में नहीं लिया जबकि 225 बल्क लीटर शराब की बड़ी मात्रा आवेदक अभियुक्त एवं सह-अभियुक्त से जप्त की गयी थी - आवेदक-अभियुक्त ही मुख्य अभियुक्त था जो कि कथित शराब को ले जा रहा था - इसलिये तथाकथित परिस्थितियों में आवेदक-अभियुक्त द्वारा प्रार्थित समानता को विचार में नहीं लिया जा सकता है - सह अभियुक्त से समानता के आधार पर प्रस्तुत जमानत आवेदन निरस्त किया गया।

Pushpendra Yadav @ Raja v. State of Madhya Pradesh
Order dated 03.12.2015 passed by the Madhya Pradesh High Court in M.Cr.C. No. 19086 of 2015 (Unreported)

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

Grant of bail – Corex Cough Syrup containing codeine drug recovered from the accused – Government issued notification dated 10.03.2016 in exercise of Section 26A of Drugs and Cosmetics Act, 1940 to prohibit the manufacturing, distribution and sale of 344 Fixed Dose Combination (FDC) Drugs including Corex – Said notification subsequently quashed by the High Court – Corex Cough Syrup contained codeine drug within the permissible limit and not covered under the NDPS Act, 1985 and the Drugs and Cosmetics Act, 1940 – Bail granted to accused as he is only manager of transportation company and not the consignee.

दंड प्रक्रिया संहिता, 1973 - धारा 439

जमानत मंजूर करना- अभियुक्त से कोरेक्स कफ सिरप जिसमें कौडीन औषधि थी, बरामद हुई थी - औषधि और प्रसाधन सामग्री अधिनियम, 1940 की धारा 26क के तहत सरकार ने दिनांक 10.03.2016 को अधिसूचना जारी कर कोरेक्स सहित 344 निश्चित खुराक संयोजन (एफ.डी.सी.) औषधियों के विनिर्माण, वितरण और विक्रय पर रोक लगाई - बाद में उक्त अधिसूचना को उच्च न्यायालय द्वारा अभिखंडित कर दिया गया - कोरेक्स कफ सिरप में अंतर्विष्ट कौडीन औषधि की मात्रा अनुज्ञेय सीमा के अंदर थी और वह एन.डी.पी.एस. अधिनियम, 1985 एवं औषधि और प्रसाधन सामग्री

अधिनियम, 1940 के अंतर्गत नहीं आती थी - अभियुक्त को जमानत प्रदान की गयी क्योंकि वह केवल परिवहन कंपनी का प्रबंधक है और माल पाने वाला परेषिती नहीं है।

Binod Kumar @ Binod Kumar Bhagat v. State of Bihar
Order dated 10.08.2017 passed by the Supreme Court in Criminal Appeal No. 1383 of 2017, reported in 2017 (3) Crimes 147

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***219. CRIMINAL TRIAL :**

Acquittal of co-accused – Plea of acquittal by the appellant on the basis of acquittal of the co-accused – No parity where evidence against both is different – If evidence against one of the accused is reliable, he may be convicted while acquitting the other.

आपराधिक विचारण:

सह अभियुक्त की दोषमुक्ति - सह-अभियुक्त की दोषमुक्ति के आधार पर अपीलार्थी द्वारा दोषमुक्ति का अभिवाक् - जहां दोनों के विरूद्ध साक्ष्य सुभिन्न हो वहां कोई समानता नहीं होती है - यदि एक अभियुक्त के विरूद्ध विश्वसनीय साक्ष्य उपलब्ध है तो दूसरे को दोषमुक्त करते हुए उसे दोषसिद्ध किया जा सकता है।

Dinesh Yadav v. State of Jharkhand
Judgment dated 09.03.2017 passed by the Supreme Court in Criminal Appeal No. 494 of 2017, reported in 2017 (5) SCC 764

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***220. CRIMINAL TRIAL :**

Ocular and Medical Evidence –

(i) Though ocular evidence has greater evidentiary value *vis-a-vis* medical evidence – But, in case where medical evidence rules out all possibility of ocular evidence, the ocular evidence may be disbelieved.

(ii) Duty of the investigation officer – He must be diligent, truthful and fair in his approach, in conformity with the police manual – Efforts must be with zeal and spirit to bring home the guilt of the accused.

अपराधिक विचारण:

चक्षुदर्शी और चिकित्सीय साक्ष्य -

(i) यद्यपि चिकित्सकीय साक्ष्य की तुलना में चक्षुदर्शी साक्ष्य का साक्षिक मूल्य अधिक होता है - किन्तु, यदि मामले में आई चिकित्सकीय साक्ष्य, चक्षुदर्शी साक्ष्य की सभी अधिसम्भाव्यताओं को समाप्त करती है तो चक्षुदर्शी साक्ष्य पर अविश्वास किया जा सकेगा।

(ii) अन्वेषण अधिकारी के कर्तव्य - उसे पुलिस मैनुअल के निर्देशों का पालन करते हुये न्यायपूर्ण, सत्यनिष्ठ और निष्पक्ष पद्धति अपनानी चाहिये - अभियुक्त की दोषिता स्पष्ट करने हेतु स्पष्ट प्रयास किये जाने चाहिये।

Mahavir Singh v. State of M.P.
Judgment dated 09.11.2016 passed by the Supreme Court in Criminal Appeal No. 1141 of 2007, reported in (2016) 10 SCC 220

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***221. EVIDENCE ACT, 1872 – Section 9**

Joint Test Identification Parade (TIP) – Two persons can be made part of same TIP – Also, it is corroborative piece of evidence to ensure that investigation is going in right direction – Identification in court, being of substantive nature, is of utmost importance.

साक्ष्य अधिनियम, 1872 - धारा 9

संयुक्त शिनाख्त परेड परीक्षण (टी.आई.पी.) - दो व्यक्तियों को उसी टी.आई.पी. का हिस्सा बनाया जा सकता है - इसके अतिरिक्त, यह संपोषक अभिसाक्ष्य का भाग है यह सुनिश्चित करने के लिये कि अनुसंधान सही दिशा में जा रहा है - न्यायालय में पहचान सारभूत प्रकृति की होने से सर्वाधिक महत्वपूर्ण है।

Sheikh Sintha Madhar and ors. v. State represented by Inspector of Police
Judgment dated 13.04.2016 passed by the Supreme Court in Criminal Appeal No. 2117 of 2009, reported in (2016) 11 SCC 265

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***222. EVIDENCE ACT, 1872 – Section 32**

Dying Declaration – It is not essential requirement of law that the recorder of dying declaration should repeat the contents of the declaration in the exact words spoken by the deceased, about the name/description, and the act of the accused, which resulted in his/her death while deposing before the court (*Ramesh v. State of Maharashtra, (2011) SCC Online Bombay 1137 (FB)* affirmed.)

साक्ष्य अधिनियम, 1872 - धारा 32

मृत्युकालिक कथन - यह विधि की अनिवार्य आवश्यकता नहीं है कि मृत्युकालिक कथन को अभिलिखित करने वाला व्यक्ति मृतक द्वारा बोले गये शब्दों की अंतर्वस्तुओं को जिसमें नाम/विवरण एवं अभियुक्त का कृत्य, जिसके कारण उसकी मृत्यु हुई, को न्यायालय में साक्ष्य दिये जाते समय दुहराये। (*रमेश वि. महाराष्ट्र राज्य*, ***(2011)*** *एससीसी आनलाईन बांबे* ***1137 (****एफ बी)* की पुष्टि की गई।)

Sunil v. State of Maharashtra
Judgment dated 01.09.2016 passed by the Supreme Court in Criminal Appeal No. 2053 of 2010, reported in (2017) 11 SCC 260

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223. EVIDENCE ACT, 1872 – Section 44

Argument of annulment of an order on the plea that it was obtained by fraud – Fraud must be pleaded and proved – Mere argument at the final stage or appeal is not sufficient – Also, every wrong action or improper act by party is not a fraud.

साक्ष्य अधिनियम, 1872 - धारा 44

आदेश के इस आधार पर अकृत होने का तर्क कि वह कपट द्वारा प्राप्त किया गया है - कपट अभिवचनित और प्रमाणित किया जाना चाहिए - अंतिम प्रक्रम या अपील में तर्क मात्र पर्याप्त नहीं है - पुनः, प्रत्येक त्रुटिपूर्ण कार्यवाही या पक्षकार का अनुचित कार्य कपट नहीं होता है।

Chandro Devi and others v. Union of India and others

Judgment dated 08.09.2017 passed by the Supreme Court in Civil Appeal No. 11360 of 2017, reported in (2017) 9 SCC 469

Relevant extracts from the judgment:

The main argument raised on behalf of the appellant by Shri Rajeev Dhavan, learned senior counsel appearing for the appellant is that the judgments of both the learned Single Judge as well as the Division Bench are based on a letter dated 4th September, 2008. On the top of this letter the words 'DGL' in capital letters are typed and, according to the appellant, this means 'Draft Government Letter'. It is urged that this letter, which was only a draft letter, was held out to be the guidelines of the Government and based on this letter the learned Single Judge as well as the Division Bench dismissed the writ petitions. According to the appellant, this was a fraud committed by the Union of India upon the court and since this is a fraud, the whole action based on this fraud is vitiated. There can be no dispute with the proposition that if there is fraud, which leads to passing of a judgment, then fraud vitiates all actions taken consequent to such fraud and this would mean that the judgment would be set aside. However, before setting aside the judgment, we must come to the conclusion that the action was fraudulent.

Every wrong action is not a fraudulent action. Assuming that the letter dated 4th September, 2008 was only a draft letter, it does not mean that this letter was fraudulently introduced by the Union of India. In the letter placed before the court the word 'DGL' finds mention. It may be true that the counsel for the Union of India did not inform the court that the words 'DGL' stood for 'Draft Government Letter', but, it is equally true that even the counsel for the appellant did not make any efforts to find out what the words 'DGL' stood for. Even the Court did not look into this aspect. Fraud has to be pleaded and proved. Mere allegations of fraud made for the first time in this Court are not sufficient. We are not, in any manner, approving the action of the Union of India in putting forth this letter before the Court. However, it cannot be said that this improper act is a fraudulent action on the part of the Union of India.

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224. EVIDENCE ACT, 1872 – Section 65B

Certificate under Section 65B of the Act for audio tapes (cassette), whether necessary? Held, original tape-recorded conversation of ransom calls handed over to police, is primary evidence – Electronic record if used as primary evidence, is admissible in evidence without compliance with the conditions laid down in Section 65B of the Act. (*Anvar P.V. v. P.K. Basheer (2014) 10 SCC 473* relied on)

साक्ष्य अधिनियम, 1872 - धारा 65ख

क्या अधिनियम की धारा 65ख के अधीन आडियो टेप्स (कैसेट्स) के लिये प्रमाण पत्र आवश्यक है? अभिनिर्धारित, मूल टेप, जिसमें मुक्ति धन का वार्तालाप अंकित है, जिसे पुलिस को सौपा गया है, वह प्राथमिक साक्ष्य है - इलेक्ट्रानिक रिकार्ड को यदि प्राथमिक साक्ष्य के रूप में प्रस्तुत किया जाता है तो वह अधिनियम की धारा 65ख में बतायी गयी शर्तों का पालन किये बिना भी साक्ष्य में ग्राह्य है (*अनवर पी.वी. विरूद्ध पी.के. बशीर* ***(2014) 10*** *एस.सी.सी.* ***473*** अवलंबित)।

Vikram Singh @ Vicky Walia and another v. State of Punjab and another

Judgment dated 07.07.2017 passed by the Supreme Court in Criminal Appeal No. 1396 of 2008, reported in (2017) 8 SCC 518

Relevant extracts from the Judgment:

The tape recorded conversation was not secondary evidence which required certificate under Section 65B, since it was the original cassette by which ransom call was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65B is a mandatory condition. In ***Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473*** this Court had laid down the above proposition in paragraph 22. However, in the same judgment this Court has observed that the situation would have been different, had the primary evidence been produced. The conversation recorded by the complainant containing ransom calls was relevant under Section 7 and was primary evidence which was relied on by the complainant. In paragraph 24 of the judgment of this Court in ***Anvar P.V.*** (supra) it is categorically held that if an electronic record is used as primary evidence the same is admissible in evidence, without compliance with the conditions in Section 65B. Paragraph 24 is as extracted below:

> "24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and

announcements were recorded using other instruments and by feeding them into a computer, CDs were made there from which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65B of the Evidence Act."

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***225. HINDU LAW :**

Presumption of Joint Hindu family and burden of proof regarding self acquired property –There lies a legal presumption that every Hindu family is joint in food, worship and estate – In absence of any proof of division, such legal presumption continues to operate in the family – The burden lies upon the member who after admitting the existence of jointness in the family properties asserts that some properties out of ancestral properties are his self-acquired property. (Referred - Mulla's Hindu Law, 22nd Edition, Article 23)

हिन्दू विधि:

संयुक्त हिन्दू परिवार की उपधारणा एवं स्व-अर्जित सम्पत्ति साबित करने का भार - सामान्य विधिक उपधारणा है कि प्रत्येक हिन्दू परिवार भोजन, पूजा एवं सम्पदा में संयुक्त है - विभाजन की साक्ष्य के अभाव में परिवार में यह विधिक उपधारणा लगातार बनी रहती है - जो सदस्य परिवार की सम्पत्तियों में संयुक्तता के अस्तित्व को स्वीकार करने के बाद, पैतृक सम्पत्तियों के अलावा कुछ सम्पत्तियों के स्व-अर्जित होने का दावा करता है, उसे साबित करने का भार उस सदस्य पर होता है। (संदर्भ - मुल्ला हिन्दू लाॅ, 22वां संस्करण, अनुच्छेद 23)

Adiveppa & others v. Bhimappa and anr.
Judgment dated 06.09.2017 passed by the Supreme Court in Civil Appeal No. 11220 of 2017, reported in (2017) 9 SCC 586

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226. HINDU MARRIAGE ACT, 1955 – Section 13B(2)

Decree of divorce on the basis of mutual consent – Minimum period of six months is not mandatory – The Court may waive the statutory period on an application, if enumerated conditions are satisfied.

हिन्दू विवाह अधिनियम, 1955 - धारा 13ख(2)

आपसी सहमति के आधार पर तलाक की डिक्री - छः माह की न्यूनतम अवधि अनिवार्य नहीं है - न्यायालय आवेदन पर वैधानिक अवधि को अधित्यजित कर सकती है, यदि प्रगणित शर्तों की पूर्ति होती है।

Amardeep Singh v. Harveen Kaur

Judgment dated 12.09.2017 passed by the Supreme Court in Civil Appeal No. 11158 of 2017, reported in 2017 (4) MPLJ 41

Relevant extracts from the judgment:

We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in ***Kailash v. Nanhku and ors., (2005) 4 SCC 480*** as follows:

> "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to

whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered."

"For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following:

i. the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;
ii. all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;
iii. the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;
iv. the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

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227. HINDU SUCCESSION ACT, 1956 – Sections 8, 15(2) and Schedule

Right of an heir to claim share – To be worked out on the basis of law in force when the succession opens and when suit is filed – Subsequent amendment to Schedule relating to Class-I heir in the year 2005 – It will have a prospective effect and will not benefit heir who was not entitled when the succession opened or on the date of the suit.

हिन्दु उत्तराधिकार अधिनियम, 1956 - धाराएं 8, 15(2) एवं अनुसूची

अंश का दावा करने का वारिस का अधिकार - जब उत्तराधिकार आरंभ होता है और जब वाद संस्थित किया जाता है उस समय प्रवृत्त विधि के आधार पर अवधारित किया जाना चाहिए - वर्ग-1 के वारिसों के संबंध में वर्ष 2005 में अनुसूची में परवर्ती संशोधन - इसका भविष्यलक्षी प्रभाव होगा और इसका लाभ उन वारिसों को नहीं होगा जो उत्तराधिकार के प्रारम्भ पर या वाद की तिथि पर अधिकृत नहीं थे।

Karunanidhi v. Seetharama Naidu and others

Judgment dated 27.03.2017 passed by the Supreme Court in Civil Appeal No. 4490 of 2017, reported in (2017) 5 SCC 483

Relevant extracts from the judgment:

That apart and even otherwise, in our considered opinion, the High Court was not right in placing reliance on Section 15 of the Act for deciding the rights of the parties. It is for the simple reason that the category of heirs to which the plaintiffs had belonged, namely, “son of a pre-deceased daughter of a pre-deceased daughter and daughter of a pre-deceased daughter of a pre-deceased daughter” was added in the Schedule (class I) only with effect from 9.9.2005 by amendment by Act No. 39 of 2005.

The plaintiffs, therefore, were not entitled in law to take the benefit of the aforesaid amendment because even according to them, their right to claim the share, if any, in the suit properties held by Alamelu Ammal accrued on the death of Alamelu Ammal in 1987 and they filed civil suit in the year 1988. In other words, a right, if any, to claim interest by succession in the properties of Alamelu Ammal opened in plaintiffs’ favour as an heir from father’s side in 1987 when Alamelu Ammal died. In this view of the matter, the plaintiffs’ rights as an heir to claim shares in the suit properties had to be worked out on the basis of law in force on the date 1987, i.e., when succession opened for them to enforce such right and when they filed the suit in 1988.

As mentioned above, the category of an heir to which the plaintiffs belonged was not included in class I list in the Schedule in 1987 but it was so included for

the first time on 09.09.2005 by Act 39/2005. In this view of the matter, the plaintiffs had no right on the strength of succession/devolution to claim any interest in the properties of Alamelu Ammal in 1987 as father's heir. ***A fortiori*** the devolution of interest in suit properties could not take place in their favour by virtue of Section 15(2)(a) of the Act. Since the amendment in the Schedule was prospective, it had no application to the case in hand with its retrospective effect so as to create any right in plaintiffs' favour in 1987.

However, if Alamelu Ammal had died after 09.09.2005 then perhaps, the plaintiffs could have claimed some interest in the suit properties subject to however their proving other conditions. The reason being the category of heirs to which they belonged was by that time included in the Schedule. Such was, however, not the case.

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228. INDIAN PENAL CODE, 1860 – Section 34

An overt act or possession of weapon, whether necessary to constitute common intention? Held, there, can be no straight jacket formula in this regard – Absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention – Events prior, during and subsequent to the occurrence are also relevant to decipher existence of common intention – Can also be depicted from the conduct and behavior of the accused.

भारतीय दण्ड संहिता, 1860 - धारा 34

क्या सामान्य आशय गठित करने के लिये प्रत्यक्ष कार्य या हथियार का कब्जा होना आवश्यक है? अभिनिर्धारित, इस संबंध में कोई निश्चित सूत्र नहीं हो सकता है - हमले में प्रत्यक्ष कार्य, ललकार या हथियार पर कब्जे का अभाव होना मात्र सामान्य आशय की अनुपस्थिति तय नहीं करते हैं - घटना के पूर्व, दौरान एवं पश्चात् के वृतांत भी सामान्य आशय की विद्यमानता को प्रकट करने हेतु सुसंगत होते हैं - अभियुक्त के आचरण तथा व्यवहार से भी तय किया जा सकता है।

Rajkishore Purohit v. State of Madhya Pradesh and others
Judgment dated 01.08.2017 passed by the Supreme Court in Criminal Appeal No. 1292 of 2017, reported in (2017) 9 SCC 483

Relevant extracts from the Judgment:

There can be no straight jacket formula. Common intention is a state of mind. It is not possible to read a person's mind. There can hardly be direct evidence of common intention. The existence or non-existence of a common intention amongst the accused has to be deciphered cumulatively from their conduct and behavior in the facts and circumstances of each case. Events prior to the occurrence as also after, and during the occurrence, are all relevant to deduce if there existed any common intention. The absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.

Though judicial precedents with regard to common intention stand well entrenched, it will be sufficient to refer ***State of Rajasthan v. Shobha Ram, (2013) 14 SCC 732***, observing as follows :-

> "Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in ***Hari Ram v. State of U.P., (2004) 8 SCC 146*** the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other."

Motive for the assault existed because the accused were aggrieved by the meeting summoned. The assault was planned in a gathering, where escape would have been easy, in the chaos that would follow the assault. The accused persons came together in a car to facilitate a quick get-away. Exhortation was made by respondent no.2, when the accused were at very close quarters to the deceased. The firing was done from a distance of about 6 inches. The respondent no.2 and accused no.4 provided cover at this time. There is nothing in the conduct of respondent no.2 to draw any inference that he was taken by surprise, when the co-accused opened fire. Rather than provide help to the deceased and his relatives, respondent no.2 immediately escaped from the place of occurrence in the chaos that followed, indicative of his awareness of the common intention. The sequence of events, and the manner in which the occurrence took place, manifests a pre-concerted plan and a prior meeting of minds. It was not the case of respondent no.2 that he was taken by surprise and was unaware that the co-accused was carrying a revolver or that they had no intention to kill the deceased. If common intention by meeting of minds is established in the facts and circumstances of the case, there need not be an overt act or possession of weapon required, to establish common intention.

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229. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3
Circumstantial Evidence – Last seen together – Only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused – Where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused,

the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain – In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation under Section 313 Cr.P.C cannot be made the basis of conviction.

भारतीय दंड संहिता, 1860 - धारा 302

साक्ष्य अधिनियम, 1872 - धारा 3

परिस्थितिजन्य साक्ष्य - अंतिम बार एक साथ देखा जाना - केवल अंतिम बार एक साथ देखे जाने वाली परिस्थिति ही यह निष्कर्ष देने के लिये परिस्थितियों की श्रृंखला को पूर्ण नहीं करेगी कि यह केवल अभियुक्त के दोषी होने की परिकल्पना के अनुरूप है - जहां अन्य कड़ियों को संतोषजनक रूप से स्थापित किया गया है और परिस्थितियां अभियुक्त के दोषी होने को इंगित करती हों, वहां अंतिम बार एक साथ देखे जाने की परिस्थिति और इस संबंध में स्पष्टीकरण का अभाव एक अतिरिक्त कड़ी को उपलब्ध कराता है, जो श्रृंखला को पूर्ण करता है - अन्य परिस्थितियों के सबूत के अभाव में, केवल एक साथ देखे जाने की परिस्थिति और धारा 313 द.प्र.सं. के तहत संतोषजनक स्पष्टीकरण के अभाव को दोषसिद्धि का आधार नहीं बनाया जा सकता है।

Anjan Kumar Sarma and ors. v. State of Assam

Judgment dated 23.5.2017 passed by the Supreme Court of India in Criminal Appeal No. 560 of 2014, reported in 2017 (2) Crimes 426

Relevant extracts from the judgment:

The prosecution relied upon nine circumstances to prove the charges against all the accused. PW-11 who conducted the Autopsy opined that the death of the victim was due to the ante mortem incised wound found on the skull which could have been caused by Material Exhibit 3 (khukri). We are in agreement with the Trial Court that the recovery of the khukri was not supported by any independent witnesses. The prosecution has also failed to prove that there were blood stains on the said khukri. The blood stains found in the bathroom of bungalow No. 17 were sent for examination which resulted in a negative report. The above circumstances not being proved would leave only two circumstances against the Accused which are that the Accused were last seen together with the deceased and the absence of any explanation forthcoming by the Accused.

The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In ***Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715,*** this court held that:

> "The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime.
>
> There must be something more establishing connectivity between the accused and the crime. Mere non-explanation

on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

xx xx xx

The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in ***Madho Singh v. State of Rajasthan, (2010) 15 SCC 588***."

In ***Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372,*** this court held that:

Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

This Court in ***Bharat v. State of M.P., (2003) 3 SCC 106***, held that the failure of the accused to offer any explanation in his statement under Section 313, Cr.P.C. alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the Accused stood un-rebutted and thus the Appellants were liable to be convicted.

Learned Senior Counsel appearing for the State of Assam relied upon ***Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570,*** at p.582 to buttress his submission that the circumstance of last seen together coupled with lack of any satisfactory explanation by the accused is a very strong circumstance on the basis of which the accused can be convicted. It was held by this Court in the above judgment as follows:-

"It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused.

> But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. We are, therefore, of the opinion that this is a case which satisfies the standards requisite for conviction on the basis of circumstantial evidence."

It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by learned Senior Counsel appearing for the State of Assam do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in ***State of Goa v. Sanjay Thakran, (2007) 3 SCC 755,*** in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

> "From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or

straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.

Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court and acquit the appellants of the charges of Section 302, 201 read with 34 IPC. The appellants are directed to be set at liberty forthwith, if not required in any other case.

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230. INDIAN PENAL CODE, 1860 – Section 364A

Proof of kidnapping for ransom – The intention behind kidnapping is important – This may be inferred from the facts and circumstances of the case – Actual payment of ransom is irrelevant.

भारतीय दण्ड संहिता, 1860 - धारा 364क

मुक्तिधन के लिये व्यपहरण का सबूत - व्यपहरण का आशय महत्वपूर्ण है - इसका मामले के तथ्यों एवं परिस्थितियों से अनुमान लगाया जा सकता है - मुक्तिधन के वास्तविक संदाय का तथ्य सुसंगत नहीं है।

Birbal Choudhary @ Mukhiya Jee v. State of Bihar
Judgment dated 06.10.2017 passed by the Supreme Court in Criminal Appeal No. 701 of 2012, reported in 2017 (4) Crimes 89 (SC)

Relevant extracts from the judgment:

As far as demand for ransom is concerned, it has to be kept in mind that on the very first day, when informant submitted his written report on the basis of which FIR was registered, he had categorically mentioned that he was convinced that the abduction was for ransom. Another aspect which is highlighted by the High Court is that out of three persons abducted, the Driver (PW-18) was released on the very next day whereas others were kept in the captivity for 52 days. This different treatment accorded to these victims is captured and highlighted by the High Court in the following manner:

> "P.W. 17, 18 & 20 were the victims of abduction. P.W. 17 and 20, businessmen and relatives of the informant, were released from captivity after 52 days on 11.1.2007., while P.W. 18, the driver was released on the next day of abduction at night. The distinction is too apparent. P.W. 18 was not worth the abduction for ransom."

It has also come on record that Exhibit-8 dated November 27, 2007 is the letter written by PW-17 during confinement signed by PW-20 also asking PW-5 to pay the ransom amount and secure their release. The demand for ransom stands established from the conversation between PW-5, when the accused Jawahar Koiry and Suresh Koiry identified themselves calling from the mobile phone number 9430029994, sent to establish contact with the abductors and made the demand for a ransom of Rs. 50 lakhs and further stated that they were sending the ring of PW-17 and a letter from them (Exhibit-8) in proof of their confinement to claim ransom. Exhibit-8 stated that PW-5 should at the earliest arrange to have them released. The mobile forensic evidence brought on record during investigation by necessary reports from the telephone authorities in the manner provided for in Section 65B of the Indian Evidence Act, 1872 of the conversation on November 28, 2006 of a call made from the aforesaid number shows that a call was made from it on mobile no. 9934848065 of PW-21, clearly proves that a demand for ransom was in fact made. Even otherwise, it is not the defence of the appellants that there existed any enmity between the victims and the appellants for false implication. Once the abduction has been established, surely the abductors did not do so in such planned organized manner with smooth flawlessness discussed, to play hide and seek games or only to scare the victims out of a business dispute or for any other reason to force them to desist from a particular course of action. An act of abduction in the present manner is the result of meticulous planning of the logistics with separate roles assigned to the individual players. The demand for ransom, therefore, clearly stands established. That it was actually paid or not is irrelevant.

In ***Malleshi v. State of Karnataka, (2004) 8 SCC 95,*** this Court has laid down the ingredients which need to be satisfied for establishing commission of crime under Section 364A. It is held that:

> "To attract the provisions of Section 364A what is required to be proved is:
> (1) that the accused kidnapped or abducted the person;
> (2) kept him under detention after such kidnapping and abduction; and
> (3) that the kidnapping or abduction was for ransom."
> Insofar as ingredient of kidnapping for ransom is concerned, the Court provided the following guidelines:
> "Ultimately the question to be decided is "what was the intention? Was it demand of ransom?" There can be no definite manner in which demand is to be made. Who pays the ransom is not the determinative fact."

Insofar as kidnapping is concerned, there is no serious dispute about the same. We find that the demand for ransom has been duly proved by the prosecution.

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231. INDIAN PENAL CODE, 1860 – Section 375 Exception 2
CONSTITUTION OF INDIA – Article 14
Constitutional validity of Exception 2 of Section 375 – "Wife not being under 15 years of age" – Held, discriminatory and violative of Article 14 – Also, inconsistent with POCSO Act, which must prevail – Must be read as "wife not being 18 years of age" – Judgment shall have prospective effect.

भारतीय दण्ड संहिता, 1860 - धारा 375 अपवाद 2

भारत का संविधान - अनुच्छेद 14

धारा 375 के द्वितीय अपवाद की संवैधानिक वैधता - ''पत्नी 15 वर्ष से कम आयु की न हो'' - अनुच्छेद 14 के उल्लंघन में एवं भेदभाव पूर्ण अवधारित - पुनः, यह पोक्सो अधिनियम से असंगत है, जो कि अभिभावी होगा - ''पत्नी 18 वर्ष से कम आयु की न हो'' के रूप में पढ़ा जाना चाहिए - इस निर्णय को भविष्यलक्षी प्रभाव दिया गया है।

Independent Thought v. Union of India and anr.
Judgment dated 11.10.2017 passed by the Supreme Court in Writ Petition (Civil) No. 382 of 2013, reported in 2017 (4) Crimes 108 (SC)

Relevant extracts from the judgment:

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with

the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons

who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences under Sections 323, 324, 325 IPC etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the “victim wife” is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

Another aspect of the matter is that the POCSO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where

an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated, she is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own “wife” not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

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RELIEF

Since this Court has not dealt with the wider issue of “marital rape”, Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> "Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".

It is, however, made clear that this judgment will have prospective effect.

It is also clarified that Section 198(6) of the Code of Criminal Procedure will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

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***232. INDIAN PENAL CODE, 1860 – Sections 302, 354, 376, 450 and 511**

CRIMINAL PROCEDURE CODE, 1973 – Sections 161, 173(2) and 193

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 – Sections 3, 5, 7, 9, 18 and 29

Cognizance of offence under POCSO Act by Special Judge – Charge Sheet filed before the Special Judge under Section 173 (2) of the Cr.P.C. against the accused/respondent for the offence punishable under Sections 302, 511, 450 and 354 of IPC and Section 18 of the Protection of Children from Sexual Offences Act, 2012 – The Special Judge returned the charge sheet to the Investigating Officer for being presented to the competent Court on the premise that there are no grounds for presuming that theaccused/respondent has committed any offence punishable under the Act of 2012 as no admissible material on record was available to *prima facie* indicate that a sexual assault or any attempt to commit a sexual offence was made upon the deceased before her death – On consideration of facts held, the Special Judge erred in returning the final report to the SHO for being presented before the Magistrate – Further held, all the aforesaid factors could have been considered at the stage of framing of charge after giving the prosecution and the accused an opportunity of being heard – Impugned order set aside.

भारतीय दंड संहिता, 1860 - धाराएं 302, 354, 376, 450 एवं 511

दंड प्रक्रिया संहिता, 1973 - धाराएं 161, 173(2) एवं 193

लैंगिक अपराधों से बच्चों का संरक्षण अधिनियम, 2012 - धाराएं 3, 5, 7, 9, 18 एवं 29

विशेष न्यायाधीश द्वारा पाक्सो के अपराध का संज्ञान - धाराएं 302, 511, 450 एवं 354 भा.दं.सं. एवं धारा 18 पाक्सो अधिनियम, 2012 के तहत दंडनीय अपराधों के लिये अभियुक्त/प्रत्यर्थी के विरूद्ध द.प्र.सं. की धारा 173 (2) के तहत विशेष न्यायाधीश के समक्ष अभियोग पत्र प्रस्तुत किया गया - विशेष न्यायाधीश ने अनुसंधानकर्ता अधिकारी को अभियोगपत्र, परिसर में ही स्थित सक्षम न्यायालय में प्रस्तुत करने के लिये वापस किया क्योंकि यह उपधारित करने के कोई आधार नहीं थे कि अभियुक्त/प्रत्यर्थी ने 2012 के अधिनियम के तहत दंडनीय कोई अपराध कारित किया है क्योंकि अभिलेख पर प्रथम दृष्टया कोई ऐसी स्वीकृत सामग्री उपलब्ध नहीं थी कि लैंगिक हमले या लैंगिक अपराध कारित करने का कोई प्रयास मृतिका के साथ उसकी मृत्यु से पूर्व कारित किया गया था - तथ्यों की विवेचना उपरांत, अभिनिर्धारित कि विशेष न्यायाधीश ने अंतिम प्रतिवेदन को एस.एच.ओ. को उसे मजिस्ट्रेट के समक्ष प्रस्तुत करने के लिये वापस कर त्रुटि की - आगे अभिनिर्धारित, इन सभी उपरोक्त कारकों को आरोप विरचित किये जाते समय अभियोजन व अभियुक्त को सुनवाई का अवसर दिया जाकर विचार में लिया जा सकता था - आक्षेपित आदेश अपास्त किया गया।

State of Madhya Pradesh v. Gangaram Ahirwar
Order dated 05.12.2016 passed by the High Court of M.P. in Criminal Revision No. 2345 of 2015, reported in 2016 Law Suit (MP) 1248

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233. INDIAN PENAL CODE, 1860 – Sections 499 and 500
CONSTITUTION OF INDIA – Articles 19(2) and 21

(i) Challenge to the constitutionality of "criminal defamation" under Sections 499 and 500 of IPC – Held, freedom of speech cannot be regarded as so righteous to make other's reputation absolutely ephemeral – Right to reputation being fundamental right under Article 21, criminal defamation cannot be characterised as disproportionate restriction – Terms "Reasonable restriction", "defamation" used in Article 19 (2) must be given independent meaning.

(ii) Criminal defamation – Ingredients – Complainant must show that the intention or knowledge or belief of the accused was to harm the reputation – Explanations of section 499 explained.

(iii) Complaint relating to defamation – Heavy burden on Magistrate to scrutinise the complaint from all aspects – Magistrate must be circumspect and judicious in exercising his discretion – Criminal justice system cannot be the means to wreak personal vengeance.

भारतीय दंड संहिता, 1860 - धाराएं 499 एवं 500

भारत का संविधान - अनुच्छेद 19(2) एवं 21

(i) धाराओं 499, 500 भा.द.सं. के अधीन ''आपराधिक मानहानि'' की संवैधानिकता पर आक्षेप - अभिनिर्धारित, भाषण की स्वतंत्रता उस सीमा तक न्यायसंगत नहीं है कि वह दूसरे की प्रतिष्ठा को पूर्णतः भंग कर दे - 'प्रतिष्ठा का अधिकार' अनुच्छेद 21 के अधीन मौलिक अधिकार है, अतः आपराधिक मानहानि को अनुचित प्रतिबंध नहीं कहा जा सकता है - अनुच्छेद 19 (2) में प्रयुक्त शब्दों ''युक्तियुक्त प्रतिबंध'', ''मानहानि'' को स्वतंत्र अर्थ प्रदान किया जाना चाहिये।

(ii) आपराधिक मानहानि - आवश्यक तत्व - परिवादी को दर्शित करना चाहिये कि अभियुक्त का आशय या ज्ञान या विश्वास, प्रतिष्ठा की हानि करना था - धारा 499 के स्पष्टीकरणों की व्याख्या की गई।

(iii) आपराधिक मानहानि का परिवाद - मजिस्ट्रेट पर कठोर भार है कि वह परिवाद की छानबीन सभी दृष्टिकोणों से करें - मजिस्ट्रेट को अपने विवेकाधिकार का प्रयोग सतर्कता पूर्वक व न्यायिक रूप से करना चाहिये - आपराधिक न्याय की प्रक्रिया, व्यक्तिगत द्वेष का बदला लेने का साधन नहीं है।

Subramanian Swamy v. Union of India
Judgment dated 13.05.2016 passed by the Supreme Court in Writ Petition (Crl.) No. 184 of 2014, reported in (2016) 7 SCC 221

Relevant extracts from the judgment:

The core issue is whether the said doctrine of ***noscitur a soccis*** should be applied to the expression "incitement of an offence" used in Article 19 (2) of the Constitution so that it gets associated with the term "defamation". The term "defamation" as used is absolutely clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word "defamation" is associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the founding fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of ***noscitur a soccis*** to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. The word "defamation" has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force.

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Freedom of speech and expression in a spirited democracy is a highly treasured value. Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as

it permits argument, allows dissent to have a respectable place, and honours contrary stances. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it. Some have condemned compelled silence to ruthless treatment. William Douglas has denounced regulation of free speech like regulating diseased cattle and impure butter. The Court has in many an authority having realized its precious nature and seemly glorified sanctity has put it in a meticulously structured pyramid. Freedom of speech is treated as the thought of the freest who has not mortgaged his ideas, may be wild, to the artificially cultivated social norms; and transgression thereof is not perceived as a folly. Needless to emphasise, freedom of speech has to be allowed specious castle, but the question is, should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. Keeping in view what we have stated hereinabove, we are required to see how the constitutional conception has been understood by the Court where democracy and rule of law prevail.

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In ***Mohd. Arif @ Ashfaq v. Registrar, Supreme Court of India and others, (2014) 9 SCC 737,*** wherein the majority in the Constitution Bench has observed that the fundamental right to life among all fundamental rights is the most precious to all human beings. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The submission is that continuance of criminal defamation under Section 499 IPC is constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. It is urged that to have defamation as a component of criminal law is an anathema to the idea of free speech which is recognized under the Constitution and, therefore, criminalization of defamation in any form is an unreasonable restriction. We have already held that reputation is an inextricable aspect of right to life under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision under Section 499 IPC alive as a part of law. The seminal point is permissibility of criminal defamation as a reasonable restriction as understood under Article 19(2) of the Constitution. To elucidate, the submission is that criminal defamation, a pre-Constitution law is totally alien to the concept of free speech. As stated earlier, the right to reputation is a constituent of Article 21 of the Constitution. It is an individual's fundamental right and, therefore, balancing of fundamental right is imperative. The Court has spoken about synthesis and overlapping of fundamental rights, and thus, sometimes conflicts between two rights and competing values. In the name of freedom of speech and expression, the right of another cannot be jeopardized. In this regard, reproduction of a passage from In ***Re Noise Pollution (V), (2005) 5 SCC 733,*** would be apposite. It reads as follows:-

> "Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by the High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution. These decisions are ***Free Legal Aid Cell Shri Sugan Chand Aggarwal v. Govt. of NCT of Delhi, 2001 AIR (Del) 455 and P.A. Jacob v. Supdt. of Police, 1993 AIR (Ker) 1***. We have carefully gone through the reasoning adopted in the two decisions and the principle of law laid down therein, in particular, the exposition of Article 21 of the Constitution. We find ourselves in entire agreement therewith."

We are in respectful agreement with the aforesaid enunciation of law. Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to Court and state that he has been wronged and abused. He can take recourse to a procedure recognized and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech.

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For the aforesaid purpose, it is imperative to analyse in detail what constitutes the offence of "defamation" as provided under Section 499 of IPC. To constitute the offence, there has to be imputation and it must have been made in the manner as provided in the provision with the intention of causing

harm or having reason to believe that such imputation will harm the reputation of the person about whom it is made. Causing harm to the reputation of a person is the basis on which the offence is founded and mens rea is a condition precedent to constitute the said offence. The complainant has to show that the accused had intended or known or had reason to believe that the imputation made by him would harm the reputation of the complainant. The criminal offence emphasizes on the intention or harm. Section 44 of IPC defines "injury". It denotes any harm whatever illegally caused to any person, in body, mind, reputation or property. Thus, the word "injury" encapsulates harm caused to the reputation of any person. It also takes into account the harm caused to a person's body and mind. Section 499 provides for harm caused to the reputation of a person, that is, the complainant. In ***Jeffrey J. Diermeier and another v. State of West Bengal and another, (2010) 6 SCC 243*** a two-Judge Bench deliberated on the aspect as to what constitutes defamation under Section 499 of IPC and in that context, it held that there must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.

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Another aspect requires to be addressed pertains to issue of summons. Section 199 Cr.P.C. envisages filing of a complaint in court. In case of criminal defamation neither any FIR can be filed nor can any direction be issued under Section 156(3) Cr.P.C. The offence has its own gravity and hence, the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process, as has been held in ***Rajindra Nath Mahato v. T. Ganguly, Dy. Superintendent and another, (1972) 1 SCC 450,*** is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant. In ***Punjab National Bank and others v. Surendra Prasad Sinha, 1993 Supp 1 SCC 499***, it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal

vengeance. In ***Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, (1998) 5 SCC 749,*** a two-Judge Bench has held that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.

We have referred to these authorities to highlight that in matters of criminal defamation the heavy burden is on the Magistracy to scrutinise the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 Cr.P.C. which stipulates about the resident of the accused at a place beyond the area in which the Magistrate exercises his jurisdiction. He must be satisfied that ingredients of Section 499 Cr.P.C. are satisfied. Application of mind in the case of complaint is imperative.

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***234. LAND ACQUISITION ACT, 1894 – Sections 18, 23, 25 and 28A**

(i) Power of the Court to award compensation – Not restricted to amount claimed by applicant – Court has duty to award just and fair compensation – Can award higher compensation than claimed amount. (Relied upon *Ashok Kumar v. State of Haryana, (2016) 4 SCC 544*)

(ii) Effect of Section 28A – Benefit of previously judicially determined compensation must be extended to those covered under the same notification who have not approached the Court.

भू अर्जन अधिनियम, 1894 - धाराएं 18, 23, 25 और 28क

(i) प्रतिकर अधिनिर्णीत करने का न्यायालय का अधिकार - आवेदक द्वारा दावाकृत राशि तक निर्बंधित नहीं - न्यायोचित प्रतिकर अधिनिर्णीत करना न्यायालय का कर्तव्य है - दावाकृत राशि से अधिक प्रतिकर अधिनिर्णीत किया जा सकता है। (अशोक कुमार विरूद्ध हरियाणा राज्य (2016) 4 एस.सी.सी. 544 अवलंबित)

(ii) धारा 28क का प्रभाव - एक ही अधिसूचना के अधीन किन्तु न्यायालय में न पहुंचने वालों को भी पूर्व में न्यायोचित रूप से निर्धारित प्रतिकर का लाभ विस्तारित किया जाना चाहिए।

Narendra and others v. State of U.P. and others
Judgment dated 11.09.2017 passed by the Supreme Court in Civil Appeal No. 10429 of 2017, reported in (2017) 9 SCC 426

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***235. LIMITATION ACT, 1963 – Articles 18, 55 and 113**

Limitation period for recovery of money – Date of final payment is relevant – But, where correspondences are exchanged and matter is kept pending, final date of rejection will be the date of cause of action – Limitation period of three years will start from such date.

परिसीमा अधिनियम, 1963 - अनुच्छेद 18, 55 एवं 113

धन की वसूली के लिये परिसीमा अवधि - अंतिम भुगतान की तिथि सुसंगत है - परंतु, जहाँ पत्राचार का आदान-प्रदान होता है और मामले को लंबित रखा जाता है, अस्वीकृति की अंतिम तिथि ही वाद कारण की तिथि होगी - तीन वर्ष की परिसीमा अवधि ऐसी तिथि से ही प्रारंभ होगी।

M/s. Aries and Aries v. Tamil Nadu Electricity Board
Judgment dated 21.03.2017 passed by the Supreme Court in Civil Appeal No. 1034 of 2008, reported in AIR 2017 SC 1897

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***236. MOTOR VEHICLES ACT, 1988 – Section 147**

Liability of insurer – Insurance Company has specifically charged a premium from the insured for carrying three persons excluding the driver – Insurance Company cannot be absolved from its liability on the death of a person from indemnifying the insured. (*B.V. Nagaraju v. M/s Oriental Insurance Co. Ltd., AIR 1996 SC 2054* referred)

मोटरयान अधिनियम, 1988 - धारा 147

बीमाकर्ता का दायित्व - बीमा कंपनी ने विनिर्दिष्ट रूप से चालक को छोड़कर तीन व्यक्तियों को ले जाने के लिये बीमाधारक से प्रीमियम का भुगतान प्राप्त किया है - इंश्योरेंस कंपनी, व्यक्ति की मृत्यु पर, बीमाधारक को क्षतिपूर्ति प्रदान करने के अपने दायित्व से मुक्त नहीं की जा सकती है। (बी.वी. नागाराजू विरूद्ध मेसर्स ओरिऐण्टल इंश्योरेंस कंपनी लिमिटेड, ए.आई.आर. 1996 एस.सी. 2054 संदर्भित)

Mata Ram v. National Insurance Company Ltd. and ors.
Order Dated 29.03.2017 passed by the Supreme Court in Civil Appeal No. 4745 of 2017, reported in AIR 2017 SC 1734

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237. MOTOR VEHICLES ACT, 1988 – Sections 166 and 167

(i) Compensation – Deductions – Defendants received benefit under another law/rules – Deductability thereof under the head "loss of pay and wages" – Whether *ex gratia* amount received by the dependants of deceased in any other law/rules be deducted from the head "pay and wages"? Amounts that may be deducted and those that may not be deducted – Differentiated – The principle laid down in *Helen C. Rebello v. Maharashtra State Road Transport, (1999) 1 SCC 90* affirmed.

(ii) Dependant of deceased entitled to claim compensation either under Motor Vehicles Act or under Workmen's Compensation Act but cannot claim under both laws.

मोटरयान अधिनियम, 1988 - धाराएं 166 एवं 167

(i) क्षतिपूर्ति - कटौती - प्रतिवादी ने अन्य विधि/नियम के अंतर्गत लाभ प्राप्त किया - ''वेतन और मजदूरी के नुकसान'' के शीर्ष के अंतर्गत कटौती - क्या किसी अन्य विधि/नियम के अंतर्गत मृतक के आश्रितों द्वारा प्राप्त पूर्व अनुदान राशि को ''वेतन और मजदूरी'' के शीर्ष से घटाया जाना चाहिये? राशियां जिनकी कटौती की जा सकती है और जिनकी कटौती नहीं की जा सकती है - विभेदित किया गया - हेलेन सी. रेबेलो विरूद्ध महाराष्ट्र स्टेट रोड ट्रान्सपोर्ट, (1999) 1 एस.सी.सी. 90 में प्रतिपादित सिद्धांत की पुष्टि की गई।

(ii) मृतक पर आश्रित या तो मोटरयान अधिनियम या कार्मिक प्रतिकर अधिनियम के अंतर्गत प्रतिकर दावा कर सकता है परन्तु दोनों विधि के अंतर्गत दावा नहीं कर सकता।

Reliance General Insurance Company Limited v. Shashi Sharma and ors.

Judgment dated 23.09.2016 passed by the Supreme Court in Civil Appeal No. 9654 of 2016, reported in (2016) 9 SCC 627

Relevant extracts from the Judgment:

The question is: whether the principle expounded by the two Judges' Bench in ***Helen C. Rebello v. Maharashtra State Road Transport, (1999) 1 SCC 90*** in paragraphs 32 to 35, in particular, can be doubted? In that case the Court was called upon to answer as to whether it will be permissible to disallow the deduction of amount receivable by the dependants of the deceased towards "Life Insurance Policy", from the amount of compensation payable under the provisions of Motor Vehicles Act (in that case Sections 110-B, 92-A and 92-B of the Act of 1939 corresponding to Sections 168, 140 and 141 of the 1988 Act). Paragraphs 32 to 35 read thus:

> "32. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do. Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this

Act has to be deciphered, correlating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving a motor vehicle, it would not be covered under the Motor Vehicles Act. Thus, the application of the general principle under the common law of loss and gain for the computation of compensation under this Act must correlate to this type of injury or death, viz., accidental. If the words "pecuniary advantage" from whatever source are to be interpreted to mean any form of death under this Act, it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the "pecuniary advantage" resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets moveable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an interpretation, the tort feasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meager liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act, whatever pecuniary advantage is received by the claimant, from whatever source, would only mean which comes to the claimant on account of the accidental death and not other forms of death. The constitution of the Motor Accident Claims Tribunal itself under Section 110 is, as the section states:

> "……for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to,……"

33. Thus, it would not include that which the claimant receives on account of other forms of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no correlation to the accidental death for which compensation is computed.

Any amount received or receivable not only on account of the accidental death but that which would have come to the claimant even otherwise, could not be construed to be the “pecuniary advantage”, liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incident may be an amount liable for deduction. However, our legislature has taken note of such contingency through the proviso of Section 95. Under it the liability of the insurer is excluded in respect of injury or death, arising out of and in the course of employment of an employee.

34. This is based on the principle that the claimant for the happening of the same incidence may not gain twice from two sources. This, it is excluded thus, either through the wisdom of the legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction, viz., the same accident. It is significant to record here in both the sources, viz., either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases he receives the amount without his contribution. How thus an amount earned out of one’s labour or contribution towards one’s wealth, savings, etc. either for himself or for his family which such person knows under the law has to go to his heirs after his death either by succession or under a Will could be said to be the “pecuniary gain” only on account of one’s accidental death. This, of course, is a pecuniary gain but how this is equitable or could be balanced out of the amount to be received as compensation under the Motor Vehicle Act. There is no correlation between the two amounts. Not even remotely. How can an amount of loss and gain of one contract be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statute has any correlation with an amount earned by an individual. Principle of loss and gain has to be on the same plane within the same sphere, of course, subject to the contract to the contrary or any provisions of law.

35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount

irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz., accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No correlation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the amount which has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

In *Paragraph 28, the Court in* ***Helen C. Rebellos case*** (supra) observed thus:

> "28. …….. This show that the word "just" was deliberately brought in Section 110-B of the 1939 Act to enlarge the consideration in computing the compensation which, of course, would include the question of deductibility, if any. This leads us to an irresistible conclusion that the principle of computation of the compensation both under the English Fatal Accidents Act, 1846 and under the Indian Fatal Accidents Act, 1855 by the earlier decisions, were restrictive in nature in the absence of any guiding words therein, hence the courts applied the general principle at the common law of loss and gain but that would not apply to the considerations under Section 110-B of the 1939 Act which enlarges the discretion to deliver better justice to the claimant, in computing the compensation, to see what is just. Thus, we find that all the decisions of the High Courts, which based their interpretation on the principles of these two Acts, viz., the English 1846 Act and the Indian 1855 Act to hold that deductions were valid cannot be upheld. As we have observed above, the decisions even with reference to the decision of this Court in Gobald Motor Service where the question was neither raised nor adjudicated and that case also, being under the 1855 Act, cannot be pressed into service. Thus, these courts by giving a restrictive interpretation in computation of compensation based on the limitation of the language of the Fatal Accidents Act, fell into an error, as it did not take into account the change of language in the 1939 Act and did not consider the widening of the discretion of the Tribunal under Section 110-B. The word "just", as its nomenclature, denotes equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, un-equitable, not just. Thus, this field of wider discretion of the Tribunal has to be within the said limitations and the limitations under any provision of this Act or any other provision having the force of law."

The principle expounded in this decision in ***Helen C. Rebello case*** (supra) that the application of general principles under the common law to estimate damages cannot be invoked for computing compensation under the Motor Vehicles Act. Further, the "pecuniary advantage" from whatever source must correlate to the injury or death caused on account of motor accident. The view so taken, is the correct analysis and interpretation of the relevant provisions of the Motor Vehicles Act of 1939, and must apply ***proprio vigore*** to the corresponding provisions of the

Motor Vehicles Act, 1988. This principle has been restated in the subsequent decision of two Judges' Bench in ***United India Insurance Co. Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281*** to reject the argument of the Insurance Company to deduct the amount receivable by the dependents of the deceased by way of "social security compensation" and "Life Insurance Policy".

Be that as it may, the term compensation has not been defined in the Act of 1988. By interpretative process, it has been understood to mean to recompense the claimants for the possible loss suffered or likely to be suffered due to sudden and untimely death of their family member as a result of motor accident. Two cardinal principles run through the provisions of the Motor Vehicles Act of 1988 in the matter of determination of compensation. Firstly, the measure of compensation must be just and adequate; and secondly, no double benefit should be passed on to the claimants in the matter of award of compensation. Section 168 of the Act of 1988 makes the first principle explicit. Sub-section (1) of that provision makes it clear that the amount of compensation must be just. The word "just" means - fair, adequate, and reasonable. It has been derived from the Latin word "justus", connoting right and fair. In para 7 of ***State of Harayana & anr. v. Jasbir Kaur & ors., (2003) 7 SCC 484,*** it has been held that expression "just" denotes that the amount must be equitable, fair, reasonable and not arbitrary. In para 16 of ***Smt. Sarla Verma & ors. v. Delhi Transport Corporation & anr., (2009) 6 SCC 121,*** this Court has observed that the compensation "is not intended to be a bonanza, largesse or source of profit". That however may depend upon facts and circumstances of each case, as to what amount would be a just compensation.

The principle discernable from the exposition in ***Helen C.Rebello's case*** (supra) is that if the amount "would be due to the dependants of the deceased even otherwise", the same shall not be deductible from the compensation amount payable under the Act of 1988. At the same time, it must be borne in mind that loss of income is a significant head under which compensation is claimed in terms of the Act of 1988. The component of quantum of "loss of income", inter alia, can be "pay and wages" which otherwise would have been earned by the deceased employee if he had survived the injury caused to him due to motor accident. If the dependents of the deceased employee, however, were to be compensated by the employer in that behalf, as is predicated by the Rules of 2006 - to grant compassionate assistance by way of ***ex-gratia*** financial assistance on compassionate grounds to the dependents of the deceased Government employee who dies in harness, it is unfathomable that the dependents can still be permitted to claim the same amount as a possible or likely loss of income to be suffered by them to maintain a claim for compensation under the Act of 1988.

The claimants are legitimately entitled to claim for the loss of "pay and wages" of the deceased Government employee against the tortfeasor or Insurance Company, as the case may be, covered by the first part of Rule 5 under the Act of 1988. The claimants or dependents of the deceased Government

employee (employed by State of Haryana), however, cannot set up a claim for the same subject falling under the first part of Rule 5 - "pay and allowances", which are receivable by them from employer (State) under Rule 5 (1) of the Rules of 2006. In that, if the deceased employee was to survive the motor accident injury, would have remained in employment and earned his regular pay and allowances. Any other interpretation of the said Rules would inevitably result in double payment towards the same head of loss of "pay and wages" of the deceased Government employee entailing in grant of bonanza, largesse or source of profit to the dependants/claimants. Somewhat similar situation has been spelt out in Section 167 of the Motor Vehicles Act, 1988, which reads thus:

> "167. ***Option regarding claims for compensation in certain cases.***— Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

Indeed, similar statutory exclusion of claim receivable under the Rules of 2006 is absent. That, however, does not mean that the Claims Tribunal should remain oblivious to the fact that the claim towards loss of Pay and wages of the deceased has already been or will be compensated by the employer in the form of ex-gratia financial assistance on compassionate grounds under Rule 5 (1). The Claims Tribunal has to adjudicate the claim and determine the amount of compensation which appears to it to be just. The amount receivable by the dependants / claimants towards the head of pay and allowances in the form of ***ex-gratia*** financial assistance, therefore, cannot be paid for the second time to the claimants. True it is, that the Rules of 2006 would come into play if the Government employee dies in harness even due to natural death. At the same time, the Rules of 2006 do not expressly enable the dependents of the deceased Government employee to claim similar amount from the tortfeasor or Insurance Company because of the accidental death of the deceased Government employee. The harmonious approach for determining a just compensation payable under the Act of 1988, therefore, is to exclude the amount received or receivable by the dependents of the deceased Government employee under the Rules of 2006 towards the head financial assistance equivalent to "pay and other allowances" that was last drawn by the deceased Government employee in the normal course. This is not to say that the amount or payment receivable by the dependents of the deceased Government employee under Rule 5 (1) of the Rules, is the total entitlement under the head of "loss of income". So far as the claim towards loss of future escalation of income and other benefits, if the deceased Government employee had survived the accident can still be pursued by them in their claim under the Act of 1988. For, it is not covered by the Rules

of 2006. Similarly, other benefits extended to the dependents of the deceased Government employee in terms of sub-rule (2) to sub-rule (5) of Rule 5 including family pension, Life Insurance, Provident Fund etc., that must remain unaffected and cannot be allowed to be deducted, which, any way would be paid to the dependents of the deceased Government employee, applying the principle expounded in ***Helen C.Rebello*** and ***Patricia Jean Mahajan's cases*** (supra).

A Priori, appellants must succeed only to the extent of amount receivable by the dependents of the deceased Government employee in terms of Rule 5(1) of the Rules 2006, towards financial assistance equivalent to the loss of pay and wages of the deceased employee for the period specified.

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238. NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42 and 43

Search and seizure of opium powder from jeep at night – Section 42 mandates compliance of two conditions – Firstly, copy of information recorded must be sent to immediate senior officer – Secondly, if warrant cannot be obtained due to paucity of time then grounds of such belief must be recorded – Absence of compliance with above conditions – To have seriously prejudiced the accused – Jeep being private vehicle, compliance of Section 43 is not necessary.

स्वापक औषधि और मनः प्रभावी पदार्थ अधिनियम, 1985 - धाराएं 42 एवं 43

रात में जीप से अफीम पाउडर की तलाशी एवं जप्ती - धारा 42 में दो शर्तों का अनुपालन आज्ञापक है - प्रथमतः, अभिलिखित की गई सूचना की प्रतिलिपि तत्काल वरिष्ठ अधिकारी को भेजी जानी चाहिये - द्वितीयतः, यदि समय की कमी के कारण वारंट प्राप्त नहीं किया जा सकता हो तो विश्वास के आधारों को लेखबद्ध किया जाना चाहिये - उपरोक्त शर्तों के अनुपालन की अनुपस्थिति - अभियुक्त को गंभीर पूर्वाग्रह कारित करती है - जीप के निजी वाहन होने के कारण, धारा 43 का अनुपालन आवश्यक नहीं है।

State of Rajasthan v. Jagraj Singh alias Hansa

Judgment dated 29.06.2016 passed by the Supreme Court in Criminal Appeal No. 1233 of 2006, reported in (2016) 11 SCC 687

Relevant extracts from the judgment:

Explanation to Section 43 defines expression "public place" which includes any public conveyance. The word "public conveyance" as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained.

Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers. The High Court has looked into the evidence and come to the conclusion that there was no material to indicate that there was any permit for running the jeep as public transport vehicle. The High Court has further held that even Kartara Ram who as per owner of the vehicle Veera Ram was using the vehicle, do not support that the jeep was used as public transport vehicle. The High Court held that personal jeep could not be treated as public transport vehicle. Following observations were made by the High Court:

> "Kartara Ram is produced as PD-5,who has deposed the statement that Vira Ram is his brother-in-law (Saala), on whose name jeep bearing No.HR 24 4057 is lying registered. He had employed Inderjit singh as driver for that jeep. Person namely Krishan has never been employed as driver. This witness has been declared hostile and he has been examined too, who does not support the prosecution case. In this manner, Viraram is the owner of the jeep. According to him he had given the jeep to Kartara Ram, but Kartara Ram has not stated anywhere in his statement that this jeep was given to him and he used the same as Public Transport Vehicle. Since powder of opium was caught in this jeep and even Notice Exh. P-6 was also served upon him by the police, he with a view to save himself, can also depose such statement that Kartara used to use the jeep as Public Transport Vehicle, whereas Kartara Ram PD-5 does not affirm this fact. Jeep was personal, it is clear on the record. In this manner, just on this ground that he has given the jeep to his brother-in-law and he used it to carry the passengers, the personal jeep could not be treated as public transport vehicle. However, the fact that jeep is used to carry the passengers has not been affirmed from the statements of Kartara Ram. There is no evidence on record on the basis of which it could be stated that jeep was public transport vehicle and they have the permit for it, rather it was the private vehicle and it is stated that Vira Ram himself is the owner of that vehicle."

There is nothing to impeach the aforesaid findings. We have also perused the statement of Vira Ram in which statement he has never even stated that he has any permit for running the vehicle as transport vehicle. He has stated that "..... I had given this jeep to Kartara Ram resident of ... who is my relative to run it for transporting passengers". Admittedly the jeep was intercepted and was seized by the police. In view of the above, the jeep cannot be said to be a public conveyance within the meaning of Explanation to Section 43. Hence, Section 43 was clearly

not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction.

xx xx xx

A Constitution Bench of this Court in ***State of Punjab v. Baldev Singh, (1999) 6 SCC 172,*** had occasion to consider the provisions of the NDPS Act and several earlier judgments of this Court. The Constitution Bench noticed that the earlier judgments in ***Balbir Singh's*** case has found approval by three Judges Bench in ***Saiyad Mohd. Saiyad Umar Saiyed & others v. State of Gujarat, (1995) 3 SCC 610,*** and a discordant note was struck by two Judges Bench in ***State of Himachal Pradesh v. Pirthi Chand and another, (1996) 2 SCC 37***. The Constitution Bench approved the view of this Court in ***Balbir Singh's*** case that there is an obligation on authorised officer under section 50 to inform the suspect that he has right to be informed in the presence of the Gazetted Officer. It was held by Constitution Bench that if search is conducted in violation of Section 50 it may not vitiate the trial but that would render the recovery of illicit articles suspect and vitiates the conviction and sentence of the accused. What is said about non- compliance of Section 50 is also true with regard to non-compliance of Section 42 of the Act.

In ***Beckodan Abdul Rahiman v. State of Kerala, (2002) 4 SCC 229***, this Court had occasion to consider both Section 42 and Section 50. In the above case there was non compliance of Section 42(2) as well as Section 50. It was also noticed that a Constitution Bench in ***State of Punjab v. Baldev Singh*** (supra) has already laid down that provisions of Section 42 and 50 are mandatory and their non-compliance would render the investigation illegal. Following was held in paragraphs 5 and 6:

> "5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW1). After recording the information, the witnesses is not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in presence of a Gazetted Officer or Magistrate.
> 6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution which rendered the case as not established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted ."

It is also relevant to note another Constitution Bench judgment of this Court in ***Karnail Singh v. State of Haryana, (2009) 8 SCC 539,*** where this Court had

again occasion to consider the provisions of Sections 42 and 50. The Constitution Bench noted the divergence of opinion in two earlier cases which has resulted in placing the matter before the larger Bench. The question was noticed in paragraphs 1 and 2 of the judgment which are to the following effect:

> "1) In the case of ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513,*** a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of ***Sajan Abraham v. State of Kerala, (2001) 6 SCC 692,*** which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.
>
> 2) In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.
>
> 3) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over."

After referring to the earlier judgments, the Constitution Bench came to the conclusion that non-compliance of requirement of Sections 42 and 50 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of Section 42. The Constitution Bench noted the effect of the aforesaid two decisions in paragraph 5. The present is not a case where insofar as compliance of Section 42(1) proviso even an arguments based on substantial compliance is raised there is total non- compliance of Section 42(1) proviso. As observed above, Section 43 being not attracted search was to be conducted after complying the provisions of Section 42. We thus, conclude that the High Court has rightly held that non compliance of Section 42(1) and Section 42(2) were proved on the record and the High Court has not committed any error in setting aside the conviction order.

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239. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
GENERAL CLAUSES ACT, 1897 – Section 27
EVIDENCE ACT, 1872 – Section 114

(i) Two consecutive notices under Section 138 of N.I. Act demanding the cheque amount – Effect – Second notice after the delivery of first is mere reminder – Not relevant for calculating period of limitation under the Section.

(ii) Correctly addressed Notice sent to the drawer by registered post – Returned with "any" of the reasons – Due service has to be presumed unless rebutted.

परक्राम्य लिखत अधिनियम, 1881 - धारा 138

सामान्य खण्ड अधिनियम, 1897 - धारा 27

साक्ष्य अधिनियम, 1872 - धारा 114

(i) परक्राम्य लिखत अधिनियम, 1881 धारा 138 के अधीन चेक धनराशि की मांग के दो क्रमवर्ती सूचना पत्र - प्रभाव - प्रथम सूचना पत्र के निर्वाह के उपरांत द्वितीय सूचनापत्र मात्र स्मरण पत्र है - इस धारा के अधीन परिसीमा अवधि की गणना हेतु सुसंगत नहीं है।

(ii) लेखीवाल को सही पते के साथ पंजीकृत डाक से सूचना पत्र भेजा गया - ''किसी'' भी कारण से वापस - जब तक अभिखंडित नहीं किया जाता सम्यक् निर्वाह उपधारित किया जाएगा।

N. Parameswaran Unni v. G. Kannan and anr.
Judgment dated 01.03.2017 passed by the Supreme Court in Criminal Appeal No. 455 of 2006, reported in (2017) 5 SCC 737

Relevant extracts from the judgment:

It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1972, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stands complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.

It is well settled that interpretation of a Statute should be based on the object which the intended legislation sought to achieve.

"It is a recognized rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid". ***(New India Sugar Mills Ltd. v. Commissioner of Sales Tax, AIR 1963 SC 1207.)***

This Court in catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed ***(Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647, State of M.P. v. Hiralal, (1996) 7 SCC 523*** and ***V. Raja Kumari v. P. Subbarama Naidu, (2004) 8 SCC 774.)*** Though in process of interpretation right of an honest lender cannot be defeated as has happened in this case. From the perusal of relevant sections it is clear that generally there is no bar under the N.I. Act to send a reminder notice to the drawer of the cheque and usually such notice cannot be construed as an admission of non-service of the first notice by the appellant as has happened in this case.

Moreover the first notice sent by appellant on 12.04.1991 was effective and notice was deemed to have been served on the first respondent. Further, it is clear that the second notice has no relevance at all in this case at hand. Second notice could be construed as a reminder of respondent's obligation to discharge his liability. As the complaint was filed within the stipulated time contemplated under Clause (b) of Section 142 of the N.I. Act, therefore Section 138 r/w 142 of N.I. Act is attracted

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240. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 143 and 147

CRIMINAL PROCEDURE CODE, 1973 – Sections 205 and 258

(i) Summons to the accused – Must indicate specified amount to be paid by the accused in respect of compensation to the complainant and account details of the complainant – If sufficient amount is deposited in the account of the complainant, the accused need not to appear before the Court and he may be discharged – Procedure laid down.

(ii) Cases relating to Section 138 – Normally to be tried summarily unless sentence exceeding one year is necessary.

(iii) Section 258 Cr.P.C. – Applies to cases relating to Section 138 N.I. Act as well – If accused tenders the cheque amount with interest and reasonable cost of litigation – Court can close proceedings and discharge the accused in exercise of its power u/s 143 of the N.I Act read with Section 258 Cr.P.C.

(iv) Exemption from personal appearance of accused under Section 205 – Can be granted on suitable self-operating conditions – If the accused proposes to contest, appearance may be through Counsel and if viable, through video conferencing.

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 138, 143 और 147

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 205 और 258

(i) अभियुक्त को समन- अभियुक्त द्वारा परिवादी को प्रतिकर हेतु देय विनिर्दिष्ट

धनराशि तथा परिवादी के खाते का विवरण प्रकट किए जाने चाहिए - यदि परिवादी के खाते में पर्याप्त धनराशि जमा कर दी जाती है तो अभियुक्त को न्यायालय के समक्ष उपस्थित होने की आवश्यकता नहीं है और उसे उन्मोचित किया जा सकता है - प्रक्रिया अभिनिर्धारित की गई ।

(ii) धारा 138 से संबंधित मामले - सामान्यतः संक्षिप्त विचारण किया जाना चाहिए जब तक कि एक वर्ष से अधिक का दण्ड आवश्यक न हो ।

(iii) धारा 258 द.प्र.सं - परक्राम्य लिखत अधिनियम की धारा 138 से संबंधित प्रकरणों में भी लागू होती है - यदि अभियुक्त ब्याज सहित चेक राशि तथा वाद का युक्तियुक्त व्यय निविदत्त करता है - तो न्यायालय प्रक्रिया समाप्त कर अभियुक्त को परक्राम्य लिखत अधिनियम की धारा 143 सहपठित धारा 258द.प्र.सं की शक्तियों का प्रयोग करते हुए उन्मोचित कर सकता है।

(iv) धारा 205 के अधीन अभियुक्त की व्यक्तिगत उपस्थिति से अभिमुक्ति - उपयुक्त स्वपरिचालित शर्तों पर प्रदान की जा सकती है - यदि अभियुक्त प्रतिवाद प्रस्तावित करता है, तो उसकी उपस्थिति अभिभाषक के माध्यम से हो सकती है और यदि सुगम हो, तो वीडियो कान्फ्रेसिंग के माध्यम से भी हो सकती है।

Meters and Instruments Private Limited and anr. v. Kanchan Mehta Judgment dated 05.10.2017 passed by the Supreme Court in Criminal Appeal No. 1731 of 2017, reported in 2017 (4) Crimes 1 (SC)

Relevant extracts from the judgment:

While it is true that in ***Subramanium Sethuraman v. State of Maharashtra, (2004) 13 SCC 324,*** this Court observed that once the plea of the accused is recorded under Section 252 of the Cr.P.C., the procedure contemplated under Chapter XX of the Cr.P.C. has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to 2002 amendment. The statutory scheme post 2002 amendment as considered in ***Mandvi Cooperative Bank Ltd. v. Nimesh B. Thakore, (2010) 3 SCC 83 and J.V. Baharuni and anr. etc. v. State of Gujarat and anr. etc., (2014) 10 SCC 494,*** has brought about a change in law and it needs to be recognised. After 2002 amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the Court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 Cr.P.C.

which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of the Cr.P.C. are applicable "so far as may be", the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible, i.e. with such deviation as may be necessary for speedy trial in the context.

x x x

In ***Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd. and ors., (2001) 7 SCC 401,*** this Court considered the issue of the hardship caused in personal attendance by an accused particularly where accused is located far away from the jurisdiction of the Court where the complaint is filed. This Court held that even in absence of accused, evidence can be recorded in presence of counsel under Section 273 Cr.P.C. and Section 317 Cr.P.C. permitted trial to be held in absence of accused. Section 205 Cr.P.C. specifically enabled the Magistrate to dispense with the personal appearance. Having regard to the nature of offence under Section 138, this Court held that the Magistrates ought to consider exercise of the jurisdiction under Section 205 Cr.P.C. to relieve accused of the hardship without prejudice to the prosecution proceedings.

It was observed :

> "These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings."

xx xx xx

It is, thus, clear that the trials under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonoured cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and ought to be properly monitored. The summons ought to indicate that the accused could make specified payment by deposit in a particular account before the specified date and inform the court and the complainant by e-mail. In such a situation, he may not be required to appear if the court is satisfied that the payment has not

been duly made and if the complainant has no valid objection. If the accused is required to appear, his statement ought to be recorded forthwith and the case fixed for defence evidence, unless complainant's witnesses are recalled for examination.

Having regard to magnitude of challenge posed by cases filed under Section 138 of the Act, which constitute about 20% of the total number of cases filed in the Courts (as per 213th Report of the Law Commission) and earlier directions of this Court in this regard, it appears to be necessary that the situation is reviewed by the High Courts and updated directions are issued. Interactions, action plans and monitoring are continuing steps mandated by Articles 39A and 21 of the Constitution to achieve the goal of access to justice ***Hussain v. Union of India, (2017) 5 SCC 702***. Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Traffic challans may perhaps be one such category. Atleast some number of Section 138 cases can be decided online. If complaint with affidavits and documents can be filed online, process issued online and accused pays the specified amount online, it may obviate the need for personal appearance of the complainant or the accused. Only if the accused contests, need for appearance of parties may arise which may be through counsel and wherever viable, video conferencing can be used. Personal appearances can be dispensed with on suitable self operating conditions. This is a matter to be considered by the High Courts and wherever viable, appropriate directions can be issued.

From the above discussion following aspects emerge:

i. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view of presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

iii. Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

iv. Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

v. Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the

accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant . If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

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241. PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (1)(b) CRIMINAL PROCEDURE CODE, 1973 – Sections 31 and 427

(i) Sentencing of policy – should be stern and uncompromising.

(ii) Scope of section 31 and applicability of section 427 – Section 31 relates to the quantum of punishment which may be legally passed when there is – (a) one trial, and (b) accused is convicted for two or more offences – Section 427 deals with sentence passed on an offender who is already sentenced for another offence – Power conferred on the court to order concurrent sentence is discretionary – Only in appropriate cases considering the fact of the case, the Court can make the sentence to run concurrent with previously imposed sentence – The policy of the legislature is that the normally the sentence should run concurrently.

भ्रष्टाचार निवारण अधिनियम, 1988 - धारा 13 (1) (ख)

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 31 एवं 427

(i) दण्ड नीति - भ्रष्टाचार के मामलों में समझौता न करने वाली और कठोर होनी चाहिये।

(ii) धारा 31 का क्षेत्र एवं धारा 427 की प्रयोज्यता - धारा 31 विधितः आदेश की जा सकने वाली दण्ड की मात्रा से संबंधित है जबकि एक अभियुक्त को (ए) एक विचारण में और (बी) दो या अधिक अपराधों में दोषसिद्ध किया गया हो - धारा

427 पूर्व से अन्य मामले में दोषसिद्ध अभियुक्त के विरूद्ध पारित किये जाने वाले दण्डादेश से संबंधित है - दण्डों को साथ-साथ भुगताये जाने का आदेश देने की शक्ति न्यायालय के विवेकाधीन है - केवल उचित प्रकरणों में प्रकरण के तथ्य को देखते हुये ही न्यायालय पूर्व आदेशित दण्डादेश के साथ-साथ दण्ड भुगताये जाने का आदेश दे सकते हैं - सामान्यतः विधायी की नीति पृथक-पृथक दण्डादेश भुगताये जाने की है।

Neera Yadav v. Central Bureau of Investigation
Judgment dated 02.08.2017 passed by the Supreme Court in Criminal Appeal No. 253 of 2017, reported in 2017 (3) Crimes 159 (SC)

Relevant extracts from the judgment:

Tackling corruption is going to be a priority task for the Government. The Government has been making constant efforts to deal with the problem of corruption. However, the constant legislative reforms and strict judicial actions have still not been able to completely uproot the deeply rooted evil of corruption. This is the area where the Government needs to be seen taking unrelenting, stern and uncompromising steps. Leaders should think of introducing good and effective leadership at the helm of affairs; only then benefits of liberalization and various programmes, welfare schemes and programmes would reach the masses. Lack of awareness and supine attitude of the public has all along been found to be to the advantage of the corrupt. Due to the uncontrolled spread of consumerism and fall in moral values, corruption has taken deep roots in the society. What is needed is a re-awakening and recommitment to the basic values of tradition rooted in ancient and external wisdom. Unless people rise against bribery and corruption, society can never be rid of this disease. The people can collectively put off this evil by resisting corruption by any person, howsoever high he or she may be.

Section 31 of Cr. P.C. relates to the quantum of punishment that the Court has jurisdiction to pass where the accused is convicted of two or more offences at one trial (Joinder of charges at one trial vide Sections 218-223 Cr.P.C.). Where accused is convicted and sentenced for several offences at one trial, the Court may direct that the sentences shall run concurrently. In the absence of such direction by the Court, sentences shall run consecutively. It is not obligatory for the trial court to direct in all cases that the sentences shall run concurrently.

This Court considered the scope of Section 31 Cr.P.C. and concurrent or consecutive running of sentence in ***O.M. Cherian alias Thankachan v. State of Kerala and others, (2015) 2 SCC 501.*** The appellant thereon was convicted for the offences under Section 498-A and Section 306 IPC. The trial court ordered substantive sentences imposed on the appellant thereon to run consecutively and the same was affirmed by the High Court. Considering the scope of Section 31 Cr.P.C. and the discretion of the Court in directing concurrent running of sentences, this Court directed sentences to run concurrently. It was held as under:-

"Section 31 CrPC relates to the quantum of punishment which may be legally passed when there is (a) one trial, and (b) the accused is convicted of "two or more offences". Section 31 CrPC says that subject to the provisions of Section 71 IPC, the court may pass separate sentences for two or more offences of which the accused is found guilty, but the aggregate punishment must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC. In Section 31(1) CrPC, since the word "may" is used, in our considered view, when a person is convicted for two or more offences at one trial, the court may exercise its discretion in directing that the sentence for each offence may either run consecutively or concurrently subject to the provisions of Section 71 IPC. But the aggregate must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC, that is; (i) it should not exceed 14 years; and (ii) it cannot exceed twice the maximum imprisonment awardable by the sentencing court for a single offence.

xx xx xx

The words in Section 31 CrPC

"... sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct"

indicate that in case the court directs sentences to run one after the other, the court has to specify the order in which the sentences are to run. If the court directs running of sentences concurrently, order of running of sentences is not required to be mentioned. Discretion to order running of sentences concurrently or consecutively is judicial discretion of the court which is to be exercised as per the established law of sentencing. The court before exercising its discretion under Section 31 CrPC is required to consider the totality of the facts and circumstances of those offences against the accused while deciding whether sentences are to run consecutively or concurrently.

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Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such

> discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically."

Section 31 Cr.P.C deals with quantum of punishment which may be legally passed when there is :- (a) one trial; and (b) the accused is convicted of two or more offences. The ambit of Section 31 is wide, covering not only a single transaction constituting two or more offences but also offences arising out of two or more transactions provided that those transactions/charges were framed together at one trial.

Section 31 relates to the quantum of the punishment that the court has jurisdiction to pass that the accused is convicted of two or more offences at one trial. Section 427 Cr.P.C. deals with sentence passed on an offender who is already sentenced for another offence. The power conferred on the Court under Section 427 to order concurrent sentence is discretionary. The salutary principle adopted by the Court is the totality of the sentences. The maximum sentence awarded in one case against the same accused is relevant consideration while giving concurrent sentence in another case. The policy of the legislature is that normally the sentencing should be done consecutively. Only in appropriate cases, considering the facts of the case, the Court can make the sentence concurrently with an earlier sentence imposed. A person sentenced to imprisonment must, for the purpose of Section 427 Cr.P.C., be deemed to be undergoing that sentence from the very moment the sentence is passed. The accused may be on bail or in custody in the earlier case at the time of passing of the subsequent sentence.

The sentencing Court has the discretion to direct concurrency. The investiture of such discretion, presupposes that it will be exercised on sound principles and not on whims. In the Criminal Procedure Code, there are no guidelines or specific provisions to suggest under what circumstances the various sentences of imprisonment shall be directed to run concurrently or consecutively. There is no straight jacket formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1) Cr.P.C. Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed. In para (69) in ***K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754,*** contains a discussion on the topic. To quote:-

> "In the case of the respondent, the Magistrate ordered that the sentence on various counts shall run consecutively. That does not mean that the respondent had been convicted of any offence, for which the sentence of imprisonment is two

years or more. The direction for the sentence to run concurrently or consecutively is a direction as to the mode in which the sentence is to be executed. That does not affect the nature of the sentence. It is also important to note that in the Code of Criminal Procedure, there are no guidelines or specific provisions to suggest under what circumstances the various sentences of imprisonment shall be directed to run concurrently or consecutively. There are no judicial decisions, to my knowledge, by superior courts laying down the guidelines as to what should be the criteria for directing the convict to undergo imprisonment on various counts concurrently or consecutively. In certain cases, if the person convicted is a habitual offender and he had been found guilty of offences on various counts and it is suspected that he would be a menace if he is let loose on the society, then the court would direct that such person shall undergo the imprisonment consecutively……"

It is well settled that where there are different transactions, different crime numbers and cases have been decided by different judgments, concurrent sentences cannot be awarded under Section 427 Cr.P.C. In ***Mohd. Akhtar Hussain v. Asst. Collector, Customs, (1988) 4 SCC 183,*** it was held as under:-

"The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

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The submission, in our opinion, appears to be misconceived. The material produced by the State unmistakably indicates that the two offences for which the appellant was prosecuted are quite distinct and different. The case under the Customs Act may, to some extent, overlap the case under the Gold (Control) Act, but it is evidently on different transactions. The complaint under the Gold (Control) Act relates to possession of 7000 tolas of primary gold prohibited under Section 8 of the said Act. The complaint under the Customs Act is with regard to smuggling of gold worth Rs 12.5 crores and export of silver worth Rs 11.5 crores. On these facts, the courts are not unjustified in directing that the sentences should be consecutive and not concurrent."

The above general rule that there cannot be concurrency of sentence if conviction relates to two different transactions, can be changed by an order of the Court. There is no straight jacket formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1) Cr.P.C. Depending on the special and peculiar facts and circumstances of the case, it is for the court to make the sentence of imprisonment in the subsequent trial run concurrently with the sentence in the previous one. In ***Benson v. State of Kerala, (2016) 10 SCC 307,*** this Court directed the substantive sentences imposed on the appellant to run concurrently. In ***V.K. Bansal v. State of Haryana, (2013) 7 SCC 211,*** some sentences were to run concurrently and some consecutively.In paras (14) and (16) in ***V.K. Bansal's*** case (supra) it was held as under:-

> "We may at this stage refer to the decision of this Court in ***Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183*** in which this Court recognised the basic rule of convictions arising out of a single transaction justifying concurrent running of the sentences. The following passage is in this regard apposite: (SCC p. 187, para 10)
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> > "10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different."
> >
> > In conclusion, we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor."

This instant case is one covered under Section 427 Cr.P.C. As noted earlier appellant Neera Yadav has been convicted in two different cases, one of abusing the official position in getting the plots allotted to herself and her daughters and other irregularities in making changes in the site plan and another one in abusing her position as CEO, Noida conspired with Rajiv Kumar in allotting plot to him. Having regard to the facts and circumstances of the case and considering the nature of allegations, in our view, it is not justifiable to direct concurrency of sentence. Any unprincipled exercise of judicial discretion and casual direction made regarding concurrency would go against the express provisions of the Prevention of Corruption Act, 1988 and the Criminal Procedure Code.

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***242. PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)(e)**

(i) Assets disproportionate to the known sources of income – Income received from any lawful source and intimated in accordance with law, rules and orders for the time being applicable.

(ii) First the prosecution has to establish assets disproportionate to the known sources of income – Thereafter, the accused public servant may be required to explain the same – The charge-sheet omitting certain periods and also agricultural income in the figures of income – The trial Court relying on its own figures, applying inferences and guess work, found the appellant guilty of offence u/s 13(1)(e) – The appellant tried for a charge different from the one framed against him – Not permissible.

भ्रष्टाचार निवारण अधिनियम, 1988 - धारा 13(1)(ङ)

(i) आय के ज्ञात स्रोतों से अनानुपातिक संपत्ति - आय जो किसी भी वैध स्रोत से प्राप्त हो और तत्समय प्रवृत्त विधि, नियम एवं आदेशों के तहत जिसकी सूचना दी गई हो।

(ii) प्रथमतः अभियोजन को आय के ज्ञात स्रोतों से अनानुपातिक संपत्ति होने को प्रमाणित करना होता है - इसके पश्चात, अभियुक्त लोक सेवक को इसका स्पष्टीकरण देने की अपेक्षा की जा सकती है - अभियोग पत्र में कुछ निश्चित अवधि को और कृषि की आय को भी आय के आंकड़ो में रखने का लोप किया - विचारण न्यायालय ने अनुमान लगाते हुये एवं अंदाज से अपने स्वयं के आंकड़ों पर भरोसा करते हुये अपीलार्थी को धारा 13(1)(ङ) का दोषी पाया - अपीलार्थी को उसके विरूद्ध लगाये गये आरोप से भिन्न आरोप के लिये विचारित किया गया - अनुज्ञेय नहीं।

Vasant Rao Guhe v. State of Madhya Pradesh
Judgment dated 09.08.2017 passed by the Supreme Court in Criminal Appeal No. 1279 of 2017, reported in 2017 (3) Crimes 180 (SC)

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243. SAMAJ KE KAMJOR VARGAON KE KRISHI BHUMI DHARAKON KA UDHAR DENE WALON KE BHUMI HADAPANE SAMBANDHI KUCHAKRON SE PARITRAN TATHA MUKTI ADHINIYAM (M.P.), 1976 – Sections 2(f), 5 and 8

Prohibited transaction of loan, determination of – Transaction has to be proved as per the five modes stipulated under section 2(f) of the Act – Two distinct sale deeds executed by the petitioner being joint owner of property – Petitioner contended that though there was an outright sale with possession, there was distinct oral understanding that sale shall not be acted upon if loan is repaid as per Section 2(f)(iii) of the Act – No direct oral evidence as to oral understanding that sale shall not be acted upon if the loan is repaid

– No explanation furnished as to two distinct shares sold differently – Held, sale deed was not prohibited transaction of loan.

म.प्र. समाज के कमजोर वर्गों के भूमि धारकों का उधार देने वालों के भूमि हड़पने संबंधी कुचक्रों से परित्रण तथा मुक्ति अधिनियम, 1976 - धाराएं 2(च), 5 एवं 8 ऋण के प्रतिनिषिद्ध संव्यवहार का निर्धारण - संव्यवहार को अधिनियम की धारा 2(च) में वर्णित पांच रीतियों के अनुसार होना साबित किया जाना चाहिये - सम्पत्ति का सहस्वामी होते हुये याची ने दो सुभिन्न विक्रय पत्र निष्पादित किये - याची द्वारा अभिकथित किया गया कि यद्यपि कब्जा सहित पूर्ण विक्रय किया गया था किन्तु धारा 2(च)(iii) के अनुसार एक मौखिक सहमति थी कि ऋण का भुगतान होने पर विक्रय पत्र कार्यशील न रहेगा - ऋण की अदायगी पर विक्रय पत्र के कार्यशील न रहने संबंधी मौखिक सहमती बावत् कोई प्रत्यक्ष मौखिक साक्ष्य नहीं थी - इस बारे में कोई स्पष्टीकरण नहीं किया गया कि दो सुभिन्न अंश अलग-अलग क्यों बेचे गये - अभिनिर्धारित, विक्रय-पत्र, ऋण के प्रतिनिषिद्ध संव्यवहार नहीं था।

Shaheed Khan and others v. Harnam Singh and others
Order dated 14.02.2017 passed by the High Court of Madhya Pradesh in Writ Petition No. 19152 of 2015, reported in 2017 (3) MPLJ 647

Relevant extracts from the Order:

Section 2 (f) of the M.P. Samaj Ke Kamjor Vargaon Ke Krishi Bhumi Dharakon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, 1976 defines the prohibited transaction of loan to mean: (f) “prohibited transaction of loan” means a transaction in which a lender of money advances loan to a holder of agricultural land against security of his interest in land, whether at the time of advancing the loan or at any time thereafter during the currency of the loan in any of the following modes, namely : (i) agreement to sell land with or without delivery of possession; (ii) outright sale of land with or without delivery of possession accompanied by separate agreement to re-sell it; (iii) outright sale of land with or without delivery of possession with a distinct oral understanding that the sale shall not be acted upon if the loan is re-paid; (iv) outright sale of land with or without delivery of possesion with a condition incorporated in the sale deed to re-sell it on re-payment of the loan; (v) transaction in any modes other than those specified in clauses (i) to (iv) affecting interest in land including a fraudulent transaction or a transaction designed to defeat the provisions of any law regulating money lending or interest, for the time being in force, and includes all those transactions in which a lender of money has, after the appointed day but on or before the date of publication of this Act in the Gazette, obtained possession of land of the holder of agricultural land through court or by force or otherwise or obtained a decree for such possession towards satisfaction of loan.”

Thus even if a person is holder of agricultural land in the weaker section [as defined under Section 2(c) of 1976 Adhiniyam] unless the transaction is

proved to be through any of the mode stipulated under Section (2) (f) of 1976 Adhiniyam ,i.e, (i) agreement to sell land with or without delivery of possession; (ii) outright sale of land with or without delivery of possession accompanied by separate agreement to re-sell it; (iii) outright sale of land with or without delivery of possession with a distinct oral understanding that the sale shall not be acted upon if the loan is re-paid; (iv) outright sale of land with or without delivery of possesion with a condition incorporated in the sale deed to re-sell it on re-payment of the loan; (v) transaction in any modes other than those specified in clauses (i) to (iv) affecting interest in land including a fraudulent transaction or a transaction designed to defeat the provisions of any law regulating money lending or interest, for the time being in force, and includes all those transactions in which a lender of money has, after the appointed day but on or before the date of publication of this Act in the Gazette, obtained possession of land of the holder of agricultural land through court or by force or otherwise or obtained a decree for such possession towards satisfaction of loan, it cannot be termed as prohibited transaction.

In the present case though it was contended by the petitioner that though there was an outright sale with the delivery of possession with a distinct oral understanding that the sale shall not be acted upon if the loan is repaid. The evidence which the petitioner led was all hearsay and there is no direct evidence as to oral understanding arrived at between the petitioner and respondent and that to a two distinct point of time having gap of three years between the transfers. There is no explanation tendered by the petitioner as to two distinct shares sold differently and about the lease agreement between the petitioner and respondent. As the respondent being the lessor having leased out his property with certain share in the produce which if not delivered has to be compensated in terms of money. The money which has been tendered was towards the lease rent in terms of money in lieu of 20 quintals of grain.

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244. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 9 and 23 SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995 – Rule 7

(i) Offences of atrocities – Validity of rule 7 *vis-a-vis* section 9(1)(b) – Investigation by officer below the rank of DSP, whether valid? Rule 7 framed by Central Government vests power to police officer not below the rank of DSP to investigate the matter – State Government in exercise of power under section 9 of the Act can extend the power of investigation to officers below the rank of DSP.

(ii) Investigation by official below the rank of DSP after notification of Rules but prior to the date of publication of notification, whether irregular or illegal? Held, No finding by court that such investigation caused prejudice to accused – Investigation by official below DSP not vitiated.

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 - धाराएं 9 एवं 23

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) नियम, 1995 - नियम 7

(i) अत्याचार के अपराध - नियम 7 साथ ही साथ धारा 9(1)(ख) की वैधता - क्या डी.एस.पी. की पंक्ति से नीचे के अधिकारी द्वारा अनुसंधान वैध है? केन्द्र सरकार के द्वारा विरचित नियम 7 में मामले का अनुसंधान करने की शक्तियां ऐसे पुलिस अधिकारी को प्रदान की गई हैं जो डी.एस.पी. की पंक्ति से नीचे का न हो - राज्य सरकार अधिनियम की धारा 9 के तहत अपनी शक्तियों का प्रयोग करते हुये डी.एस.पी. की पंक्ति से नीचे के अधिकारी को भी अनुसंधान करने की शक्तियां प्रदान कर सकती है।

(ii) डी.एस.पी. की पंक्ति के नीचे के अधिकारी द्वारा नियमों की अधिसूचना के पश्चात परंतु अधिसूचना के प्रकाशन की दिनांक से पूर्व किया गया अनुसंधान, क्या अनियमित या अवैध है? अभिनिर्धारित, न्यायालय ने ऐसे कोई निष्कर्ष नहीं दिये कि ऐसे अनुसंधान से अभियुक्त को प्रतिकूल प्रभाव कारित हुआ हो - डी.एस.पी. की पंक्ति से नीचे के अधिकारी द्वारा किया गया अनुसंधान दूषित नहीं।

State of Bihar & others etc. v. Anil Kumar & others etc.
Judgment dated 23.03.2017 passed by the Supreme Court in Civil Appeal No. 4397 of 2017, reported in 2017 (3) Crimes 211

Relevant extracts from the Judgment:

Having given a thoughtful consideration, to the contention advanced on behalf of the appellant-State of Bihar, we are of the view, that the legal position as has been declared by this Court, is in complete consonance and conformity with the postulation contained in Section 465 of the Code of Criminal Procedure. This being the position, we have no hesitation in holding, that the second determination rendered by the High Court, to the extent that the investigation carried out by a police officer below the rank of a Deputy Superintendent of Police, after 31.03.1995 and prior to the issuance of the notification dated 03.06.2002 (on 09.08.2008), would stand vitiated, has necessarily to be set aside. In our view, the above finding could have been returned only if, the concerned Court expressed its satisfaction, that the investigation carried out, by a subordinate police officer/official, who had no authority to investigate the matter, had caused prejudice to the accused, leading to miscarriage of justice. Since no such finding has been recorded, and since it has also not been established before this Court, that the accused had suffered such prejudice, it is not possible for us, to sustain the above conclusion, of the High Court. The same is accordingly hereby set aside.

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245. SERVICE LAW :

Departmental Enquiry – Criminal proceeding – Whether can be prosecuted simultaneously where facts and evidence involved are common? Held, pendency of criminal proceedings cannot be sole basis to stay disciplinary proceedings – Further, disciplinary proceedings cannot be stayed for indefinite period.

सेवा विधि

विभागीय जाँच - आपराधिक कार्यवाही - क्या एक साथ अभियोजन चलाया जा सकता है, जहाँ साक्ष्य एवं तथ्य समान हों? अभिनिर्धारित, अनुशासनात्मक कार्यवाही के स्थगन के लिये आपराधिक कार्यवाही का लंबन एकमात्र आधार नहीं हो सकता है - आगे, अनुशासनात्मक कार्यवाही अनिश्चित अवधि के लिये नहीं रोकी जा सकती।

State Bank of India and ors. v. Neelam Nag and another
Judgment dated 16.09.2016 passed by the Supreme Court in Civil Appeal No. 4715 of 2011, reported in (2016) 9 SCC 491

Relevant extracts from the Judgment:

This Court in ***Karnataka SRTC v. M.G.Vittal Rao, (2012) 1 SCC 442*** has summed up the same in the following words:

> "(i) There is no legal bar for both the proceedings to go on simultaneously.
>
> (ii) The only valid ground for claiming that the disciplinary proceedings may be stated would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts or law.
>
> (iii) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.
>
> (iv) Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common."

The recent decision relied by the appellant in the case of ***Stanzen Toyotetsu India (P) Ltd. v. Girish V., (2014) 3 SCC 636,*** has adverted to the relevant decisions ***Hindustan Petroleum Corpn. Ltd. v. Sarvesh Berry, (2005) 10 SCC 471, Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., (1999) 3 SCC 679, A.P. SRTC v. Mohd.Yousuf Miya, (1997) 2 SCC 699 and State of Rajasthan v. B.K. Meena, (1996) 6 SCC 417*** including the case of ***M.G.Vittal Rao*** (supra). After adverting to those decisions, in paragraph 16, this Court opined as under:

> "16. Suffice it to say that while there is no legal bar to the holding of the disciplinary proceedings and the criminal trial

simultaneously, stay of disciplinary proceedings may be an advisable course in cases where the criminal charge against the employee is grave and continuance of the disciplinary proceedings is likely to prejudice their defence before the criminal Court. Gravity of the charge is, however, not by itself enough to determine the question unless the charge involves complicated question of law and fact. The Court examining the question must also keep in mind that criminal trials get prolonged indefinitely especially where the number of accused arraigned for trial is large as is the case at hand and so are the number of witnesses cited by the prosecution. The Court, therefore, has to draw a balance between the need for a fair trial to the accused on the one hand and the competing demand for an expeditious conclusion of the ongoing disciplinary proceedings on the other. An early conclusion of the disciplinary proceedings has itself been seen by this Court to be in the interest of the employees."

The Court then went on to examine the facts of that case and observed in para 18 as follows:

"18. .....The charge-sheet, it is evident from the record, was filed on 20.8.2011. The Charges were framed on 20-12-2011. The trial Court has ever since then examined only three witnesses so far out of a total of 23 witnesses cited in the charge-sheet. Going by the pace at which the trial Court is examining the witnesses, it would take another five years before the trial may be concluded. The High Court has in the judgment under appeal given five months to the trial Court to conclude the trial. More than fifteen months has rolled by ever since that order, without the trial going anywhere near completion. The disciplinary proceedings cannot remain stayed for an indefinitely long period. Such inordinate delay is neither in the interest of the appellant Company nor the respondents who are under suspension and surviving on subsistence allowance....."

In paragraph 19, the Court proceeded to conclude thus:

"19. In the circumstances and taking into consideration all aspects mentioned above as also keeping in view the fact that all the three Courts below have exercised their discretion in favour of staying the ongoing disciplinary proceedings, we do not consider it fit to vacate the said order straightaway. Interests of justice would, in our opinion, be sufficiently served if we direct the Court dealing with the criminal charges against the respondents to conclude the proceedings as expeditiously as possible but in any case

> within a period of one year from the date of this order. We hope and trust that the trial Court will take effective steps to ensure that the witnesses are served, appear and are examined. The Court may for that purpose adjourn the case for no more than a fortnight every time an adjournment is necessary. We also expect the accused in the criminal case to cooperate with the trial Court for an early completion of the proceedings. We say so because experience has shown that the trials often linger on for a long time on account of non-availability of the defence lawyers to cross-examine the witnesses or on account of adjournments sought by them on the flimsiest of the grounds. All that needs to be avoided. In case, however, the trial is not completed within the period of one year from the date of this order, despite the steps which the trial Court has been directed to take the disciplinary proceedings initiated against the respondents shall be resumed and concluded by the inquiry officer concerned. The impugned orders shall in that case stand vacated upon expiry of the period of one year from the date of the order."

Reverting to the facts of the present case, indisputably, the alleged misconduct has been committed as far back as May 2006. The FIR was registered on 5th December, 2006 and the charge-sheet was filed in the said criminal case on 6th February, 2007. The contents of the charge-sheet are indicative of involvement of the respondent in the alleged offence. Resultantly, the criminal Court has framed charges against the respondent as far back as 12th June, 2007. The trial of that case, however, has not made any effective progress. Only 3 witnesses have been examined by the prosecution, out of 18 witnesses cited in the charge-sheet filed before the criminal Court. Indeed, listing of criminal case on 133 different dates after framing of charges is not solely attributable to the respondent. From the information made available by the Additional Superintendent of Police on affidavit, it does indicate that atleast 26 adjournments are directly attributable to the accused in the criminal case. That is not an insignificant fact. This is inspite of the direction given by the Division Bench on 28th June, 2010, to the concerned criminal Court to proceed with the trial on day-to-day basis. The progress of the criminal case since then, by no means, can be said to be satisfactory. The fact that the prosecution has named 18 witnesses does not mean that all the witnesses are material witness for substantiating the factum of involvement of the respondent in introducing the co-accused for opening a new bank account, to misplace the clearing instruments relating to various customers or for the payment released to the undeserving customer causing huge financial loss to the bank. The charge in the criminal case is for offences under Section 409, 34 of IPC, one of criminal breach of trust by a public servant.

In the peculiar facts of the present case, therefore, we accede to the contention of the appellants that the pendency of the criminal case against the respondent cannot be the sole basis to suspend the disciplinary proceedings initiated against the respondent for an indefinite period; and in larger public interest, the order as passed in ***Stanzen's case*** (supra) be followed even in the fact situation of the present case, to balance the equities.

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246. SPECIFIC RELIEF ACT, 1963 – Sections 14 and 41(e)
CIVIL PROCEDURE CODE, 1908 – Section 9
Whether civil court has jurisdiction to grant relief of reinstatement of an employee? Held, No.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धाराएं 14 और 41(ड)

सिविल प्रक्रिया संहिता, 1908 - धारा 9

क्या सिविल न्यायालय को किसी कर्मचारी को पुनस्र्थापित करने का अनुतोष प्रदान करने की अधिकारिता है? अभिनिर्धारित, नहीं।

Maharashtra State Cooperative Housing Finance Corporation Limited v. Prabhakar Sitaram Bhadange
Judgment dated 30.03.2017 passed by the Supreme Court in Civil Appeal No. 1488 of 2017, reported in (2017) 5 SCC 623

Relevant extracts from the judgment:

We may state at the outset that it was conceded at the Bar that if the employee of a Co-operative society is covered by the definition of 'workman' within the meaning of the Industrial Disputes Act, 1947 and claims a relief of reinstatement, in that event the Co-operative Court will not have jurisdiction to entertain such a claim, inasmuch as, relief of reinstatement cannot be granted by the Co-operative Court. Such a relief can only be granted by the Labour Court or the Industrial Tribunal constituted under the Industrial Disputes Act having regard to the fact that special and complete machinery for this purpose is provided under the provisions of the Industrial Disputes Act, the jurisdiction of the Civil Court stands ousted. This is so held by this Court consistently in a number of judgments. (***Uttar Pradesh Warehousing Corporation Ltd. v. Chandra Kiran Tyage, 1970 1 LLJ 32, Dr. S. Dutt v. University of Delhi, 1959 SCR 1236 and S.R. Tewari v. District Board, Agra, 1964 1 LLJ 1***)

These observations are made on the premise that even if it is accepted that the Co-operative Court established under the Act is a substitute of a Civil Court, the jurisdiction of the Civil Court to grant relief would not go beyond the jurisdiction which has been vested in the Civil Court. When admittedly the Civil Court does not have jurisdiction to grant any such relief and its jurisdiction is barred in view of the law laid down in the aforesaid judgment, as ***a fortiori***, the jurisdiction of the Co-operative Court shall also stand barred. We may also clarify one more aspect. Contract of personal services is not enforceable under the common law. Section 14, read with Section 41(e) of the Specific Relief Act, 1963, specifically bars the enforcement of such a contract. It is for this reason the principle of law

which is well established is that the Civil Court does not have the jurisdiction to grant relief of reinstatement as giving of such relief would amount to enforcing the contract of personal services. However, as laid down in the cases referred to above, and also in ***Executive Committee of Vaish Degree College, Shamli & Ors. v. Lakshmi Narain & Ors., (1976) 2 SCC 58***, there are three exceptions to the aforesaid rule where the contract of personal services can be enforced:

(a) in the case of a public servant who has been dismissed from service in contravention of Article 311 of the Constitution of India;
(b) in the case of an employee who could be reinstated in an industrial adjudication by the Labour Court or an Industrial Tribunal; and
(c) in the case of a statutory body, its employee could be reinstated when it has acted in breach of the mandatory obligations imposed by the statute.

Even when the employees falling under any of the aforesaid three categories raise dispute qua their termination, the Civil Court is not empowered to grant reinstatement and the remedy would be, in the first two categories, by way of writ petition under Article 226 of the Constitution or the Administrative Tribunal Act, as the case may be, and in the third category, it would be under the Industrial Disputes Act. An employee who does not fall in any of the aforesaid exceptions cannot claim reinstatement. His only remedy is to file a suit in the Civil Court seeking declaration that termination was wrongful and claim damages for such wrongful termination of services.

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247. SPECIFIC RELIEF ACT, 1963 – Sections 19(b) and 20

Form of passing decree in suit for specific performance of agreement against vendor wherein disputed property is sold to subsequent purchaser by vendor – Court shall direct specific performance of contract between vendor & prior transferee and shall also direct the subsequent transferee to join in the conveyance to pass the title to prior transferee – Further, refund of consideration to subsequent transferee may also be directed (Relied on *Lala Durga Prasad v. Deep Chand AIR 1954 SC 75*).

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धाराएं 19(ख) एवं 20

विक्रेता के विरूद्ध करार के विनिर्दिष्ट पालन हेतु वाद में जहां विक्रेता द्वारा विवादित सम्पत्ति पश्चातवर्ती क्रेता को बेची जा चुकी है, आज्ञप्ति का प्रारूप - न्यायालय निर्देश देगा कि संविदा का विनिर्दिष्ट पालन विक्रेता एवं पूर्व-अन्तरती के बीच किया जाये और यह भी निर्देश देगा कि सम्पत्ति में स्वत्व अन्तरित करने के लिये पश्चात्वर्ती क्रेता ऐसे हस्तांतरण पत्र में शामिल हो - यह भी कि, पश्चात्वर्ती क्रेता को प्रतिफल वापस किये जाने के बारे में भी निर्देश दिये जा सकेंगे। (लाला दुर्गा प्रसाद वि. दीपचन्द ए.आई.आर. 1954 एस.सी. 75 अवलंबित)

Nadiminti Suryanarayan Murthy (Dead) through L.Rs. v. Kothurthi Krishna Bhaskara Rao and others
Judgment dated 09.10.2017 passed by the Supreme Court in Civil Appeal No. 5517 of 2007, reported in (2017) 9 SCC 622

Relevant extracts from the Judgment:

The question arose before this Court in the case of ***Durga Prasad & anr. v. Deep Chand & ors., AIR 1954 SC 75*** as to what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a decree for specific performance of contract directing him to transfer the suit property to the plaintiff in term of contract.

The learned Judge-Vivian Bose, J. examined this issue and speaking for the Bench in his inimitable style of writing, held as under:

> "Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee."

The question, in this case, arises this way. The effect of the decree now is that the plaintiff is required to pay the balance sale consideration to defendant Nos.1 to 5 in terms of agreement dated 18.01.1983 and, in turn, defendant Nos.1 to 5 have to execute the sale deed of the suit house in plaintiff's favour and give possession of the suit house to the plaintiff. Since, in the meantime, defendant Nos.1 to 5 have sold the suit house to defendant No.6, vide sale deed dated 09.02.1983 for Rs.45,000/- such sale would not bind the plaintiff. Indeed the sale deed dated 09.02.1983 now has become bad in law and the transaction of sale between defendant Nos.1 to 5 and defendant No.6 has failed.

In such circumstances, the seller, i.e., (defendant Nos.1 to 5) has no right to retain the sale consideration of Rs.45,000/- which they received from defendant No.6 or any part thereof, as the case may be, and has to, therefore, refund the same to the buyer (defendant No.6). In other words, whatever amount which defendant Nos.1-5 received from defendant No.6 (whether Rs.45,000/- or any part thereof), the same has to be refunded by defendant Nos.1-5 to defendant No.6-(see Section 65 of the Contract Act). Nevertheless, defendant No.6 would join in execution of sale deed in plaintiff's favour along with defendant Nos.1-5 as held by this Court in ***Durga Prasad*** (supra) for conveying the valid title of the suit house to the plaintiff.

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248. SPECIFIC RELIEF ACT, 1963 – Section 34

EASEMENTS ACT, 1882 – Section 28

Suit by the plaintiff for declaration and injunction on the ground being "Mahant" or "Manager" of the temple – No specific pleadings and evidence to substantiate his claim on those grounds – Trial court granted decree on the basis of adverse possession which was not at all pleaded in the plaint – Held, suit was liable to be rejected at threshold – Court cannot travel beyond pleadings to grant any relief.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 34

सुखाचार अधिनियम, 1882 - धारा 28

वादी द्वारा मंदिर के ''महंत'' या ''प्रबंधक'' के आधार पर घोषणा एवं निषेधाज्ञा के लिये वाद - उक्त आधारों पर अपने दावे को साबित करने के लिये कोई विनिर्दिष्ट अभिवचन और साक्ष्य नहीं - विचारण न्यायालय ने विरोधी आधिपत्य के आधार पर आज्ञप्ति प्रदान की, जो कि वाद पत्र में अभिवचनित ही नहीं था - अभिनिर्धारित, वाद प्रारंभिक स्तर पर ही नामंजूर किये जाने योग्य था - न्यायालय किसी सहायता को प्रदान करने के लिये अभिवचनों से परे नहीं जा सकता है।

State of Uttarakhand and anr.v. Mandir Sri Laxman Sidh Maharaj

Judgment dated 12.09.2017 passed by the Supreme Court in Civil Appeal No. 4096 of 2008, reported in AIR 2017 SC 4472

Relevant extracts from the judgment:

To begin with, in our considered opinion, the plaint completely lacked of necessary material pleadings and particulars for claiming a declaration of title over the suit property (temple and land) and permanent injunction.

Secondly, the necessary material pleadings in such case ought to have been as to how and on what basis, the plaintiff claimed his ownership over such a famous heritage temple and the land surrounding the temple. The plaintiff, i.e., Sri Bharat Bhushan Bharti, who had styled himself as 'Mahant" and "Manager" of the temple, ought to have pleaded necessary details such as, whether he claimed the right of ownership through his forefathers and, if so,

who were they and whether they constructed the temple with their own resources and, if so, in which year?

Thirdly, whether the plaintiff's forefathers were allotted the land in question pursuant to any grant or patta or lease or license or any kind of written permission for constructing the temple on such land by the State and, if so, its details ought to have been pleaded.

Fourthly, whether the plaintiff's forefathers ensured compliances of such grant etc. if grant was made and whether the construction of the temple was for the family as a private temple or for the benefit of public at large as the case may. These facts also ought to have been pleaded.

Fifthly, how and in what manner, the present plaintiff claims to be or/and is related to the forefathers, who constructed the temple around 5000-6000 years back for tracing the plaintiff's right of inheritance through family pedigree. These facts also ought to have been pleaded.

Sixthly, when the plaintiff claimed a right of management of the temple and its property as "Mahant/Pujari" or "Manager", then he ought to have pleaded as to on what basis, he was claiming the post of "Mahant/Pujari" or "Manager" - was it through his forefathers or through any other channel and who, according to him, was the owner of the temple; and who nominated him as Mahant/Pujari; and whether it was by any written order; and, if so, on what terms and conditions and whether such person had any such authority to nominate the plaintiff or was it by way of any custom prevalent etc. These facts ought to have been pleaded with details.

Seventhly, whether the plaintiff as "owner" or "Mahant" or "Manager" ever asserted his right of ownership, Mahantship or Managership against public at large without there being any objection from anyone from public at large.

In our considered opinion, a case with which we are dealing here, the aforesaid material facts were necessarily to be pleaded to establish prima facie the legal right of the plaintiff in such type of suit property.

As mentioned above, since the plaint did not contain aforementioned pleadings, the suit was liable for rejection at the threshold. That apart, there was absolutely no evidence (documentary) adduced by the plaintiff to prove and establish his legal ownership rights over the temple and the land and nor did he adduce any documentary evidence to show his so-called "Mahantship" or "Managership", except making bald averments in the plaint running in four pages and that too with no material details set out above.

We are, therefore, really at a loss to understand as to how and on what basis such suit could be entertained much less decreed.

What was more a matter of serious concern that the Trial Court proceeded to decree the plaintiff's suit by conferring an ownership of the Temple/land with a right of easement over the use of well to drink water from the well on the basis of their "adverse possession" over the suit property.

By no stretch of imagination, in our view, such a declaration of ownership over the suit property and right of easement over a well could be granted by the Trial Court in plaintiff's favour because even the plaintiff did not claim title in the suit property on the strength of "adverse possession". Neither there were any pleadings nor any issue much less evidence to prove the adverse possession on land and for grant of any easement right over the well. The Courts below should have seen that no declaration of ownership rights over the suit property could be granted to the plaintiff on the strength of "adverse possession" (see ***Gurdwara Sahib v. Gram Panchayat Village Sirthala & anr., (2014) 1 SCC 669).*** The Courts below also should have seen that courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief. This principle is fully applied to the facts of this case against the plaintiff.

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249. SPECIFIC RELIEF ACT, 1963 – Section 34
FAMILY COURTS ACT, 1984 – Sections 7 and 8

(i) Suit for declaration of legal character, whether maintainable against legal representative? Held, third party plaintiff can file a suit or continue at behest of the legal representative of a dead plaintiff for declaration of legal character under Section 34 of the Act.

(ii) Civil Court's jurisdiction regarding declaratory suits for legal character *vis-a-vis* Sections 7 and 8 of the Family Courts Act – Section 8 (a) of the Family Courts Act does not bar the jurisdiction of the civil court for declaratory suit as to legal character of marriage filed under Section 34 of the Specific Relief Act.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 34

कुटुम्ब न्यायालय अधिनियम, 1984 - धाराएं 7 व 8

(i) क्या विधिक हैसियत की घोषणा हेतु वाद, विधिक प्रतिनिधि के विरूद्ध प्रचलन योग्य है? अभिनिर्धारित, धारा 34 के अधीन विधिक हैसियत की घोषणा हेतु वाद पर व्यक्ति वादी द्वारा फाइल किया जा सकता है अथवा मृत वादी के विधिक प्रतिनिधि की आज्ञा से वाद जारी रखा जा सकता है।

(ii) विधिक हैसियत की घोषणा के वाद में सिविल न्यायालय की क्षेत्राधिकारिता एवं कुटुम्ब न्यायालय अधिनियम की धारा 7 व 8 - कुटुम्ब न्यायालय अधिनियम की धारा 8 (क), विनिर्दिष्ट अनुतोष अधिनियम की धारा 34 के अधीन वैवाहिक हैसियत की विधिक घोषणा हेतु वाद में सिविल न्यायालय के क्षेत्राधिकार को वर्जित नहीं करती है।

Samar Kumar Roy (Dead) Through L.R. v. Jharna Bera
Judgment dated 05.09.2017 passed by the Supreme Court in Civil Appeal No. 11200 of 2017, reported in (2017) 9 SCC 591

Relevant extracts from the Judgment:

We find that the High Courts have uniformaly taken the view that a suit for declaration of a legal character filed under Section 34 can be filed by a third party plaintiff, or continued at the behest of the legal representative of a dead plaintiff. Thus, in ***Krishna Pal v. Ashok Kumar Pal, (1982) 2 Cal LJ 366*** a Single Judge of the Calcutta High Court was confronted with whether a suit filed in the Munsif's Court for a declaration that there was no marriage solemnized at all would be without jurisdiction. Section 19 of the Hindu Marriage Act requires all suits or petitions filed under the Act to be instituted before a District Court, whereas a suit for declaration as to a legal status is to be instituted in the Munsif's court. After referring to the prayer in that case, the learned Single Judge found:

> "As already stated, the plaintiff has chosen not to pray for any relief either by way of annulment of decree of nullity or by way of a decree for dissolution of the alleged marriage. The plaint filed by him cannot be considered to be a petition under the Hindu Marriage Act. The plaintiff has sought for certain declaration regarding the status of the parties and for consequential reliefs and the learned Munsif has jurisdiction under the Specific Relief Act to consider whether the plaintiff has made out any case for obtaining such discretionary declaratory and consequential reliefs. I add that the findings and observations made by the learned Munsif regarding the maintainability of the suit did not amount to determination of any other issue framed by him. I accordingly discharge this Rule without any orders as to costs. Let the records be sent down expeditiously."
>
> xx xx xx
>
> It is obvious that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs.There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act. Indeed, in ***Dhulabhai v. Madhya Pradesh, (1968) 3 SCR 662***, this Court had occasion to consider whether the civil court's jurisdiction was expressly or impliedly barred by statute. After referring to a number of judgments, this Court laid down 7 propositions of law, of which two are of relevance to the present case:
>
> > "…. Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.
>
> An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

On a reading of the aforesaid propositions, it is clear that the examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the Civil Court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. Also as was pointed out, an exclusion of the jurisdiction of the civil courts is not readily inferred. Given the line of judgments referred to by the High Courts, and given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either ***de jure*** or ***de facto***, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law.

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250. URBAN BUILDINGS (REGULATION OF LETTING, RENT AND EVICTION) ACT, 1972 (U.P.) – Section 21(1)(a)

Eviction on the basis of *bona fide* requirement – Legislation is pro tenant but Courts cannot forget duty towards landlord who is owner of the property – Also, landlord alone is the best judge as to usage of property – Court may also take note of subsequent events after filing of suit while determining *bona fide* requirement.

नगरीय भवन (किराएदारी, भाटक तथा निष्कासन का विनिमय)

अधिनियम, 1972 (उ.प्र.) - धारा 21(1)(क)

सद्भाविक आवश्यकता के आधार पर निष्कासन - विधान अभिधारी अभिमुखी है परंतु न्यायालय, भूस्वामी, जो संपत्ति का स्वामी है, के बारे में अपने कर्तव्य का विस्मृत नहीं कर सकते - पुनः, यह भी कि भूस्वामी संपत्ति के उपभोग के संबंध में सर्वोत्तम न्यायाधीश है - सद्भाविक आवश्यकता का विनिष्चय करते समय न्यायालय वाद संस्थित होने की परवर्ती परिस्थितियों की अवेक्षा भी कर सकते है।

Nidhi v. Ram Kripal Sharma (Dead) through L.Rs.
Judgment dated 07.02.2017 passed by the Supreme Court in Civil Appeal No. 1008 of 2017, reported in (2017) 5 SCC 640

Relevant extracts from the judgment:

The legislations made for dealing with such landlord-tenant disputes were pro-tenant as the court tends to bend towards the tenant in order to do justice with the tenant; but in the process of doing justice the Court cannot be over zealous and forget its duty towards the landlord also as ultimately, it is the landlord who owns the property and is entitled to possession of the same when he proves his bona fide beyond reasonable doubt as it is in the case before this Court.

First appellate court as well as the High Court observed that during the pendency of the appeal, the appellant got married, her husband a member of Indian Revenue Service (IRS) posted at Delhi, Mumbai and other places and this subsequent event has extinguished the personal requirement of the appellant. In the impugned judgment, the High Court referred to number of judgments ***Hasmat Rai and another v. Raghunath Prasad, (1981) 3 SCC 103 and Ramesh Kumar v. Kesho Ram, 1992 Supp (2) SCC 623*** and other judgments.

Ordinarily, rights of the parties stand crystallised on the date of institution of the suit. However, the court has power to take note of the subsequent events and mould the relief accordingly. Power of the court to take note of subsequent events came up for consideration in a number of decisions. In ***Om Prakash Gupta v. Ranbir B. Goyal, (2002) 2 SCC 256,*** this Court held as under:-

> "The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the

> opposite party is not taken by surprise. In ***Pasupuleti Venkateswarlu v. Motor & General Traders, (1975) 1 SCC 770*** this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed. ***Om Prakash Gupta*** case (supra) was referred with approval in ***Ram Kumar Barnwal v. Ram Lakhan (Dead), (2007) 5 SCC 660"***.

Though the court has the power to take note of the subsequent events, court has to consider the effect of subsequent development on the bona fide need of the landlord. For the purpose of coming to the conclusion on bona fide need of the landlord, comparative hardship to the parties will have to be taken into consideration. As discussed above, in the present case, the appellant got married during the pendency of the appeal and settled with her husband; still her requirement to accommodate her parents and grandparents continued. Appellant has established her bona fide requirement for accommodating her parents and grandparents in the suit premises. Merely because the appellant got married amidst the proceedings does not extinguish her claim for the relief of possession of the suit premises. In our view, the subsequent event, namely, marriage of appellant does not extinguish her requirement considering the comparative hardship, it is to be pointed out that the respondents have another business of sweet shop and thus, is not going to suffer if ordered to vacate the suit premises as they can shift the place of business to some other place without suffering any loss of occupation, whereas the parents of the appellant would be subjected to hardship as she has no other premises to accommodate her grandparents as well as her parents. While taking note of the subsequent events, the High Court has not considered the comparative hardship to the appellant and erred in declining the relief to the appellant.

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PART - II A

GUIDELINES REGARDING ISSUANCE OF NON-BAILABLE WARRANTS

The Apex Court in the case of ***Inder Mohan Goswami v. State of Uttaranchal, AIR 2008 SC 251,*** enumerated following guidelines regarding personal liberty of individual and issuance of non-bailable warrants by trial Courts:

(A) Personal liberty and the interest of the State

1. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law. (Para-49)
2. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

   (Para - 50)
3. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

   (Para-51)

(B) When non-bailable warrants should be issued

1. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

(a) It is reasonable to believe that the person will not voluntarily appear in court; or

(b) The police authorities are unable to find the person to serve him with a summon; or

(c) It is considered that the person could harm someone if not placed into custody immediately.

(Para- 52)

2. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

(Para- 53)

3. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

(Para- 54)

4. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

(Para- 55)

5. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.

(Para- 56)

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PART – III

CIRCULARS/NOTIFICATIONS
MEMO OF HIGH COURT OF MADHYA PRADESH REGARDING USAGE OF SOCIAL NETWORKING SITE, WHATS APP/FACE BOOK HIGH COURT OF MADHYA PRADESH : JABALPUR

MEMO

No.1513 Jabalpur, dated 23rd August, 2017

To,

All the District & Sessions Judges in the State.

Sub – Regarding usage of social networking site, WhatsApp/Facebook etc.

Reference – Memo No.996 dated 19th October, 2016.

On the subject and reference cited above, it has come to notice that the judicial officers are indulged in posting of objectionable, unwanted and obscene material on WhatsApp groups, which is not only dis-reputing the image of the Judiciary as a whole but is also maligning the image of the individual Judge indulged in sharing such posts/material. Such practice is prevalent, despite issuance of the above referred memo.

A Judicial Officer is not only required to behave alike a sober, seasoned and dignified person while presiding over the board but is also expected to maintain the same decency and decorum in public as well as in their personal life.

Therefore, as directed, in continuation of circular No.996 dated 19.10.2016, you are requested to direct all the subordinate judicial officers working under your control and supervision to maintain decency and decorum as and when they appear in public so as to maintain a sober, seasoned and dignified persona. In addition thereto, all the judicial officers shall not share any vulgar and obscene videos, photographs etc. on social networking sites, such as Facebook, WhatsApp. etc. If any judicial officer is found indulging in doing such acts, which are unbecoming of a Judicial Officer, the same would be viewed seriously and stern disciplinary action would be taken against them.

sd/-
(SATYENDRA KUMAR SINGH)
PRINCIPAL REGISTRAR (VIGILANCE)

AMENDMENT IN THE HIGH COURT OF MADHYA PRADESH FAMILY COURT RULES, 1988

After Rule 9(2), following shall be inserted.

Rule 9(3)—

(a) Whenever any fresh suit or proceedings is presented before a Family Court, the Family Court,after registration as per sub-rule (I), at the first instance, shall issue a notice without a copy of application or petition, as the case may be, to respondent to appear and explore the feasibility of amicable settlement. The notice shall mention the relief claimed only.

(b) The Family Court, on appearance of respondent, shall proceed with the procedure laid down under sub Rule 2 of Rule 6.

(c) If all efforts to arrive at amicable settlement do not yield positive results, the Family Court shall cause to be, delivered a copy of application or petition, as the case may be, to the other party at the expense of the applicant or petitioner.

(*Published in Madhya Pradesh Gazette dated 02.06.2017 Part 4(c))*

Judges ought to be more learned than witty, more reverent than plausible, and more advised thanconfident. Above all things, integrity is their portion and proper virtue.

– Francis Bacon

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PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

PREVENTION OF CRUELTY TO ANIMALS (CARE AND MAINTENANCE OF CASES PROPERTY ANIMAL) RULES, 2017

New Delhi, the 23rd May, 2017

G.S.R.495 (E).—Whereas the draft Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2016 were published, as required under sub-section (1) of section 38 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960), vide the Ministry of Environment, Forest and Climate Change notification number G.S.R. 35(E), dated the 16th January, 2017 in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i) dated, the 16th January, 2017 inviting objections and suggestions from all persons likely to be affected thereby before the expiry of thirty days from the date on which copies of the Gazette containing the said notification were made available to the public; And whereas the copies of the said Gazette were made available to the public on the 16th January, 2017;

And whereas objections and suggestions received from the public have been considered by the Central Government; Now, therefore, in exercise of the powers conferred by sub-sections (1) and (2) of section 38 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960), the Central Government hereby makes the following rules, namely: —

1. **Short title and commencement.—** (1) These rules may be called the Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017.
   (2) They shall come into force on the date of their publication in the Official Gazette.
2. **Definitions.—** In these rules, unless the context otherwise requires, —
   (a) "Act" means the Prevention of Cruelty to Animals Act, 1960 (59 of 1960);
   (b) "Animal Welfare Organisation" means an organisation recognised by the Animal Welfare Board of India and includes a Society for Prevention of Cruelty to Animals established in any district under the Prevention of Cruelty to Animals (Establishment and Regulation of Societies for Prevention of Cruelty to Animals) Rules, 2001 made under the Act;

(c) “cattle” means a bovine animal including bulls, cows, buffalos, steers, heifers and calves and includes camels;

(d) “Society for Prevention of Cruelty to Animals (SPCA)” means a SPCA established under the Prevention of Cruelty to Animals (Establishment and Regulation of Societies for Prevention of Cruelty to Animals) Rules, 2001 made under the Act;

(e) “State Board” means the State Animal Welfare Board constituted, in a State, by the State Government;

(f) “vehicle” means any vehicle (including a trailer of any description and the detachable body of a vehicle) constructed or adapted for use on a road;

(g) words and expressions used in these rules and not defined, but defined in the Act, shall have the meanings respectively assigned to them in the Act.

3. Custody of animals pending litigation.— When an animal has been seized under the provision of the Act or the rules made thereunder—

(a) the authority seizing the animal shall ensure health inspection, identification and marking such animal, through the jurisdictional veterinary officer deployed at Government Veterinary Hospital of the area and marking may be done by ear tagging or by chipping or by any less irksome advance technology but marking by hot branding, cold branding and other injurious marking shall be prohibited;

(b) the magistrate may direct the animal to be housed at an infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala during the pendency of the litigation.

4. Cost of care and keeping of animal pending litigation.—(1) The State Board shall within three months from the date of commencement of these rules and thereafter on the 1st day of April every year, specify the cost of transport, maintenance and treatment per day for every species of animal that is commonly seized in the State.

(2) The magistrate shall use the rates specified by the State Board as the minimum specified rates for transport, maintenance and treatment of the seized animals under sub-section (4) of section 35 of the Act.

(3) In case the animal under consideration is not on the rate sheet specified by the State Board, the magistrate shall fix the cost of transport, treatment and maintenance of the animal based on the input provided by the jurisdictional veterinary officer.

5. Execution of bond.— (1) The magistrate when handing over the custody of animal to an infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala shall determine an amount which is sufficient to cover all reasonable cost incurred and anticipated to be incurred for transport, maintenance and treatment of the animal based on the input provided by the jurisdictional veterinary officer and shall direct the accused and the owner to execute a bond of the determined value with sureties within three days and if the accused and owner do not execute the bond, the animal shall be forfeited to infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala.

(2) The infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala having the custody of the animal may draw on from the bond on a fortnightly basis the actual reasonable cost incurred in caring for the animal from the date it received custody till the date of final disposal of the animal.

(3) The magistrate shall call for the accused and the owner to execute additional bond with sureties once eighty percent of the initial bond amount has been exhausted as cost for caring for the animal.

(4) Where a vehicle has been involved in an offence, the magistrate shall direct that the vehicle be held as a security.

(5) In case of offence relating to transport of animals, the vehicle owner, consignor, consignee, transporter, agents and any other parties involved shall be jointly and severally liable for the cost of transport, treatment and care of animals.

(6) In cases where a body corporate owns the animal, the Chief Executive Officer, President or highest-ranking employee of the body corporate, the body corporate and the accused shall be jointly and severally liable for the cost of transport, treatment and care of the animal.

(7) In cases where the Government owns the animal, the Head of the Department and the accused shall be jointly and severally liable for the cost of transport, treatment and care of the animal.

(8) If the owner and the accused do not have the means to furnish the bond, the magistrate shall direct the local authority to undertake the costs involved and recover the same as arrears of land revenue.

6. Abandoned animal.— (1) In case where the investigating officer files a report that prima facie offence under the Act has been made out but he is unable to determine the accused or the owner of the animal, then the magistrate shall direct the local authority to undertake the costs involved and it shall be deemed that the owner has relinquished the ownership of the animal.

(2) The relinquishment of ownership shall have no effect on any criminal charges against the unknown offender or the owner.

7. Voluntary relinquishment.— Nothing in these rules shall be construed to prevent the voluntary and permanent relinquishment of any animal by the owner who is the accused, to infirmary, pinjarapole, SPCA, Animal Welfare Organisation or Gaushala in lieu of executing a bond but the voluntary and permanent relinquishment shall have no effect on any criminal charges against the accused or owner.

8. Status of animal upon disposal of litigation.— (1) If the accused is convicted, or pleads guilty, the magistrate shall deprive him of the ownership of animal and forfeit the seized animal to the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala already having custody for proper adoption or other disposition.

(2) If the accused is found not guilty of all charges, the seized animal shall be returned to the accused or owner of the animal and the unused portion of any bond amount executed shall be returned to the person who executed the bond.

9. Process of adoption or other disposition.— (1) The infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala having custody of the animal during the litigation or post litigation may euthanize the animal in its custody as per section 13 of the Act.

(2) Where the animal has been forfeited to the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala after conviction, abandonment or voluntary relinquishment, as the case may be, the animal shall be put up for adoption.

(3) A person who has been charged under the Act or any cattle preservation law made by the State Government shall be prohibited from adopting animals from the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala.

(4) The infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala prior to giving the animal for adoption shall,—

(a) in case of cattle, take an undertaking in form of an affidavit that the animals are adopted for agriculture purposes and not for slaughter, and verify that the person adopting the animal is an agriculturist by seeing the relevant revenue document;

(b) in case of draught and pack animals, take an undertaking in the form of an affidavit that the animals are adopted for draught and pack purposes and not for slaughter;

(c) in case of dogs and cats, ensure that the animal is spayed or neutered before adoption;

(d) keep a record of name and address of the person adopting the animal and procure an identity proof and address proof of the person adopting the animal;

(e) obtain from the person adopting the animal a declaration in the form of an affidavit that he shall not alienate the animal up to six months from the date of adoption and shall abide by the rules for transport framed under the Act or any other law for the time being in force and shall get regular veterinary checkup done for the animal.

(5) The person adopting the animal shall–

(a) not sell the animal;

(b) not abandon the animal;

(c) follow the State cattle protection and preservation law;

(d) not sacrifice the animal for any religious purpose;

(e) not sell the cattle to a person outside the State without permission as per the State cattle protection and preservation law.

(6) Where a cattle or a draught and pack animal has been adopted, before its removal from the premises of the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala, the proof of adoption shall

be issued in five copies, out of which first copy shall be handed over to person adopting the animal, second copy to infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala, as the case may be, third copy to tehsil office of the residence of person adopting the animal, fourth copy to the Chief Veterinary Officer, Office of District of person adopting the animal and last copy shall be sent to the court to be filed in the case file.

(7) The adoption of animal shall not create an irrevocable right to the person adopting the animal, and the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala, as the case may be, may from time to time inspect the animal and in case it finds that the person who has adopted the animal is not providing sufficient care or it has reasons to believe that an offence under the Act or any cattle preservation law is anticipated, then the infirmary, pinjrapole, SPCA, Animal Welfare Organisation or Gaushala, as the case may be, shall take possession of the animal.

(8) The person adopting the animal shall only be the lawful guardian of the animal and shall not have any rights bestowed generally to an owner of the animal, but shall have the duty to take all responsible measures to ensure the well being of such animal and to prevent infliction upon such animal of unnecessary pain or suffering.

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A mistake which makes you humble is much better than an achievement that makes you arrogant.

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मध्यप्रदेश उच्च न्यायालय, जबलपुर

मध्य प्रदेश राज्य न्यायिक अकादमी

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