150 YEARS OF CELEBRATING THE MAHATMA

MADHYA PRADESH STATE JUDICIAL ACADEMY
HIGH COURT OF M.P.
सत्यमेव जयते
Silver Jubilee Year 1994-2019

JOTI JOURNAL

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MADHYA PRADESH STATE JUDICIAL ACADEMY

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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EDITORIAL

Esteemed Readers,

Penning this editorial makes me exultant and resplendently proud to present this 145th issue of JOTI Journal along with my jotting. I am as old as this Academy in judicial service. It was a moment of elation when I joined as Director in this Silver Jubilee Year on 1st of August, 2019 with reminiscing the "first day" of Judicial Officers' Training Institute in 1994. This Academy has achieved a glorious stature in a quarter of a century and has carved for itself a niche amongst all the State Judicial Academies of the country. Thence, I realize this onerous responsibility and shall discharge my duties by following the way paved by my predecessors.

This year, we are celebrating the sesquicentennial birth anniversary of Rashtrapita Mahatma Gandhi. Ergo, it is only natural to visit Gandhian philosophy of justice. Gandhi, in his autobiography, said "Facts mean truth, and once we adhere to truth, the law comes to our aid naturally." Conformance of truth becomes even more vital in a profession if it holds the trust of the society to deliver unflinching justice. Needless, to say that the intent of compliance of truth should be integral to judicial education.

The training has always conveyed imparting of knowledge, both theoretical and practical. Academy is improvising the techniques to galvanize the moderate abilities and continuously making endeavour for improving the performance and efficiency of the judges of the District Judiciary to the maximum. Of course, the idea is not just in the ambition to climb to the higher echelons but justice to every person coming to the Court with strong belief.

In the months of August and September, 2019, two batches consisting of 92 and 110 Judges recently inducted in judicial service were imparted induction training at the Academy of their second and first phases, respectively. This gives us a chance to have a vibrant interaction with these emphatic youngsters and we see a promising future. These neophytes are endowed with brilliant legal acumen yet praxis of judiciary be passed on to them as a legacy from veterans. We hope to see the senior judges doing their part.

The Academy is also concerned with training to the in-service Judges. It is noteworthy that State Medico-legal Institute, Bhopal and State Forensic Laboratory, Sagar have featured as two pivotal institutes imparting trainings

regularly since 2012. During last couple of months,the Academy has organised short term courses at these two institutes. In the same period, Workshops on *Motor Accident Claim Cases & Key issues relating to Criminal Revision* and *Domestic Violence and offences against women* were also conducted. The Academy had also organised a sensitization programme in collaboration with Madhya Pradesh State Legal Services Authority & M.P. State Pollution Control Board at State Forest Research Institute, Jabalpur on a contemporary subject of environment that is *Sustainable Development without disorder to Gen-X* wherein 113 officials from various departments including Judges from the District Judiciary participated.

To expand the horizon of training from the buttoned up contemporary mode of class room training and also for ensuring optimum utilization of Information & Communication Technology in dissemination of knowledge, the Academy, has started live streaming of the lectures delivered in the Academy. This facility can be availed by all the Judges of the District Judiciary on their laptops/desktops as well as on mobile phones. Other forms of information technology will also be utilized with the tone of new generation.

I am pleased to mention that this in-house bi-monthly has become the part of Academy's fundamental role since its first publication in October, 1995 as it has been a guiding factor for the Judges of the District Judiciary which was appreciated by everyone. Although, the major part of JOTI Journal contains head-notes and abstracts from the judgments of Hon'ble Supreme Court and High Court of Madhya Pradesh and other States, but we at the Academy, feel that in order to fulfil the true purpose of a journal published by an institution imparting judicial education, it should include more articles and write-ups pertaining to law and justice and other relevant topics.

The process of improving judicial education and its conductivity will continue with consistent efforts and cooperation of all concerned to ensure better outputs and outcomes in this field.

Inputs and write-ups from the readers are always welcome.

We look forward for your kind comments and suggestions for improving our future issues.

Ramkumar Choubey
Director

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

Workshop on – Motor Accident Claim Cases & Key Issues relating to Criminal Revision
(03.08.2019 & 04.08.2019)

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

Sensitization Programme on – Sustainable Development without disorders to Gen-X (17.08.2019 & 18.08.2019)

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

Sensitization Programme on – Sustainable Development without disorder to Gen-X (17.08.2019 & 18.08.2019)

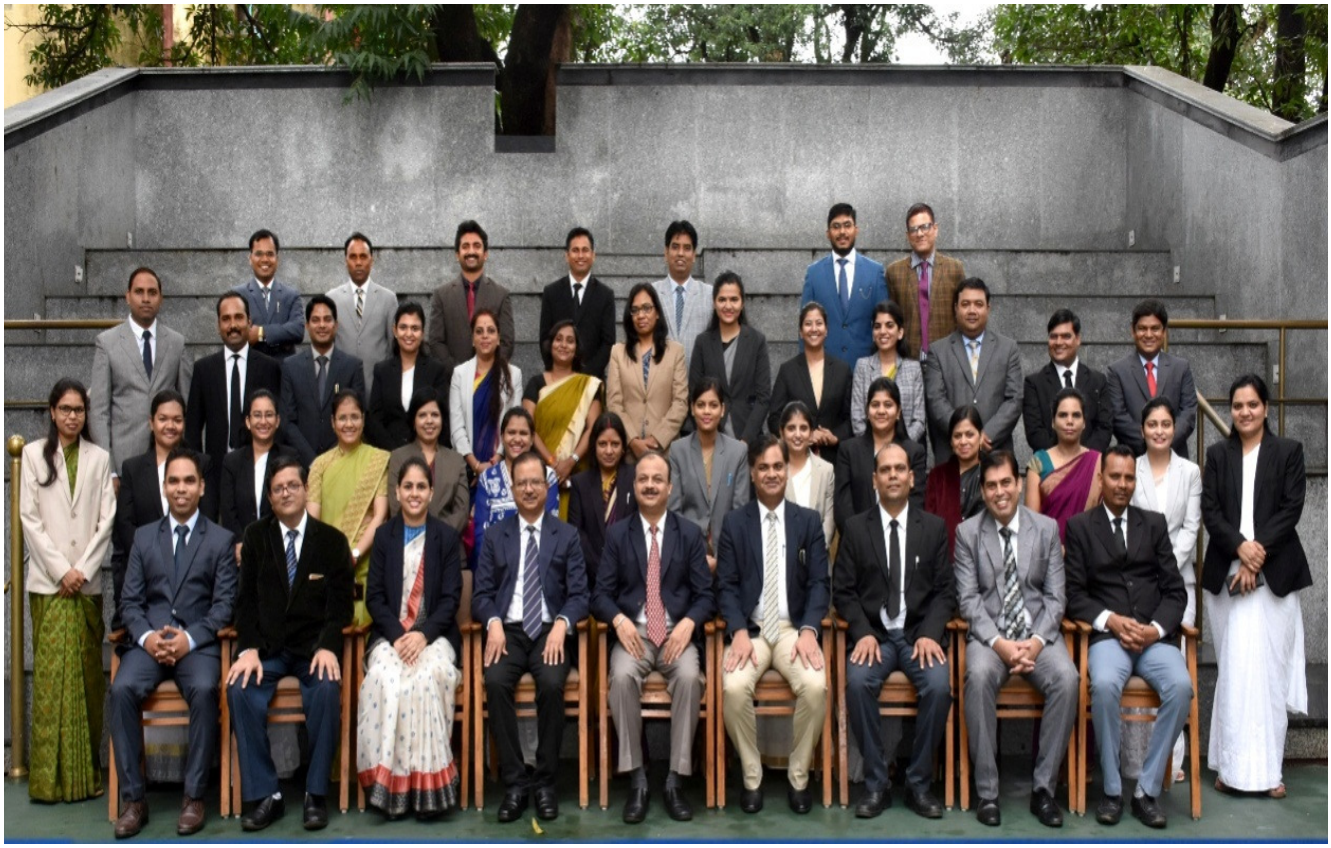
MADHYA PRADESH STATE JUDICIAL ACADEMY,
HIGH COURT OF M.P., JABALPUR

Specialized Educational Programme for Additional District & Sessions Judges
at State Medico Legal Institute, Bhopal (20th to 22nd August, 2019)

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

Specialized Education Programme for Additional District & Sessions Judges
at State Forensic Science Laboratory, Sagar
(20th to 22nd September, 2019)

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



Specialised Educational Programme on – Domestic Violence and Offences against Women (29.09.2019 & 30.09.2019)

PART - I

मोटर दुर्घटना दावा प्रकरणों में योगदायी (CONTRIBUTORY) एवं सम्मिश्र (COMPOSITE) संबंधी विधि

प्रदीप कुमार व्यास
जिला एवं सत्र न्यायाधीश, धार

मोटर दुर्घटना दावा प्रकरणों में अधिकरणों के समक्ष धारा 166 मोटर यान अधिनियम, 1988 के अधीन प्रस्तुत आवेदन पत्रों के निराकरण के लिए योगदायी एवं सम्मिश्र उपेक्षा के प्रश्न प्रायः उत्पन्न होते हैं। विभिन्न न्यायदृष्टांतों में प्रतिपादित विधि के प्रकाश में योगदायी एवं सम्मिश्र उपेक्षा को समझाने का प्रयास इस आलेख में किया जा रहा है।

1. उपेक्षा का अर्थ

उपेक्षा की कोई परिभाषा मोटर यान अधिनियम, 1988 में नहीं दी गई है। उपेक्षा से तात्पर्य है एक प्रज्ञावान व्यक्ति का किसी अन्य व्यक्ति के प्रति सावधानी रखने का जो विधिक कर्तव्य होता है उसे ध्यान में रखते हुए उस व्यक्ति को किस परिस्थिति में कैसे सावधानीपूर्वक कार्य करना चाहिये। यदि वैसा वाहन चालक द्वारा नहीं किया गया है तो यह कहा जा सकता है कि यह वाहन चालक की उपेक्षा थी।

न्यायदृष्टांत प्रमोद कुमार रसिक भाई जवेरी विरूद्ध के.के. टाक, (2002) 6 एससीसी 455, में यह प्रतिपादित किया गया कि उपेक्षा का सामान्य अर्थ सावधानी रखने के विधिक कर्तव्य को भंग करना कहा जा सकता है।

न्यायदृष्टांत न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड विरूद्ध कमलाम्मा, 2013 एसीजे 1941, केरल उच्च न्यायालय के मामले में यह प्रतिपादित किया गया कि जिन परिस्थितियों में दुष्कृतिकर्ता था, उन समान परिस्थितियों में एक प्रज्ञावान व्यक्ति को रखा जाए तो क्या वह वैसे ही कार्य करता जैसा दुष्कृतिकर्ता ने किया है। यह भी उपेक्षा को निर्धारित करने का एक मानक बतलाया गया है।

2. धारा 166 मोटर यान अधिनियम का आवेदन और उपेक्षा का बिन्दु

यदि आवेदक या मृतक के वैध प्रतिनिधि धारा 166, मोटर यान अधिनियम, 1988 के तहत दावा प्रस्तुत करते हैं तो उन्हें वाहन चालक की उपेक्षा प्रमाणित करना आवश्यक होता है और यदि वे इसमें सफल नहीं होते हैं तो आवेदन स्वीकार नहीं किया जा सकता है। इस संबंध में न्यायदृष्टांत ***सुरिंदर कुमार अरोरा विरूद्ध डॉ. मनोज बिसला, एआईआर 2012 एससी 1918, ओरिएंटल इंश्योरेंस कंपनी प्राइवेट लिमिटेड विरूद्ध मीना वारियाल, एआईआर 2007 एससी 1609, ओरिएंटल इंश्योरेंस कंपनी विरूद्ध प्रेमलता शुक्ला, 2007 (3) एमपीएचटी 225 (एससी),*** अवलोकनीय हैं।

3. प्रमाणभार का स्तर

अधिकरण के सामने यह प्रश्न उत्पन्न होता है कि उपेक्षा का प्रमाणभार किस स्तर का होना चाहिए? अधिकरण को कौन सी प्रक्रिया अपनाना चाहिए?

न्यायदृष्टांत ***यूनियन आॅफ इंडिया विरूद्ध टी.आर. वर्मा, एआईआर 1957 एससी 882,*** में यह प्रतिपादित किया गया है कि अधिकरणों में जो जांच संचालित की जाती है उनमें साक्ष्य अधिनियम लागू नहीं होता है, यद्यपि ये जांच न्यायिक प्रकृति की होती है। विधि की मंशा यह है कि अधिकरण ऐसी जांच में प्राकृतिक न्याय के सिद्धांतों का पालन करे जिनके अनुसार पक्षकारों को साक्ष्य प्रस्तुत करने का अवसर देना, विपक्षी की उपस्थिति में साक्ष्य लेना, विपक्षी को प्रतिपरीक्षण का अवसर देना आदि शामिल हैं। यदि अधिकरणों ने इस प्रकार प्राकृतिक न्याय के सिद्धांतों का पालन किया है तो यह पर्याप्त होता है।

न्यायदृष्टांत ***रामस्वरूप शर्मा विरूद्ध राममूर्ति, 2004 एसीजे 1697 एमपी,*** के अनुसार दावा अधिकरण व्यवहार न्यायालय नहीं है। दावा प्रकरणों में साक्ष्य के कठोर नियम लागू नहीं होते हैं। अधिकरणों को व्यवहार न्यायालयों से विस्तृत शक्तियां, तथ्यों और विवादों को सुनिश्चित करने के लिए होती हैं।

क्लेम प्रकरणों में उपेक्षा को अधिसंभावनाओं की प्रबलता के स्तर तक प्रमाणित करना होता है। दुर्घटना का कठोर प्रमाण देना आवेदक के लिये संभव नहीं होता है। इस संबंध में न्यायदृष्टांत ***बिमला देवी विरूद्ध हिमाचल रोड कॅारपोरेशन, एआईआर 2009 एससी 2819,*** अवलोकनीय है।

न्यायदृष्टांत ***सुनीता विरूद्ध राजस्थान स्टेट रोड ट्रांसपोर्ट कॅारपोरेशन, एआईआर 2019 एससी 994,*** के अनुसार मोटर दुर्घटना दावा प्रकरणों में प्रमाणभार अधिसंभावनाओं की प्रबलता के स्तर का होना चाहिए। युक्तियुक्त संदेह से परे का स्तर लागू नहीं होता है। केवल पिछली सीट पर बैठे व्यक्ति की परीक्षा न कराना दावा प्रकरण के लिए घातक नहीं होता है। यदि साक्षी की उपस्थिति घटना स्थल पर साबित हो जाती है तो वह वाहन की पिछली सीट पर बैठे व्यक्ति की उम्र बतलाने में असफल रहा, इस आधार पर उसकी सम्पूर्ण साक्ष्य को अस्वीकार नहीं किया जा सकता है। इस मामले में यह भी प्रतिपादित किया गया कि आपराधिक प्रकरण की साक्ष्य सूची में नामित न किए गए व्यक्ति को साक्ष्य के रूप में पेश करने में कोई रोक नहीं है। केवल विपक्षी को प्रतिपरीक्षण का अवसर देना चाहिए।

न्यायदृष्टांत ***मंगलाराम विरूद्ध ओरिएंटल इंश्योरेंस कंपनी लिमिटेड, एआईआर 2018 एससी 1900,*** में यह प्रतिपादित किया गया है कि मोटर दुर्घटना दावा प्रकरणों में अभिवचनों के कठोर नियम लागू नहीं होते हैं। साक्ष्य का मूल्यांकन अधिसंभावनाओं की प्रबलता की कसौटी पर किया जाना चाहिए।

इस मामले में यह भी प्रतिपादित किया गया कि नक्शा मौका दुर्घटना के पश्चात् की मोटर साईकिल की स्थिति को दर्शाता है न कि दुर्घटना के समय की स्थिति को। वह स्थान जहां दुर्घटना के बाद वाहन पड़ा हुआ मिला था यह मानने का आधार नहीं हो सकता है कि वाहन दुर्घटना के समय कथित वाहन सड़क की गलत दिशा में चलाया जा रहा था।

न्यायदृष्टांत ***परमेश्वरी विरूद्ध अमरचंद, एआईआर 2011 एससी 1504,*** के अनुसार दांडिक मामलों की तरह क्लेम प्रकरणों में कठोर प्रमाण का नियम लागू नहीं होता है। एक गवाह ने वाहन दुर्घटना की शिकायत दर्ज नहीं करवाई, मात्र इस आधार पर उस पर अविश्वास नहीं किया जा सकता। पुलिस अधीक्षक के कार्यालय में शिकायत दर्ज की गई थी, इस पर कोई विवाद नहीं था लेकिन उस कार्यालय से कोई व्यक्ति शिकायत को प्रमाणित करने नहीं आया था। मात्र इस आधार पर आवेदक के मामले पर अविश्वास नहीं किया जा सकता है। क्लेम प्रकरणों में संवेदनशील रुख अपनाने पर बल दिया गया।

न्यायदृष्टांत ***एन.के. ब्रदर्स प्राईवेट लिमिटेड, विरूद्ध एम. करुमणिअम्माल, एआईआर 1980 एससी 1354,*** में अधिकरणों का यह कर्तव्य बताया गया है कि वे इस बात की विशेष सावधानी रखें कि निर्दोष आहतों को भटकना न पड़े और चालक और मालिक उनके दायित्व से मात्र इस कारण बच न निकलें कि कुछ संदेह उत्पन्न हुआ है। ऐसे तथ्यों और परिस्थितियां, जो युक्तियुक्त हों, उनके आधार पर अभिमत बनाना चाहिए। न्यायालय को तकनीकियों में नहीं पड़ना चाहिए।

न्यायदृष्टांत ***महेन्द्र कुमार विरूद्ध रामस्वरूप, 2011 (3) एमपीएलजे 310,*** में यह प्रतिपादित किया गया है कि मोटर दुर्घटना दावा प्रकरणों में साक्ष्य अधिनियम और सिविल प्रक्रिया संहिता के प्रावधान कठोरता से लागू नहीं होते हैं। इस मामले में आवेदक को टिबिया फिबूला हड्डी का अस्थिभंग हुआ था और वह डॉक्टर का कथन नहीं करवा पाया था। यह मत दिया गया कि उपलब्ध साक्ष्य पर विचार करके निष्कर्ष देना चाहिए। साक्ष्य अधिनियम और सिविल प्रक्रिया संहिता को कठोरता से लागू करके आहतगण के लिए अधिकरण के दरवाजे बंद नहीं करना चाहिए।

न्यायदृष्टांत ***मोहम्मद नासिर विरूद्ध अंगद प्रसाद, 2003 (4) एमपीएलजे 95 (डीबी)***, में यह प्रतिपादित किया गया है कि मोटर दुर्घटना के मामलों में युक्तियुक्त संदेह से परे के प्रमाणभार का स्तर लागू नहीं होता है बल्कि अधिसंभावनाओं की प्रबलता का स्तर लागू होता है।

माननीय मध्यप्रदेश उच्च न्यायालय ने न्यायदृष्टांत ***मनफूल विरूद्ध मेहमूद, 2003 (4) एमपीएलजे 174 (डीबी),*** में यह प्रतिपादित किया है कि मोटर दुर्घटना दावा प्रकरणों में साक्ष्य के कठोर नियम लागू नहीं होते हैं। आवेदक को केवल यह प्रमाणित करना होता है कि एक वाहन के उपयोग से दुर्घटना हुई, जिसमें या तो किसी की मृत्यु कारित हुई या किसी को उपहति कारित हुई। यदि आवेदक इतना प्रमाणित कर देता है तो यह पर्याप्त है कि इन मामलों में यदि कुछ संदेह भी है तो भी उसका लाभ आवेदक को दिया जाना चाहिए।

न्यायदृष्टांत ***बसंत कुमार विरूद्ध छत्रपाल सिंह, 2003 एसीजे 369 एमपी (डीबी),*** के मामले में मृतक चालक की विधवा को वाहन मालिक द्वारा बताया गया था कि ट्रक नंबर एमबीएन 1637 के चालक ने उसका ट्रक तेजी और लापरवाही से चलाया था। वह घटना स्थल पर नहीं थी। चालक के विरूद्ध धारा 304ए भा.दं.सं. का अपराध पंजीबद्ध हुआ था। धारा 158(6), मोटर यान अधिनियम, 1988 के तहत थाना प्रभारी ने दावा अधिकरण को दुर्घटना की सूचना दी थी। इन परिस्थितियों में ट्रक एमबीएन 1637 का दुर्घटना में लिप्त होने का निष्कर्ष अभिलिखित किया जा सकता है, ऐसा प्रतिपादित किया गया।

न्यायदृष्टांत ***नेशनल इंश्योरेंस कंपनी लिमिटेड विरूद्ध कमला, 2003 (1) एमपीएचटी 406 डीबी,*** में दुर्घटना में मिनी बस के 11 व्यक्ति दुर्घटना स्थल पर ही मर गए, 6 घायल हो गए और मिनी बस चकनाचूर हो गई। चालक की भी मृत्यु हो गई। प्रतिपादित किया गया कि ये तथ्य अपने आप में बोलते हैं और एक संकेत देते हैं कि टैंकर चालक, टैंकर को तेजी और लापरवाही से चला रहा था और वाहन उसके नियंत्रण में नहीं था। ऐसे में "रेस ईप्सा लोकीटर" का सिद्धांत पूरी तरह आकर्षित होता है।

इस मामले में न्यायदृष्टांत ***पुष्पा विरूद्ध रंजीत जी. एंड पी. कंपनी, एआईआर 1977 एससी 1735,*** को विचार में लिया गया, जिस मामले में यह कहा गया कि सामान्यतः वादी को उपेक्षा प्रमाणित करनी होती है लेकिन कुछ मामलों में वादी को इसमें विचार योग्य असुविधा या हार्डशिप होती है क्योंकि दुर्घटना का सही कारण उसके ज्ञान में नहीं होता है बल्कि यह पूरी तरह से प्रतिवादी के ज्ञान में होता है जिसने दुर्घटना कारित की। ऐसी असुविधा से बचने के लिए "रेस ईप्सा लोकीटर" अर्थात् दुर्घटना स्वयं बोलती है, का सिद्धांत लागू किया जाता है। कुछ ऐसे मामले होते हैं जिसमें तथ्यों से ही उपेक्षा स्पष्ट हो जाती है वहां ये सिद्धांत लागू होता है।

इस प्रकार विधिक स्थिति यह स्पष्ट होती है कि मोटर दुर्घटना दावा प्रकरणों में साक्ष्य और प्रक्रिया के कठोर नियम लागू नहीं होते हैं। अधिसंभावनाओं की प्रबलता के स्तर तक उपेक्षा प्रमाणित करना होती है। उचित मामलों में "रेस ईप्सा लोकीटर (***Res ipsa Loquitur***)" या परिस्थितियां स्वयं बोलती हैं का सिद्धांत भी लागू किया जा सकता है।

4. क्या शपथ-पत्र पर साक्ष्य ली जा सकती है?

कई बार मोटर दुर्घटना दावा अधिकरणों के सामने यह प्रश्न उत्पन्न होता है कि क्या साक्ष्य शपथ पत्र पर ली जा सकती है?

कुछ विद्वानों का मत है कि म. प्र. मोटर यान नियम, 1994 के नियम 240 के अनुसार आदेश 18 सीपीसी के प्रावधान दावा अधिकरण पर लागू नहीं होते हैं। इस कारण शपथ-पत्र पर साक्ष्य नहीं ली जा सकती है और नियम 235 के अनुसार साक्षी की परीक्षा का ज्ञापन तैयार करना होता है जो शपथ-पत्र में संभव नहीं है।

लेखक के मत में साक्षी की परीक्षा का ज्ञापन तैयार करने की प्रथा लगभग समाप्त हो चुकी है। साक्ष्य शब्द सह शब्द ही लिखा जाता है। मोटर दुर्घटना दावा प्रकरण का त्वरित निराकरण अपेक्षित है। ऐसे में यदि शपथ-पत्र पर साक्ष्य ली जाती है तो इससे समय की बचत होगी।

इसके अतिरिक्त म. प्र. मोटर यान नियम, 1994 के हैं जबकि आदेश 18 सीपीसी में शपथ-पत्र पर साक्ष्य लेने का संशोधन इसके बाद 01.07.2002 से प्रभाव में आया है जो केन्द्र सरकार का कानून है और अधिभावी प्रभाव रखता है। अतः, इन मामलों में शपथ-पत्र पर साक्ष्य ली जा सकती है।

न्यायदृष्टांत ***नेशनल इंश्योरेंस कंपनी लिमिटेड विरूद्ध नवल, किशोर रोड लखनऊ विरूद्ध श्रीमती पुष्पा देवी, 2017 (1) आरसीआर 815*** या ***रिसेन्ट सिविल रिपोर्टर फस्ट अपील फ्रॉम आर्डर नंबर 545/11 निर्णय दिनांक 27.10.2016*** इलाहाबाद उच्च न्यायालय पूर्णपीठ, के अनुसार क्लेम प्रकरण में शपथ-पत्र पर साक्ष्य ली जा सकती है।

न्यायदृष्टांत ***कपूरी देवी विरूद्ध वीधाराम कोली, 2007 (1) जेएलजे 250 (डीबी),*** के मामले में क्लेम प्रकरण में आदेश 18 नियम 4 सीपीसी के तहत साक्षी का शपथ-पत्र प्रस्तुत हुआ था लेकिन साक्षी को प्रतिपरीक्षण के लिए उपस्थित नहीं रखा गया था, इस कारण शपथ-पत्र को स्वीकार न करने बावत् विधि प्रतिपादित की गई थी। इस मामले में यह नहीं कहा गया था कि शपथ-पत्र पर साक्ष्य नहीं ली जा सकती है।

5. वाहन चालक का परीक्षण न करवाने का प्रभाव

मामलों में वाहन चालक का परीक्षण नहीं करवाया जाता है जबकि वाहन चालक दुर्घटना का सबसे निकट का और सर्वश्रेष्ठ साक्षी होता है जो यह स्पष्ट कर सकता है कि दुर्घटना किन परिस्थितियों और किसकी लापरवाही का परिणाम थी। यदि चालक ऐसा स्पष्टीकरण नहीं देता है तो यह उपधारित किया जा सकता है कि दुर्घटना वाहन चालक की उपेक्षा का परिणाम थी। इस संबंध में न्यायदृष्टांत ***मध्यप्रदेश राज्य सड़क परिवहन विभाग विरूद्ध वैजयंती, 1995 एसीजे 560 (एमपी) डीबी, चंदा देवी विरूद्ध राजेन्द्र सिंह, 2004 एसीजे 634 (एमपी) डीबी, रानी हेमंत कुमारी विरूद्ध न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड, 1974 एसीजे 284 (एमपी), के.के. जैन विरूद्ध मंसूर अनवर, 1990 एसीजे 219 (एमपी), गायत्री बाई विरूद्ध नरेन्द्र, 1999 (2) एमपीडब्ल्यूएन 141 (डीबी), राजेन्द्र सिंह विरूद्ध शीतल दास, 1992 एसीजे 130 एमपी, पुष्पा बाई विरूद्ध मेसर्स रंजीत जीनिंग एंड प्रेसिंग कंपनी प्राईवेट लिमिटेड, (1977) 2 एससीसी 745,*** अवलोकनीय हैं।

अतः यदि मोटर दुर्घटना दावा प्रकरणों में अनावेदक पक्ष उल्लंघनकारी वाहन के चालक का परीक्षण नहीं करवाता है तब ये उपधारणा की जा सकती है कि दुर्घटना वाहन चालक की उपेक्षा का परिणाम थी।

6. दांडिक प्रकरण के दस्तावेजों का महत्व

मोटर दुर्घटना दावा प्रकरणों में आवेदक दांडिक प्रकरणों के दस्तावेजों की प्रमाणित प्रतिलिपियां प्रस्तुत करते हैं। माननीय मध्यप्रदेश उच्च न्यायालय ने न्यायदृष्टांत ***अनिल तिवारी विरूद्ध साहिब सिंह, 2000 (1) एमपीएलजे 59,*** में यह प्रतिपादित किया है कि मोटर दुर्घटना दावा प्रकरणों में दांडिक प्रकरण के दस्तावेजों को कठोरता से प्रमाण करने की आवश्यकता नहीं होती है।

धारा 161 दं.प्र.सं. के तहत लेखबद्ध कथन, जो विधि अनुसार प्रमाणित नहीं हुए हों, वे ग्राह्य नहीं होते हैं। न्यायदृष्टांत ***नरपाल विरूद्ध कान्ता, 1993 एसीजे 175, पंजाब*** एवं हरियाणा उच्च न्यायालय अवलोकनीय है।

आवेदक के लिए यह आवश्यक नहीं है कि वह दांडिक प्रकरण के दस्तावेजों की प्रमाणित प्रतिलिपियां प्रस्तुत करें क्योंकि ऐसे दस्तावेज तात्विक साक्ष्य नहीं होते हैं बल्कि केवल पुष्टिकारक साक्ष्य होते हैं। ऐसे दस्तावेज पेश न करने के आधार पर क्लेम प्रकरण खारिज करना उचित नहीं माना गया। न्यायदृष्टांत ***लालू राम विरूद्ध रामबाबू, (2004) एक्सीडेंट एवं कम्पेन्सेशन केसेस (एसीसी) 271 (डीबी) (एमपी),*** अवलोकनीय है।

लेखक के मत में उपेक्षा के वाद प्रश्न पर विचार करते समय इन दस्तावेजों को पुष्टिकारक साक्ष्य के रूप में प्रयोग किया जा सकता है।

7. धारा 133, मोटर यान अधिनियम, 1988 के तहत दी गई जानकारी

इन मामलों में वाहन मालिक द्वारा अनुसंधान अधिकारी को धारा 133, मोटर यान अधिनियम के तहत दी गई यह जानकारी प्रस्तुत की जाती है कि दुर्घटना के समय उल्लंघनकारी वाहन कौन चला रहा था। ऐसी जानकारी को भी आवेदकगण के पक्ष में एक महत्वपूर्ण परिस्थिति माना जा सकता है।

8. दांडिक प्रकरण में अभिलिखित साक्ष्य व निर्णय का प्रभाव

दांडिक प्रकरण में वाहन चालक का दोषमुक्त हो जाना क्लेम प्रकरणों पर कोई प्रतिकूल प्रभाव नहीं डालता है क्योंकि क्लेम प्रकरणों में साक्ष्य से आवेदक को यह स्थापित करना होता है कि दुर्घटना वाहन चालक की उपेक्षा से हुई है। क्लेम प्रकरणों में युक्तियुक्त संदेह से परे स्तर का प्रमाणभार आवश्यक नहीं होता है बल्कि अधिसंभावनाओं की प्रबलता देखनी होती है।

दांडिक प्रकरण में हुई दोषमुक्ति, अधिकरणों पर बंधनकारी नहीं होती है।

न्यायदृष्टांत ***रज्जू यादव विरूद्ध इमरत सिंह, 2002 (2) एमपीडब्ल्यूएन 24, धर्मवीर सिंह विरूद्ध रघुवीर, 1998 एसीजे 1292 एमपी, पी. वारालक्ष्मी विरूद्ध कर्नाटक स्टेट रोड ट्रांसपोर्ट कॉरपोरेशन, 2003 एसीजे 1952 (डीबी),*** अवलोकनीय है।

दांडिक प्रकरणों में अभिलिखित साक्ष्य और उसके आधार पर निकाले गए निष्कर्ष क्लेम प्रकरणों में उपयोग में नहीं लिए जा सकते हैं। ऐसी साक्ष्य क्लेम प्रकरणों में अग्राह्य होती है। न्यायदृष्टांत ***महिला धनबंती विरूद्ध कुलवंत महेन्द्र सिंह, एआईआर 1994 एमपी 44 एवं लक्ष्मी गोंटिया विरूद्ध नंदलाल, 1999 एसीजे 241 (एमपी) (डीबी),*** अवलोकनीय हैं।

दांडिक प्रकरण में यदि चालक द्वारा अपराध की संस्वीकृति या Confesssion किया जाता है तब ऐसी संस्वीकृति धारा 17 सहपठित धारा 21, भारतीय साक्ष्य अधिनियम, 1872 के तहत पुष्टिकारक साक्ष्य के रूप में प्रयोग में ली जा सकती है।

न्यायदृष्टांत ***धनंजय प्रसाद सूर्यवंशी विरूद्ध राजेन्द्र प्रसाद शर्मा, 2006 एसीजे 2829 (डीबी),*** छत्तीसगढ़ उच्च न्यायालय, में यह प्रतिपादित किया गया है कि यदि चालक दंड न्यायालय के समक्ष यह स्वीकार करता है कि उसने वाहन उतावलेपन और उपेक्षा से चलाया था तो उसकी यह स्वीकारोक्ति धारा 18, भारतीय साक्ष्य अधिनियम के तहत क्लेम प्रकरणों में तात्विक साक्ष्य के रूप में स्वीकार योग्य है। इस मामले में यह भी कहा गया कि दांडिक मामले की दोषसिद्धि व्यवहार मामले में उपेक्षा की प्रथम दृष्ट्या साक्ष्य के रूप में ग्राह्य होती है।

9. प्रथम सूचना के बारे में

कभी-कभी अधिकरणों के सामने विलंबित प्रथम सूचना के मामले भी आते हैं।

न्यायदृष्टांत ***रवि विरूद्ध बद्री नारायण, एआईआर 2011 एससी 1226,*** में यह प्रतिपादित किया गया है कि विलंब से प्रथम सूचना दर्ज करवाना आवेदक के क्लेम प्रकरण को खारिज करने का

एकमात्र आधार नहीं हो सकता। भारतीय परिस्थितियों को देखते हुए एक आम आदमी से यह अपेक्षा नहीं कर सकते कि वह दुर्घटना के ठीक पश्चात् पुलिस थाने की ओर तेजी से जायेगा। मानवीय स्वभाव और पारिवारिक दायित्व व्यक्ति के दिमाग में रहते हैं और सर्वप्रथम वह आहत का उपचार कराने पर ध्यान देता है बजाय पुलिस थाने जाने के। ऐसी परिस्थितियों में व्यक्ति से अनुचित विलंब के बिना यांत्रिक तरीके से प्रथम सूचना दर्ज कराने की अपेक्षा नहीं की जा सकती। अतः, विलंबित प्रथम सूचना के आधार पर आहत के साथ न्याय से इंकार नहीं किया जा सकता। न्यायालय को विलंब के मामलों में साक्ष्य को सावधानी से देखना चाहिए। यदि न्यायालय पाती है कि कहानी गढ़ने के कोई संकेत नहीं हैं और किसी निर्दोष को घटना से जोड़ने की कोई संभावना नहीं है तब, केवल विलंब के आधार पर क्लेम खारिज नहीं करना चाहिए।

कभी-कभी प्रथम सूचना में वाहन का नंबर अंकित नहीं होता है।

न्यायदृष्टांत ***कुसुमलता विरूद्ध सतबीर, एआईआर 2011 एससी 1234,*** के अनुसार तेजी से आ रहे वाहन ने आहत को पीछे से टक्कर मारी। वह गंभीर रूप से घायल हुआ और उसे तत्काल चिकित्सा सहायता की आवश्यकता थी। आहत के भाई द्वारा उल्लंघनकारी वाहन का नंबर नोट न कर पाना ऐसे में स्वाभाविक था क्योंकि वह ऐसे तनाव में नंबर नोट करना भूल गया और इसी कारण प्रथम सूचना में वाहन के नंबर का उल्लेख नहीं आया। मात्र प्रथम सूचना में वाहन का नंबर नहीं आने के आधार पर दावे पर अविष्वास नहीं किया जाना चाहिए।

अधिकरणों को यह भी ध्यान रखना चाहिए कि प्रथम सूचना प्रतिवेदन एक तात्विक साक्ष्य नहीं है। इस संबंध में न्यायदृष्टांत ***शब्बीर अहमद विरूद्ध म. प्र. राज्य परिवहन निगम, 1984 एसीजे 525,*** अवलोकनीय है।

पुलिस में रिपोर्ट नहीं किया जाना आवेदक के मामले में प्रतिकूल अनुमान निकालने का आधार नहीं हो सकता है। इस संबंध में न्यायदृष्टांत ***ब्रिस्टू राम विरूद्ध अनंत राम, 1990 एसीजे 333,*** अवलोकनीय है।

धारा 166, मोटर यान अधिनियम के तहत क्लेम आवेदन प्रस्तुत करने के लिए प्रथम सूचना दर्ज करवाना अनिवार्य शर्त नहीं है। इस संबंध में न्यायदृष्टांत ***यशवंत सिंह विरूद्ध शिवप्रसाद, 2005 (4) एमपीएलजे 531, आर.पी. गौतम विरूद्ध आर.एन.एम. सिंह, एआईआर 2008 एमपी 68,*** अवलोकनीय हैं।

प्रथम सूचना प्रतिवेदन में दर्ज करवाये गए तथ्य सामान्यतः साक्ष्य में ग्राह्य नहीं होते हैं लेकिन प्रथम सूचना प्रतिवेदन में लिखवाए गए तथ्य जो क्लेम आवेदन का भी भाग हैं उन्हें देखा जा सकता हैं। इस संबंध में न्यायदृष्टांत ***नेशनल इंश्योरेंस कंपनी लिमिटेड विरूद्ध रत्तानी, एआईआर 2009 एससी 1499,*** अवलोकनीय है।

10. अधिकरण के सदस्य की भूमिका

कभी-कभी कोई पक्ष वह साक्ष्य ही पेश नहीं करता जो पेश करना ही चाहिए, जैसे उपेक्षा को प्रमाणित करने के लिए किसी गवाह का कथन ही न करवाना या चालन अनुज्ञप्ति का अभाव होना या उसका उचित न होना प्रमाणित करने के लिए क्षेत्रीय परिवहन अधिकारी के कार्यालय से अभिलेख

और साक्षी न बुलवाना आदि। ऐसे मामलों में अधिकरणों को सहायता के लिए हाथ बढ़ाना चाहिए और संबंधित गवाह को बुलवाना चाहिए।

अधिकरणों को एक अंपायर की तरह दो पक्षकारों की लड़ाई को दूर से टेलीस्कोप से देखते नहीं रहना चाहिए क्योंकि अधिकरणों पर इन मामलों में पक्षकारों को निर्देशित करने का भी दायित्व रहता है। इस संबंध में न्यायदृष्टांत ***लक्ष्मी विरूद्ध नंदलाल, 1999 (1) एमपीएलजे 240,*** अवलोकनीय है।

11. लोक स्थान के बारे में

उल्लंघनकारी वाहन का लोक स्थान पर उतावलेपन और उपेक्षा से चलाया जाना आवश्यक होता है। अतः लोक स्थान के बारे में कुछ विधिक स्थितियां ध्यान में रखना चाहिए।

दुर्घटना मील परिसर में हुई। इसे लोक स्थान माना गया। न्यायदृष्टांत ***शोधरा देवी विरूद्ध रामनारायण, 1991 एसीजे 695,*** अवलोकनीय है।

क्या प्रिंटिंग प्रेस कम्पाउंड लोक स्थान है? न्यायदृष्टांत ***नरसिंह विरूद्ध बालकिशन, 1988 एसीजे 288 एमपी,*** में प्रिंटिंग प्रेस कम्पाउंड को लोक स्थान माना गया।

राज्य सचिवालय के द्वार के अंदर की सड़क लोक स्थान है, यद्यपि द्वार के अंदर पास धारक ही प्रवेश कर सकता है। इस संबंध में न्यायदृष्टांत ***ओरिएंटल फायर एवं जनरल इंश्योरेंस विरूद्ध रघुनाथ, 1992 एसीजे 117 उड़ीसा,*** अवलोकनीय है।

12. बिना चालन अनुज्ञप्ति के वाहन चलाना

बिना चालन अनुज्ञप्ति के वाहन चलाना अपने-आप में उपेक्षा का प्रमाण नहीं माना जा सकता है। यदि एक व्यक्ति बिना चालन अनुज्ञप्ति के वाहन चलाता है तो वह एक अपराध कारित करता है लेकिन मात्र इस कारण से दुर्घटना में उसकी उपेक्षा का निष्कर्ष नहीं निकाला जा सकता। इस संबंध में न्यायदृष्टांत ***सुरिंदर कुमार राणा विरूद्ध सुरिंदर सिंह, एआईआर 2008 एससी 2405,*** अवलोकनीय है।

न्यायदृष्टांत ***सरस्वती विरूद्ध न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड, 2019 एसीजे 42 एससी,*** तीन न्यायमूर्तिगण की पीठ के अनुसार यदि मृतक बिना चालन अनुज्ञप्ति के वाहन चला रहा था, मात्र इस कारण उसकी योगदायी उपेक्षा का निष्कर्ष नहीं निकाला जा सकता।

13. दोपहिया में एक से अधिक सवारी बैठाना

यदि कोई वाहन चालक दोपहिया वाहन पर एक से अधिक सवारी बैठाता है तो यह धारा 128, मोटर यान अधिनियम के प्रावधान का उल्लंघन हो सकता है, लेकिन मात्र इस आधार पर ऐसी

उपधारणा नहीं की जा सकती कि ऐसे वाहन चालक की दुर्घटना में कोई उपेक्षा है या योगदायी उपेक्षा है। इस संबंध में न्यायदृष्टांत ***देवी सिंह विरूद्ध विक्रम सिंह, 2007 (4) एमपीएचटी 535 (पूर्णपीठ), नन्हेलाल विरूद्ध हरिश्चंद्र, 2008 (2) एमपीएचटी 46 डीबी एवं नर्मदा प्रसाद विरूद्ध नानकराम, 2013 एसीजे 2008,*** अवलोकनीय है।

14. क्षमता से अधिक यात्री बैठाना

कभी-कभी किसी चार पहिया वाहन में क्षमता से अधिक यात्री बैठे होने का तथ्य आ जाता है और ऐसे में बीमा कंपनी प्रतिकर के लिए उत्तरदायी न होने का बचाव लेती है। इन मामलों में उपेक्षा का निर्धारण करते समय यह तथ्य ध्यान रखना चाहिए कि क्या क्षमता से अधिक यात्री बैठाना दुर्घटना का कारण था। यदि ऐसा प्रमाणित हो तभी संबंधित वाहन के चालक की क्षमता से अधिक यात्री बैठाने के कारण उपेक्षा या योगदायी उपेक्षा मानना चाहिए।

15. वाहन खराब हो जाने से पार्क करना और उपेक्षा का निर्धारण

कभी-कभी वाहन अचानक खराब हो जाता है तो उसे उसी स्थान पर पार्क करने के अलावा कोई विकल्प तत्समय नहीं होता है। यदि ऐसे वाहन से कोई अन्य वाहन टकरा जाता है और दुर्घटना हो जाती है, तब उपेक्षा का निर्धारण कैसे किया जाए, यह कठिनाई उत्पन्न होती है। इस संबंध में म.प्र. मोटर यान नियम, 1994 का नियम 201 अवलोकनीय है, जो इस प्रकार हैः-

> ''201. सड़क पर परित्यक्त यान - यदि मशीन बंद हो जाने के कारण या अन्यथा कोई यान चलते-चलते रूक गया है या सम्यक् रूप से नियत किए गए यान खड़े करने के स्थान के सिवाय सड़क पर किसी अन्य स्थान में ऐसी स्थिति में रूककर खड़ा हो गया है जिससे यातायात में बाधा हो सकती है तो चालक -
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> (1) तत्काल यान को हटवायेगा और साथ ही किसी बाधा या खतरे को दूर करवाएगा,
>
> (2) जब तक भारी मालयान या भारी यात्री मोटर यान को ऊपर वर्णित स्थिति में न हटवा दिया जाये, तब तक सड़क पर यान की उपस्थिति दर्शाने के लिए आवश्यक रूप से पूर्वावधानी युक्त निम्नलिखित संकेत रखेगा, अर्थात् -
>
> (क) कौंधने वाले समस्त दीपों (फ्लेशर लाईट) को चालू कर देगा,
>
> (ख) 50 सेंटीमीटर ऊंचे स्टैण्ड पर आधारित 30 वर्ग सेंटीमीटर आकार के चेतावनी फलक, जिन पर सफेद पृष्ठ भूमि पर काले रंग से ''सावधान'' लिखा हो और जिन पर लाल प्रकाश परावर्तक लगे हों, सड़क पर यान के आगे तथा पीछे यान के बाजू में रखेगा।''

उक्त नियम के प्रकाश में यह चालक का कर्तव्य है कि वह तत्काल यान को हटवाये या ऐसा संभव न हो तो फ्लेशर लाईट चालू रखे और लाल प्रकाश परावर्तक उक्त आकार के स्टैंड जिस पर ''सावधान'' लिखा हो, यान के आगे और पीछे और साईड में रखेगा।

यदि चालक ने ऐसा नहीं किया है और ऐसे पार्क किए गए वाहन से कोई अन्य वाहन टकराता है तब गलत तरीके से वाहन पार्क करने वाले चालक को उपेक्षावान माना जाना चाहिए और यदि योगदायी उपेक्षा की स्पष्ट साक्ष्य हो, तो वैसा निष्कर्ष निकालना चाहिए।

16. योगदायी उपेक्षा (Contributory Negligence)

जब किसी वाहन दुर्घटना में उल्लंघनकारी वाहन के साथ-साथ आवेदक या मृतक की भी उपेक्षा रहती है, तब यह कहा जा सकता है कि दुर्घटना उन दोनों की योगदायी उपेक्षा का परिणाम थी और ऐसी योगदायी उपेक्षा में आवेदक या मृतक की जिस सीमा तक उपेक्षा प्रमाणित होती है, उस संबंध में भी निष्कर्ष देना होता है अर्थात् आवेदक या मृतक दुर्घटना में कितने प्रतिशत उपेक्षावान रहा, उसके अनुसार उसकी योगदायी उपेक्षा मानी जाती है।

योगदायी उपेक्षा का प्रश्न तभी उठता है जब दोनों पक्ष वाहन चलाते समय उतावलेपन या उपेक्षापूर्ण रहे हों। इस संबंध में न्यायदृष्टांत ***निशांत सिंह विरूद्ध ओरिएंटल इंश्योरेंस कंपनी लिमिटेड, 2019 (1) एमपीएलजे 535 एससी,*** तीन न्यायमूर्तिगण की पीठ अवलोकनीय है।

न्यायदृष्टांत ***पवन कुमार विरूद्ध हरिकिशन, 2014 एसीजे 704 एससी,*** के अनुसार जहां कोई व्यक्ति दो या दो से अधिक दोषकर्ताओं की उपेक्षा के कारण घायल होता है, तब यह कहा जाता है कि वह व्यक्ति उन दो या दो से अधिक दोषकर्ताओं की सम्मिश्र उपेक्षा (Composite Negligence) के कारण घायल हुआ है जिसमें उस व्यक्ति की अर्थात् घायल की कोई भूमिका नहीं थी।

इस मामले में यह भी प्रतिपादित किया गया कि यदि कोई व्यक्ति आंशिक रूप से स्वयं की और आंशिक रूप से किसी अन्य व्यक्ति की लापरवाही के कारण घायल होता है तब यह कहा जाता है कि वह व्यक्ति स्वयं की और उस अन्य व्यक्ति की योगदायी उपेक्षा (Contributory Negligence) के कारण घायल हुआ है।

इस मामले में यह भी प्रतिपादित किया गया कि सम्मिश्र उपेक्षा के मामले में आवेदक के लिए यह स्थापित करना आवश्यक नहीं है कि किस दोषकर्ता की किस सीमा तक लापरवाही थी और न्यायालय के लिए भी इस संबंध में दोशकर्ताओं की उपेक्षा की सीमा निर्धारित करना आवश्यक नहीं होता है।

इस मामले में यह भी प्रतिपादित किया गया कि योगदायी उपेक्षा के मामले में आवेदक की भी उपेक्षा थी, मात्र इस कारण से मामला खारिज नहीं हो जायेगा बल्कि जिस सीमा तक आवेदक की योगदायी उपेक्षा रही है उस सीमा तक प्रतिकर कम कर दिया जायेगा।

न्यायदृष्टांत ***प्रमोद कुमार रसिक भाई जवेरी विरूद्ध के.के. टाक, 2002 (6) एससीसी 455,*** में यह प्रतिपादित किया गया कि जहां दुर्घटना में आवेदक की भी कोई भूमिका किसी कार्य या लोप को करने में होती है जिससे कि क्षति होती है अर्थात् आवेदक की भी उपेक्षा होती है वहां योगदायी उपेक्षा का सिद्धांत आकर्षित होता है।

17. सम्मिश्र उपेक्षा (Composite Negligence)

जब कोई दुर्घटना, दो या दो से अधिक वाहन चालकों की उपेक्षा के कारण होती है, जिसमें किसी तीसरे पक्ष को क्षति होती है, तब यह कहा जाता है कि यह दुर्घटना उन वाहन चालकों की सम्मिश्र उपेक्षा का परिणाम थी। इस संबंध में न्यायदृष्टांत ***आंध्रप्रदेश राज्य सड़क परिवहन निगम विरूद्ध वी.के. हेमलता, एमएससीडी 2008 एससी 302,*** अवलोकनीय है।

न्यायदृष्टांत ***सुशीला भदौरिया विरूद्ध एम. पी. स्टेट रोड ट्रांसपोर्ट कॉरपोरेशन लिमिटेड, 2005 (1) एमपीएलजे 372,*** (पूर्णपीठ) में यह प्रतिपादित किया गया है कि सम्मिश्र उपेक्षा या (Composite Negligence) के मामले में प्रतिकर राशि का प्रभाजन नहीं करना चाहिये, यदि ऐसी विशिष्ट साक्ष्य न हो कि चालक किस सीमा तक उपेक्षावान रहा है और ऐसे मामलों आवेदक या मृतक के वैध प्रतिनिधि दोनों उल्ललंघनकारी वाहनों के चालक, मालिक व बीमा कंपनी से संयुक्त रूप से प्रतिकर वसूल सकते हैं।

इस मामले में यह भी निर्धारित किया गया कि सम्मिश्र उपेक्षा के मामले में दोनों वाहनों के चालक, मालिक और बीमा कंपनी को आवेदक, पक्षकार बनाये, यह आवश्यक नहीं है। आवेदक किसी एक वाहन चालक, मालिक और बीमा कंपनी से पूरा प्रतिकर वसूल कर सकता है।

न्यायदृष्टांत ***ललित विरूद्ध अब्दुल रशीद, 2007 एसीजे 2771,*** के मामले में दो संयुक्त दुष्कृतिकर्ताओं की सम्मिश्र उपेक्षा से दुर्घटना हुई लेकिन ऐसी विशिष्ट साक्ष्य नहीं थी कि कौन किस सीमा तक उत्तरदायी है। दोनों दुष्कृतिकर्ता संयुक्त रूप से प्रतिकर अदा करेंगे, ऐसे आदेश किए गए।

न्यायदृष्टांत ***रत्ना पाराशर विरूद्ध कुसुमलता, आईएलआर 2008 एमपी 16,*** के मामले में दो वाहन बीच सड़क पर आमने सामने टकराए। ''रेस ईप्सा लोकिटर ***(Res ipsa loquitur)***'' का सिद्धांत लागू होता है। सम्मिश्र उपेक्षा प्रमाणित मानी गई।

न्यायदृष्टांत ***खेन्यी विरूद्ध न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड, 2015 एसीजे 1441 एससी,*** तीन न्यायमूर्तिगण की पीठ के मामले में यह प्रतिपादित किया गया कि जहां दो संयुक्त दोषकर्ताओं की सम्मिश्र उपेक्षा के कारण दुर्घटना हुई हो, वहां आवेदक दोनों या दोनों में से किसी एक पर दावा करके संपूर्ण प्रतिकर वसूल कर सकता है। दो दुष्कृतिकर्ताओं और आवेदक के बीच प्रतिकर का प्रभाजन अनुमत नहीं है। आवेदक किसी एक से पूरी राशि वसूल कर सकता है।

इस मामले में यह भी प्रतिपादित किया गया कि जहां आवेदक ने संयुक्त दुष्कृतिकर्ताओं को पक्षकार के रूप में जोड़ा हो और पर्याप्त साक्ष्य भी अभिलेख पर हो, वहां अधिकरण उनके बीच के दायित्व का निर्धारण कर सकता है लेकिन आवेदक किसी एक से पूरी राशि तब भी वसूल कर सकता है लेकिन यदि दोनों को पक्षकार के रूप में संयोजित नहीं किया गया हो तब न्यायालय को दायित्व का प्रभाजन नहीं करना चाहिए। जो दुष्कृतिकर्ता पक्षकार बनाया गया है वह अन्य से राशि वसूल सकता है, इस संबंध में विधि समझाई गई है।

18. योगदायी उपेक्षा और अवयस्क

सामान्यतः, अवयस्क या बच्चों के मामले में योगदायी उपेक्षा का सिद्धांत उसी बल से लागू नहीं होता है जिस बल से वयस्कों के मामलों में लागू होता है। सामान्यतः, यह एक तथ्य का प्रश्न होता है। इस संबंध में न्यायदृष्टांत उक्त ***सुधीर कुमार राणा विरूद्ध सुरेन्द्र सिंह, एआईआर 2008 एससी 204,*** अवलोकनीय है।

योगदायी उपेक्षा का अभिवाक् प्रमाणित करने के लिए अकाट्य (Cogent) साक्ष्य होनी आवश्यक होती है। मृतक स्कूटर चालक, अन्य वाहन से टक्कर के समय अवयस्क था यह अपने आप में यह उपधारित करने के लिए पर्याप्त नहीं है कि उसकी दुर्घटना में योगदायी उपेक्षा थी। इस संबंध में न्यायदृष्टांत ***मीरा देवी विरूद्ध हिमाचल प्रदेश रोड ट्रांसपोर्ट कारपोरेशन, 2014 (3) एमपीएलजे 504 एससी,*** तीन न्यायमूर्तिगण की पीठ, अवलोकनीय है।

न्यायदृष्टांत ***जवाहर सिंह विरूद्ध बाला जैन, (2011) 6 एससीसी 425,*** के मामले में एक अवयस्क द्वारा बिना चालन अनुज्ञप्ति के वाहन चलाया जा रहा था, तब दुर्घटना हुई। माननीय सर्वोच्च न्यायालय ने यह मत दिया कि वाहन स्वामी प्रतिकर के लिए उत्तरदायी है क्योंकि यह उसका कर्तव्य है कि वह यह सुनिश्चित करे कि उसके वाहन का दुरुपयोग न हो। बीमा कंपनी पहले तृतीय पक्ष को प्रतिकर का भुगतान करेगी और फिर उस राशि को वाहन स्वामी से वसूल सकेगी। योगदायी उपेक्षा का कोई मामला नहीं बनता है।

19. योगदायी उपेक्षा के मामले में प्रतिकर निर्धारण में सुसंगत तथ्य

आंध्रप्रदेश राज्य सड़क परिवहन निगम विरूद्ध वी.के. हेमलता, एमएससीडी 2008 एससी 302, के अनुसार योगदायी उपेक्षा के मामले में प्रतिकर की गणना के समय यह तथ्य ध्यान रखना चाहिए कि दुर्घटना के लिए कौन चालक अधिक उत्तरदायी रहा और दुर्घटना को टालने में किस चालक के पास अंतिम अवसर था।

20. उपेक्षा के संबंध में कुछ मार्गदर्शक तथ्य व उदाहरण

1. चलती हुई बस में यदि किसी यात्री ने हाथ बाहर निकाल रखा है तो उस मामले में चालक को उपेक्षावान माना गया है। चालक को एक सुरक्षित दूरी बनाए रखना था। इस संबंध में न्यायदृष्टांत ***सुरेश विरूद्ध प्रदीप कुमार, 1984 एमपीडब्ल्यूएन 410,*** अवलोकनीय है।
2. अगले टायर के फटने से ट्रक पेड़ से जा टकराया। यह माना गया कि चालक का वाहन की गति पर नियंत्रण नहीं था और वह उपेक्षावान है। इस संबंध में न्यायदृष्टांत ***ठाकुर बाई विरूद्ध विरत रूस्तम जी पटेल, 1983 एमपीडब्ल्यूएन 355,*** अवलोकनीय है।
3. टायर फटने के मामले में वाहन चालक और मालिक को यह प्रमाणित करना होता है कि वाहनका समय-समय पर निरीक्षण करवाया गया था और ऐसे प्रमाण के अभाव में यह उपधारित किया जा सकता है कि दुर्घटना चालक की लापरवाही का परिणाम थी। इस संबंध में न्यायदृष्टांत ***बाबू भाई ठक्कर विरूद्ध एमपीईबी, 1997 (1) विधि भास्कर 89,*** अवलोकनीय है।

4. यांत्रिक खराबी के कारण दुर्घटना होने का बचाव होने पर वाहन स्वामी को यह प्रमाणित करनाहोगा कि सभी युक्तियुक्त सावधानियां रखी गईं थीं। उसके बाद भी कथित कमी सामने नहीं आ पाई थी। इस संबंध में न्यायदृष्टांत ***स्टेट आफ एम.पी. विरूद्ध श्रीमती किशोर, 1998 (1) एमपीएलजे 245,*** अवलोकनीय है।

5. वाहन चालक तेज गति के कारण वाहन पर नियंत्रण नहीं रख पाया उसे उपेक्षा का दोषी माना गया। इस संबंध में न्यायदृष्टांत ***म.प्र. राज्य परिवहन निगम विरूद्ध श्रीमती सुशीला बाई, 1997 (2) डब्ल्यू एन 194,*** अवलोकनीय है।

6. वाहन चालक ने न तो बस रोकी और न ही हार्न बजाया जबकि पदयात्री निकल रहे थे। ड्रायवर को उपेक्षा का दोषी माना गया। न्यायदृष्टांत ***लछिया बाई विरूद्ध दर्शन सिंह, 1988 जेएलजे 469,*** अवलोकनीय है।

7. बस चालक एक गाड़ी को ओवरटेक कर रहा था जबकि उसने यह देख लिया था कि विपरीत दिशा से एक ट्रक आ रहा था। ऐसे में चालक को उपेक्षा का दायी माना गया। न्यायदृष्टांत ***म.प्र. राज्य परिवहन निगम विरूद्ध गुमेल सिंह, 1986 (2) डब्ल्यूएन 157,*** अवलोकनीय है।

8. ट्रक अचानक मृतक की ओर मुड़ा, ट्रक चालक को पूरी तरह दुर्घटना के लिए उत्तरदायी माना गया। न्यायदृष्टांत ***मनोरमा देवी विरूद्ध एन.डी. पटेल, 1987 (1) डब्ल्यू एन 216,*** अवलोकनीय है।

9. स्कूटर चालक एक बस को ओवरटेक कर रहा था और सामने से आ रही बस से टकरा गया। स्कूटर चालक को उपेक्षावान माना गया न कि बस चालक को। इस संबंध में न्यायदृष्टांत ***इंदरमल विरूद्ध जनरल मैनेजर, एमपीएसआरपीसी 1990 जेएलजे 560,*** अवलोकनीय है।

10. यह सिटी बस के चालक का दायित्व है कि वह यह सुनिश्चत करे कि सभी यात्री सुरक्षित रूप से बस से उतर गए हैं उसके बाद ही बस को आगे चलाए। यदि चालक इसमें असफल रहता है तो उसे उपेक्षा के लिए दोषी माना गया। न्यायदृष्टांत ***बेनी बाई विरूद्ध ए. सलीम, 1997 (2) एमपीडब्ल्यूएन 179,*** अवलोकनीय है।

11. एक जीप खुले क्षेत्र में पार्क की गई थी जो आसानी से दिखाई दे रही थी। उसे डंपर चालकने डैश किया जिससे जीप में बैठे चालक और एक अधिकारी की मृत्यु हो गई। डंपर चालक दुर्घटना के लिए उत्तरदायी माना गया। न्यायदृष्टांत ***नेशनल इंश्योरेंस कंपनी लिमिटेड विरूद्ध शबीना खातून, एआईआर 1998 एमपी 238,*** अवलोकनीय है।

12. ट्रक रोड छोड़कर रोड के बाहर जाते हुए एक पेड़ से जा टकराया। यह उपधारणा उत्पन्न होती है कि सामान्य दशा में एक चलता हुआ वाहन रोड को नहीं छोड़ता है। चालक पर यह प्रमाण भार है कि वह यह स्पष्टीकरण देवे कि दुर्घटना में उसकी कोई उपेक्षा नहीं थी। न्यायदृष्टांत ***अनिल तिवारी विरूद्ध साहेब सिंह, 2000 (1) एमपीएलजे 59,*** अवलोकनीय है।

13. मृतक जीप से उतर रहा था। अचानक जीप चालक ने जीप को चालू करके तेज गति से चलाया। मृतक गिरकर मर गया। चालक की उपेक्षा से दुर्घटना होना माना गया। न्यायदृष्टांत ***गया प्रसाद पांडे विरूद्ध यतीन्द्र कुमार, 2005 (3) एमपीएलजे 373,*** अवलोकनीय है।

14. बस मालिक ने लिखित कथन में यह स्वीकार किया था कि उसका वाहन, दुर्घटना में लिप्त था। यह स्वीकारोक्ति यह निर्धारित करने के लिए पर्याप्त है कि कथित वाहन, दुर्घटना में लिप्त था। न्यायदृष्टांत ***सरोज विरूद्ध हेतलाल, एआईआर 2011 एससी 671,*** अवलोकनीय है।

15. ट्रक और जीप के टकराने से दुर्घटना हुई। मृतक जीप में यात्रा कर रहा था। जीप के चालक की कोई उपेक्षा नहीं पाई गई। ट्रक बीमित नहीं है, मात्र इस कारण से जीप की बीमा कंपनी को प्रतिकर के लिए उत्तरदायी नहीं माना जा सकता। न्यायदृष्टांत ***न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड विरूद्ध बिस्मिल्लाह बाई, एआईआर 2009 एससी (सप्लीमेन्ट) 2289,*** अवलोकनीय है।

16. बस एक पुलिया के नीचे से गुजर रही थी। पुलिया में बम लगा रखा था जिसके फटने से दुर्घटना हुई। चालक को दुर्घटना के लिए उत्तरदायी नहीं माना गया। न्यायदृष्टांत ***यूनियन आॅफ इंडिया विरूद्ध भागरी, 2012 (3) एमपीएचटी 117,*** अवलोकनीय है।

17. ट्रक में बम प्लांट किया हुआ था जिसके फटने से दुर्घटना हुई। ट्रक चालक को उत्तरदायी मानागया। यह अभिनिर्धारित किया गया कि उसने यह सावधानी नहीं रखी कि ट्रक में बम फिट है जबकि ट्रक एक उच्च सुरक्षा वाले क्षेत्र से गुजर रहा था। न्यायदृष्टांत ***समीरचंद विरूद्ध मैनेजिंग डायरेक्टर असम स्टेट ट्रांसपोर्ट कॉरपोरेशन, एआईआर 1999 एससी 136,*** अवलोकनीय है।

18. एक चलते हुए ट्रक के पीछे से कार टकराई। दोनों वाहनों के बीच की दूरी मात्र 10-15 फीट थी। इसे एक सुरक्षित दूरी नहीं माना गया। कार चालक की उपेक्षा मानी गई। इस संबंध में न्यायदृष्टांत ***निशांत सिंह विरूद्ध ओरिएंटल इंश्योरेंस कंपनी लिमिटेड, 2019 (1) एमपीएलजे 535, एससी,*** तीन न्यायमूर्तिगण की पीठ, अवलोकनीय है।

19. ट्रेक्टर का उपयोग ब्लास्टिंग मशीन से अनावेदक के खेत में कुंआ खोदने के लिए किया जारहा था। बेट्री ट्रेक्टर में स्थापित थी तथा ब्लास्टिंग के लिए विस्फोटक को बेट्री से चार्ज किया जा रहा था। ब्लास्टिंग के दौरान एक भारी पत्थर उड़ता हुआ मृतक के सिर पर लगा। उसकी मृत्यु हो गई। इसे मोटर यान के उपयोग से दुर्घटना माना गया। दुर्घटना होने और उल्लंघन के मध्य कारणात्मक संबंध होना चाहिए। न्यायदृष्टांत ***कलीम खान विरूद्ध फेमिदा बी, एआईआर 2018 एससी 3209,*** अवलोकनीय है।

20. अन्य क्लेम प्रकरणों में अन्य अधिकरण द्वारा दिया गया उपेक्षा का निष्कर्ष, दूसरे क्लेम प्रकरण में जिसमें कि आवेदक पक्षकार नहीं था या ऐसा पक्षकार जो उस मामले में एक पक्षीय रहा था और उसने उस मामले को कंटेस्ट नहीं किया था, उनके विरूद्ध रेसज्यूडिकेटा का प्रभाव

नहीं रखता है। न्यायदृष्टांत ***शांति बाई विरूद्ध अजय, 2013 एसीजे 2283 एमपी*** एवं ***ओरिएंटल इंश्योरेंस कंपनी लिमिटेड, विरूद्ध सुब्बाराव, 2016 (1) जेएलजे 297,*** अवलोकनीय है।

21. योगदायी उपेक्षा के संबंध में कुछ मार्गदर्शक तथ्य व उदाहरण

1. जहां मृतक बस की छत पर बैठा था। इसे योगदायी उपेक्षा का मामला माना गया। इस संबंध में न्यायदृष्टांत ***मैनेजर, ओरिएंटल कंपनी इंडिया प्राईवेट लिमिटेड, विरूद्ध मंथोला, 2006 (3) एमपीएचटी 115 (डीबी),*** अवलोकनीय है। न्यायदृष्टांत त्रिलोकचंद विरूद्ध पुरूषोत्तम, 2007 एसीजे 2473 एमपी (डीबी), के मामले में आवेदक ने वाहन के बाहर हाथ निकाल रखा था व वाहन में यात्रा कर रहा था। ट्रक और बस में टक्कर हुई। आवेदक को 25 प्रतिशत योगदायी उपेक्षावान माना गया।
2. कभी-कभी अनावेदक पक्ष इस संबंध में भी तर्क करते हैं कि आवेदक या मृतक ने हेलमेट नहीं पहन रखा था। अतः दुर्घटना में उसकी भी योगदायी उपेक्षा मानी जावे। हेलमेट न पहनना मोटर यान अधिनियम के प्रावधानों का उल्लंघन हो सकता है लेकिन मात्र इस आधार पर आवेदक या मृतक की योगदायी उपेक्षा नहीं मानी जानी चाहिए। बीमा कंपनी को यह प्रमाणित करना चाहिए कि बीमा पॉलिसी में हेलमेट पहनने की शर्त अंकित थी क्योंकि बीमा एक संविदात्मक दायित्व है।
3. यदि आवेदक किसी मोटर साईकिल पर पीछे बैठा है, मात्र इस कारण यह नहीं कहा जा सकता कि दुर्घटना में आवेदक की योगदायी उपेक्षा है। इस संबंध में न्यायदृष्टांत ***पिन्टू विरूद्ध हुसैन, 2011 (2) दुर्घटना मुआवजा प्रकरण 243 एमपी,*** अवलोकनीय है।
4. निगम की बस और प्राईवेट बस में टक्कर हुई। निगम की बस के चालक को चोटें आईं। नक्शा मौका के अनुसार निगम की बस का चालक सही दिशा में था जबकि प्राईवेट बस का चालक आंशिक रूप से गलत दिशा में आया था। ऐसी साक्ष्य थी कि आहत ने बस को धीमा नहीं किया और अपने बाईं साईड नहीं लिया। अधिकरण ने दोनों बस चालक को समान रूप से उपेक्षा के लिए दोषी पाया। उच्च न्यायालय ने इस निष्कर्ष की पुष्टि की। सर्वोच्च न्यायालय ने प्राईवेट बस के चालक की 75 प्रतिशत और कॉरपोरेशन बस के चालक की 25 प्रतिशत उपेक्षा मानी। न्यायदृष्टांत ***टी.ओ. एंथनी विरूद्ध करवरनन, एमएसीडी 2008 एससी 246: (2008) 3 एससीसी 748,*** अवलोकनीय है।
5. न्यायदृष्टांत ***विजय कुमार दूगर विरूद्ध विद्याधर दत्त, (2006) 3 एससीसी 242,*** में यह प्रतिपादित किया गया है कि जहां दो वाहन आमने-सामने टकराते हैं और योगदायी उपेक्षा का निर्धारण करना होता है वहां दोनों वाहन चालक को समान रूप से उपेक्षा के लिए उत्तरदायी माना जाना चाहिए।

6. दो वाहन चालक विपरीत दिशा से एक पुलिया पर से निकलने के लिए आ रहे थे। एक चालक ने फ्लेश लाइट दी कि उसे पहले निकलने दिया जाए। दूसरे चालक ने वाहन नहीं रोका। दोनों चालकों को उपेक्षा के लिए उत्तरदायी माना गया। न्यायदृष्टांत ***सुरेन्द्र कुमार वर्मा विरूद्ध बहादुर सिंह, 2001 (2) एमपीडब्ल्यूएन 242,*** अवलोकनीय है।

7. मृतक ट्रेक्टर ट्राली के नीचे सोया हुआ था। ट्रेक्टर चालक ने उपेक्षापूर्वक ट्रेक्टर को स्टार्ट किया। मृतक का सिर पहिये में आ गया। अधिकरण ने मृतक की 50 प्रतिशत योगदायी उपेक्षा मानी।माननीय उच्च न्यायालय ने ट्रेक्टर चालक को पूर्णतः उत्तरदायी माना। न्यायदृष्टांत ***शकुन्तला विरूद्ध घनश्याम, 2008 (2) एमपीएचटी 449 (डीबी),*** अवलोकनीय है।

8. गैस टैंकर इंडिकेटर अथवा पार्किंग लाईट के बिना बीच सड़क पर पार्क किया गया था। व्यस्त सड़क और सामने आने वाले यातायात की फ्लेश लाईट की उपस्थिति के कारण यह नहीं माना जा सकता कि सामने से आ रही कार के चालक को टैंकर दिखाई दे रहा था। योगदायी उपेक्षा के बारे में की गई कटौती अपास्त की गई। कार चालक की उपेक्षा नहीं मानी गई। इस संबंध में न्यायदृष्टांत ***अर्चित सैनी विरूद्ध ओरिएंटल इंश्योरेंस कंपनी लिमिटेड, 2018 (4) एमपीएलजे 319 (एससी),*** अवलोकनीय है।

9. दोपहिया वाहन और ट्रक के बीच टक्कर हुई। मृतक का दोपहिया वाहन, ट्रक से टक्कर के बाद सड़क पर लगभग 20 से 25 फीट तक खींचकर घसीटा गया था। उल्लंघनकारी ट्रक बहुत तेज गति से चलाया जा रहा था। उसके चालक का वाहन पर पर्याप्त नियंत्रण नहीं था। ट्रक चालक को यह ज्ञान होना चाहिए कि वह एक भारी मोटर यान चला रहा है और उसे पर्याप्त सावधानी रखना था। योगदायी उपेक्षा का निष्कर्ष अपास्त किया गया। ट्रक चालक की उपेक्षा मानी गई। न्यायदृष्टांत ***अश्विन भाई जयंती लाल मोदी विरूद्ध रामकरण रामचंद्र शर्मा, 2014 एसीजे 2648 (एससी),*** अवलोकनीय है।

10. सड़क के मध्य ट्रेक्टर और मोटर साईकिल टकराये। अधिकरण ने दोनों चालकों को समान रूप से उपेक्षावान निर्धारित किया। माननीय उच्च न्यायालय ने ट्रेक्टर चालक व मोटर साईकिल चालक के बीच 75:25 की योगदायी उपेक्षा अभिनिर्धारित की। माननीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया कि मोटर साईकिल चालक उसके दो अवयस्क बच्चों के साथ चल रहा था इसलिए वह पर्याप्त सावधानी रखेगा। उसके भाग पर असावधानी होने कीकोई साक्ष्य नहीं थी। योगदायी उपेक्षा का निष्कर्ष अपास्त कियागया। न्यायदृष्टांत ***किरण विरूद्ध सज्जन सिंह, 2014 एसीजे 2550 एससी,*** अवलोकनीय है।

11. निगम की बस और मोटर साईकिल के बीच टक्कर हुई। अधिकरण और उच्च न्यायालय ने 75:25 प्रतिशत उपेक्षा निर्धारित की। माननीय सर्वोच्च न्यायालय ने योगदायी उपेक्षा का निष्कर्ष अपास्त किया और यह अभिमत दिया कि निगम की बस दाहिनी तरफ मुड़ी थी और उसने मुड़ने का संकेत दिये बिना डिपो में प्रवेश किया था। निगम के बस के चालक को इस बात का ज्ञान होना चाहिए था कि वह एक भारी यात्री वाहन चला रहा है इस कारण उसे अतिरिक्त

सावधानी रखनी थी। यदि निगम बस चालक पर्याप्त सावधानी रखता और बस को धीमा कर लेता ताकि सड़क के अन्य वाहन आसानी से निकल सकें तो दुर्घटना टाली जा सकती थी। न्यायदृष्टांत ***येराम्मा विरूद्ध जी. कृष्णमूर्ति, 2014 एसीजे 2161 एससी,*** अवलोकनीय है।

12. मृतक कार में बैठा था। कार और मिनी ट्रक के बीच टक्कर होने से दुर्घटना हुई। चूंकि मृतककार नहीं चला रहा था इस कारण योगदायी उपेक्षा के निष्कर्ष को अपास्त किया गया। न्यायदृष्टांत ***विद्या देवी विरूद्ध गोविंद, 2014 एसीजे 460 एमपी,*** अवलोकनीय है।

13. ट्रक डायवर जब एक अन्य वाहन को, जो गलत दिशा से आ रहा था, उसे ओवरटेक कर रहा था तभी उसने सामने से आ रही कार को डैश किया। दोनों वाहनों की ड्रायवर साईड पर दुर्घटना हुई। कार ड्रायवर ने तेजी से आ रहे ट्रक को देख लिया था। वह अपनी कार को बांई दिशा में पार्क कर सकता था, यदि वह धीमी गति में होता। अधिकरण ने ट्रक ड्रायवर को दुर्घटना के लिए उत्तरदायी माना। माननीय उच्च न्यायालय ने ट्रक ड्रायवर और कार ड्रायवर की 80:20 प्रतिशत योगदायी उपेक्षा प्रमाणित मानी।

न्यायदृष्टांत ***न्यू इंडिया इंश्योरेंस कंपनी लिमिटेड, विरूद्ध प्रीति, 2014 एसीजे 176 एमपी,*** अवलोकनीय है।

14. वैन और टैंकर में टक्कर हुई। वैन के चालक की मृत्यु हो गई। अधिकरण ने पाया कि टैंकरके चालक ने बीच सड़क पर वाहन को पार्क किया था और वैन के ड्राईवर ने तेजी और लापरवाही से वैन चलाई थी। दोनों चालकों को उपेक्षा का समान रूप से उत्तरदायी माना गया। न्यायदृष्टांत ***अनुराधा कौशिक विरूद्ध वरूण ग्राउंड वाटर डेवलपमेंट कारपोरेशन, 2007 एसीजे 2877 एमपी (डीबी),*** अवलोकनीय है।

22. उपसंहार

उक्त संपूर्ण विवेचन से निम्नलिखित निष्कर्ष निकलते हैं:-

1. यदि आवेदक या आवेदकगण धारा 166, मोटर यान अधिनियम, 1988 के तहत क्लेम प्रस्तुत करते हैं तो उनके लिए अनावेदक वाहन चालक की उपेक्षा प्रमाणित करना आवश्यक होता है।
2. प्रमाण भार का स्तर अधिसंभावनाओं की प्रबलता के स्तर का होता है जिसमें साक्ष्य और प्रक्रिया के कठोर नियम लागू नहीं होते हैं।
3. ''रेस ईप्सा लोकीटर'' या परिस्थितियां स्वयं बोलती हैं का सिद्धांत भी उचित मामले में लागू किया जा सकता है।
4. यदि अनावेदक वाहन चालक साक्ष्य कक्ष में आकर यह स्पष्टीकरण नहीं देता कि दुर्घटना किन परिस्थितियों में और किसकी उपेक्षा से हुई तो उनके विरूद्ध प्रतिकूल अनुमान निकाला जा सकता है।

5. दांडिक प्रकरण के दस्तावेजों की प्रमाणित प्रतिलिपियों को पुष्टिकारक साक्ष्य के रूप में प्रयोग किया जा सकता है।
6. दांडिक प्रकरणों के दोषमुक्ति या दांडिक प्रकरणों में अभिलिखित साक्ष्य और उसके आधार पर निकाले गए निष्कर्ष का क्लेम प्रकरणों पर कोई प्रतिकूल प्रभाव नहीं होता है।
7. दांडिक प्रकरणों में वाहन चालक द्वारा यदि अपराध की संस्वीकृति या कन्फेशन किया जाता है तो उसे धारा 17 सहपठित धारा 21, भारतीय साक्ष्य अधिनियम के तहत स्वीकृति के रूप में पुष्टिकारक साक्ष्य के रूप में प्रयोग किया जा सकता है।
8. प्रथम सूचना प्रतिवेदन दर्ज न करवाना या विलंब से दर्ज करवाना या उसमें वाहन नंबर न होना आवेदक के मामले को खारिज करने का एकमात्र आधार नहीं हो सकता है।
9. दोपहिया वाहन में एक से अधिक सवारी बैठाना या बिना चालन अनुज्ञप्ति के वाहन चलाना या क्षमता से अधिक यात्री बैठाना अपने आप में उपेक्षा का अनुमान निकालने के लिए पर्याप्त नहीं होता है।
10. यदि दो या दो से अधिक व्यक्तियों की उपेक्षा के कारण यदि किसी तीसरे व्यक्ति को, जिसकी कि दुर्घटना में कोई भूमिका नहीं है, क्षति कारित होती है तो इसे उन दो व्यक्तियों की सम्मिश्र उपेक्षा या Composite Negligence कहा जाता है।
11. जब दो व्यक्तियों की उपेक्षा से कोई दुर्घटना होती है जिसमें एक पक्ष आवेदक या मृतक भी होता है अर्थात् उसका भी दुर्घटना में योगदान रहता है तो यह योगदायी उपेक्षा का मामला कहा जाता है।
12. सम्मिश्र उपेक्षा के मामले में आवेदक किसी एक वाहन के चालक, मालिक और बीमा कंपनी से पूरा प्रतिकर वसूल सकता है। उसे अन्य वाहन के या दूसरे वाहन के चालक, मालिक या बीमा कंपनी को पक्षकार बनाना आवश्यक नहीं होता है।
13. योगदायी उपेक्षा के मामले में आवेदक की जिस सीमा तक उपेक्षा रहती है, उतनी प्रतिकर राशि कम कर दी जाती है।
14. इन मामलों में आदेश 18 नियम 4 सी.पी.सी. के तहत शपथ-पत्र पर साक्ष्य ली जा सकती है।
15. सदस्य या अतिरिक्त सदस्य मोटर दुर्घटना दावा अधिकरणों को अंपायर की तरह न बैठकर युक्तियुक्त प्रतिकर निर्धारण की जांच में सक्रिय भूमिका निभाना चाहिए और समस्त आवश्यक साक्ष्य बुलवाना चाहिए और सहायता के लिए हाथ बढ़ाना चाहिए।

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PART – II
NOTES ON IMPORTANT JUDGMENTS

201. CIVIL PROCEDURE CODE, 1908 – Section 47 and Order 21 Rule 47

Whether detailed enquiry by taking evidence of objector is necessary on objection being filed under Section 47 and Order 21 Rule 47 CPC? Held, No – Only when minimum essential *prima facie* adjudicatable material is produced in their favour by the objector, then a detailed enquiry may be conducted – Objector need not mechanically be permitted to lead evidence.

सिविल प्रक्रिया संहिता, 1908 - धारा 47 एवं आदेश 21 नियम 47

क्या धारा 47 एवं आदेश 21 नियम 47 सीपीसी के तहत आपत्ति प्रस्तुत होने पर आपत्तिकर्ता की साक्ष्य लेकर विस्तृत जांच किया जाना आवश्यक है? अभिनिर्धारित, नहीं - केवल जब आपत्तिकर्ता द्वारा अपने पक्ष में न्यूनतम आवश्यक प्रथम दृष्टया न्यायनिर्णयन के योग्य सामग्री प्रस्तुत की जाती है तब विस्तृत जांच की जा सकती है - आपत्तिकर्ता को यांत्रिक रूप से साक्ष्य प्रस्तुत करने की अनुमति नहीं दी जानी चाहिए।

Padam Singh and others v. Radhelal and others

Judgment dated 14.03.2018 passed by the High Court of Madhya Pradesh in S. A. No. 1693 of 2006, reported in ILR (2018) MP 1168

Relevant extracts from the judgment:

The appellate Court found that the decree holder and judgment debtor have fought a long drawn battle in the corridors of the Court, which continued for about 23 years. It is not possible to accept the contention of obstructor no.3 and 4 that they were not aware of such litigation and outcome there of when they are admittedly sons of judgment debtor. In the written statement filed in original Civil Suit No.37-A/82, the defendant no.2 has not pleaded about the existence of any partition in favour of obstructors. The appellate Court also considered the report of "Machkuri". It was held that it cannot be said that in every case, where application under Order 21 Rule 97 of CPC is filed, recording of evidence is necessary. The Court below by placing reliance on ***Hamid Khan Ansari v. Lilabai, 2004 (2) MPLJ 317,*** rejected the appeal.

In the case of ***Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and others, AIR 1997 SC 856,*** the Apex Court held that obstructor cannot be thrown of lock, stock and barrel by decree holder and he has a right to raise obstruction as per Order 21 Rule 97 of CPC. This principle is consistently followed in the case of ***Silverline Forum Pvt. Ltd. v. Rajiv Trust and another, AIR 1998 SC 1754*** and ***Tanjeem-E-Sufia v. Bibi Haliman and others, AIR 2002 SC 3083.*** In the case of ***Silverline Forum Pvt. Ltd.*** (supra), the Supreme Court held as under:-

> "It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order XXL, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."

In the present case, the obstructors' objection has been considered and adjudicated by both the Courts below. As per principle laid down in the case of ***Silverline Forum Pvt. Ltd.*** (supra), it is clear that adjudication does not necessarily mean a detailed enquiry or collection of evidence. Putting it differently, as a thumb rule, it cannot be said that in every case the Court dealing with obstruction is bound to record evidence and then only give a finding. It depends on the facts and circumstances of the case and on the averments made by the obstructor. Pertinently, in ***Hamid Khan Ansari*** (supra), this Court considered the judgments of ***Brahmdeo Choudhary*** (supra) and ***Silverline Forum Pvt. Ltd.*** (supra). In ***Hamid Khan Ansari*** (supra), the obstruction was moved on the ground that the obstructor is in possession since last 17-18 years and had constructed a garage on the portion of land. Since he is running a garage, he claimed title and possession on the suit property.

This Court after considering aforesaid judgments of Supreme Court, opined that in support of his claim, the obstructor has not filed any document to show that he is in possession and is running a garage on the suit land. No license, electricity bill, permission to set up the garage was filed to establish the possession. This Court considered the report of "ameen" and opined that there was no report that there exists any garage on the land in question. This Court disbelieved the story of appellant wherein he pleaded that he was not aware about the dispute and came to know only when execution proceeding was filed.

The present case if examined on as per the principles laid down by Supreme Court in aforesaid cases, which are followed in the case of ***Hamid Khan Ansari*** (supra), it will be clear that in the facts and circumstances of the present case, the Courts below have adjudicated the application under Order 21 Rule 97 of the CPC. In the peculiar facts and circumstances of this case and more particularly on account of the averments of the parties, no further enquiry or recording of evidence was required. Thus, substantial question no. 1 must be answered in negative by holding that as a straight-jacket formula, it cannot be said that in every case where such obstruction is filed, the executing Court is bound to conduct a detailed enquiry and permit the obstructor to lead evidence. The said course of action depends on the nature of pleadings and material produced by

the obstructor. The answer of substantial question no. 2 depends on answer to the first question. In view of answer to the first question, the second question needs to be answered in negative. At the cost of repetition, it is clear that obstructor no. 3 and 4 were sons of judgment debtor. None of the obstructor could file any material to show that they were in lawful possession of the suit land. If they were in possession, they should have pleaded the manner and method by which they came into possession. During these 35 years when they were allegedly in possession and constructed houses, they must have paid corporation tax, water tax, electricity bill, property tax and other statutory payments based on possession of the property. No such documents have been filed and, therefore, in the light of judgment of ***Hamid Khan Ansari*** (supra), in my view, the Courts below have not committed any error of law in rejecting the application filed under Order 21 Rule 97 of CPC. In ***C. Some Gowda v. C. Ranga Rao and others, AIR 2004 Karnataka NOC 293,*** the High Court opined that a person raising objection must show some ***prima-facie*** material in support of his objection. In ***G. Ganesan andothers v. J. Surendran and others, (2005) 1 MadLJ 191,*** the Court opined that a petition as an obstructor without any document or material to show that he was in actual possession of premises cannot be filed. It is further held that except for a bare statement that they are in possession of the suit property, no other material was filed to show their actual possession *prima facie*. Such petitions are not maintainable at all.

In ***R. Devadass v. Subordinate Judge, Ponneri and others, AIR 2004 Madras 249,*** the Court opined as under:-

> "10. A blind and stereo types method of receiving and activating every application without knowing as to whether it is ***bona fide*** or ***mala fide*** is an unhealthy trend and before an application is entertained, especially at the state of execution of a hardly won decree, the executing Court has got an inherent duty to search for the availability of the ***bona fide*** adjudicatable material."

It is noteworthy that Madras High Court in ***R. Devadass*** (supra) considered the judgments of Supreme Court in the case of ***Brahmdeo Choudhary*** (supra) and ***Tanzeem-e-Sufia*** (supra) and held that in absence of showing *prima facie* adjudicatable material in their favour by obstructor, it is to be held that the objection is only to prevent the execution of the decree. *Malafide* methods are being adopted by the revision petitioner. In absence of *prima facie* adjudicatable matter, the petition was dismissed.

In view of aforesaid analysis, in the considered opinion of this Court, the Courts below have not committed any error in dismissing the application of appellants. In absence of minimum essential prima facie pleadings and material, the Courts were not obliged to mechanically permit the obstructors to lead evidence.

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***202. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 9**

Restoration of suit – Liberal approach is expected – Where plaintiff remained present on most of the dates and proceedings could not be taken due to business of Court, such a plaintiff should not be punished for solitary absence.

सिविल प्रक्रिया संहिता, 1908 - आदेश 9 नियम 9

वाद का पुनस्र्थापन - उदार दृष्टिकोण अपेक्षित है - जहां वादी अधिकांश तिथियों पर उपस्थित रहा तथा कार्यवाहियां न्यायालय की व्यस्तता के कारण प्रारंभ नहीं की जा सकीं ऐसे वादी को, एकमात्र अनुपस्थिति के कारण दण्डित नहीं किया जाना चाहिए।

Kusumben Indersinh Dhupia v. Subhaben Biharilalji Bhaiya and another

Judgment dated 09.01.2019 passed by the Supreme Court in Civil Appeal No. 230 of 2019, reported in (2019) 3 SCC 569

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203. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

(i) Temporary Injunction; grant of – In appeal against order refusingTemporary Injunction – Held, it is the duty of the Court to first form an opinion regarding *prima facie* case in favour of the plaintiff and thereafter, to decide whether temporary injunction can be granted or not? Further, to form such an opinion, the stage of the suit must be a factor for consideration.

(ii) *Prima facie* case; meaning of – Explained.

सिविल प्रक्रिया संहिता, 1908 - आदेश 39 नियम 1 एवं 2

(i) अस्थाई निषेधाज्ञा प्रदान किया जाना - अस्थाई निषेधाज्ञा से इंकार करने के आदेश के विरूद्ध अपील में - अभिनिर्धारित, यह न्यायालय का कर्तव्य है कि पहले वह वादी के पक्ष में प्रथम दृष्टया प्रकरण होने के संबंध में अपनी राय बनाए और फिर विनिश्चित करे कि क्या अस्थाई निषेधाज्ञा प्रदान की जा सकती है या नहीं - आगे यह भी कि, ऐसी राय बनाते समय, वाद का प्रक्रम एक विचार योग्य कारक होना चाहिए।

(ii) प्रथम दृष्टया प्रकरण का अर्थ - समझाया गया।

Skol Breweries Ltd. v. Som Distilleries and Breweries Ltd.

Judgment dated 14.11.2018 passed by High Court of Madhya Pradesh in M.A. No. 2745 of 2018, reported in AIR 2019 MP 41

Relevant extracts from the judgment:

As per the Major Law Lexicon by P. Ramanatha Aiyar, 4th Edition 2010, Vol. 5, a prima facie case is defined as under:

> "*Prima facie* case" is that which raises substantial question, of course, bonafide which needs investigation and ultimately a decision on merits.

> When the Court is called upon to examine whether the plaintiff has a *prima facie* case in a suit, for the purpose of determining whether a temporary injunction should be granted, the Court must perforce examine the merits of the case, and it will be compelled to consider whether there is likelihood of the suit being decreed. The depth of investigation which the Court must necessarily pursue for that purpose will vary with each case. When the decision of the suit turns principally on a question of law, very often the decision as to whether a prima facie case exists will turn on considerations identical with or substantially similar to those affecting the ultimate determination of the suit.
>
> A '*prima facie*' case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a *prima facie* case to justify issuance of a temporary injunction."

In a case reported in *Vellakutty v. Karthyayani, AIR 1968 Kerala 179,* the Court has observed what has to be considered by the Court while granting temporary injunction, which reads thus;

> ".....The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the Court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant. (***Abdul Qadeer v. Municipal Board, Moradabad, AIR 1955 All 414***). It is also clear that a prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the Court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a *prima facie* case to justify issuance of a temporary injunction."

Besides, in a case reported in ***Roshan Lal v. Ratto, AIR 1977 Himachal Pradesh 10,*** the Court has observed the ***prima facie*** case, which reads thus;

> "When the Court is called upon to examine whether the plaintiff has *prima facie* case in a suit for the purpose of determining whether a temporary injunction should be granted, the Court must perforce examine the merits of the case and it will be compelled to consider whether there is likelihood of the suit being decreed. The depth of investigation which the Court must necessarily pursue for that purpose will vary with each case. When the decision of the suit turns principally on a question of law, very often

the decision as to whether a prima facie case exists will turn on considerations identical with or substantially similar to those affecting the ultimate determination of the suit."

Likewise, in a case reported in ***Krishan Lal Kohli v. V.K. Khanna and another, AIR 1993 Delhi 356,*** the Court has held as under:-

"..... What is meant by prima facie case? *Prima facie* case is that which raises substantial question, of course bona fide, which needs investigation and ultimately a decision on merits and, as already noticed by me above, the respondent before me and the plaintiff in the suit, namely Mr. Khanna does succeed in raising such questions. And, for the present, I find no reason to hold that the questions so raised have not been raised bona fide. But then, as we all know, mere existence of a prima facie case would not suffice."

Since the appellant/plaintiff is claiming temporary injunction then it is the duty of this Court to first form an opinion regarding prima facie case in favour of the plaintiff and then to decide whether temporary injunction can be granted or not. To form an opinion, this Court cannot shut its eyes ignoring the stage of the suit, especially when admittedly evidence has been closed by the parties and case is fixed for final arguments.

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***204. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 2A**

Order of injunction; punishment for disobedience of – Held, clear evidence regarding willful disobedience of the order of the Court is necessary for punishment.

सिविल प्रक्रिया संहिता, 1908 - आदेश 39 नियम 2क

निषेधाज्ञा आदेश की अवज्ञा के लिये दण्ड - अभिनिर्धारित, दण्ड देने हेतु न्यायालय के आदेश की जानबूझकर अवज्ञा के संबंध में स्पष्ट साक्ष्य आवश्यक है।

Ramasamy (Purchaser) v. Venkatachalapathi (Decree-holder) and another

Judgment dated 22.01.2019 passed by the Supreme Court in Civil Appeal No. 932 of 2019, reported in (2019) 3 SCC 544

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***205. CRIMINAL PROCEDURE CODE, 1973 – Section 125**

Maintenance – Sufficient cause for wife to live separately – Wife living separately with her parents – Plea of husband that wife left matrimonial house voluntarily – Admission by husband that he is not ready to take his wife with him – Held, if wife is willing to live with her husband but husband is not willing to take her, it is sufficient cause for the wife to live separately.

दण्ड प्रक्रिया संहिता, 1973 - धारा 125

भरण-पोषण - पत्नी का पृथक रहने का पर्याप्त कारण - पत्नी अपने माता-पिता के साथ पृथक रह रही है - पति का यह अभिवाक् कि पत्नी ने ससुराल को स्वेच्छा से छोड़ दिया है - पति की यह स्वीकारोक्ति कि वह अपनी पत्नी को अपने साथ रखने के लिये तत्पर नहीं है - अभिनिर्धारित, यदि पत्नी अपने पति के साथ रहना चाहती है किन्तु पति उसे अपने साथ नहीं रखना चाहता, तो पत्नी का पृथक रहने का यह पर्याप्त कारण है।

Devendra Singh v. State of Madhya Pradesh and another

Order dated 28.02.2019 passed by the High Court of Madhya Pradesh in Criminal Revision No. 113 of 2015, reported in 2019 Cri.L.J. 1958

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206. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)

UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 – Section 43D (2)

(i) Default bail – Detention beyond statutory period of 90 days; when permissible? Held, as per the provisions of Section 43D (2) of UAP Act, 1967, detention beyond 90 days and upto 180 days from the date of arrest is permissible – Essential conditions for applicability of Section 43D(2) explained.

दण्ड प्रक्रिया संहिता 1973 - धारा 167 (2)

विधि विरूद्ध क्रियाकलाप (निवारण) अधिनियम, 1967 - धारा 43घ (2)

(i) डिफॉल्ट जमानत - 90 दिवस की सांविधिक अवधि के परे विरोध, कब अनुज्ञेय है? अभिनिर्धारित, अवैधानिक क्रियाकलाप (निवारण) अधिनियम, 1967 की धारा 43घ(2) के प्रावधानों के अनुसार गिरफ्तारी की तिथि से 90 दिवस के परे तथा 180 दिवस तक निरोध अनुज्ञेय है - धारा 43घ(2) की प्रयोज्यता हेतु आवश्यक शर्तें वर्णित की गई है।

Union of India v. Mubarak alias Muhammed Mubarak

Judgment dated 07.05.2019 passed by the Supreme Court in Criminal Appeal No. 865 of 2019, reported in AIR 2019 SC 2428

Relevant extracts from the judgment:

Before we proceed to examine the question raised in the instant appeal any further, it may be apposite to take note of Section 43D(2)(b) of the UAP Act, 1967:

"43D. Modified application of certain provisions of the Code.

(1) xxx

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in subsection (2),

(a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:

> Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:
>
> Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”

The necessary ingredients of the proviso to Section 43D(2)(b) of the UAP Act, 1967 has to be fulfilled for its proper application. These are as under:

A. It has not been possible to complete the investigation within the period of 90 days.
B. A report to be submitted by the Public Prosecutor.
C. Said report indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 90 days.
D. Satisfaction of the Court in respect of the report of the Public Prosecutor.

Taking note of the specific reasons which has been assigned by the Special Public Prosecutor in his report of which reference has been made (supra), we are satisfied that the specific reasons assigned by the Public Prosecutor fulfil the mandate and requirement of Section 43D(2)(b) of the UAP Act, 1967 and that was considered by the Special Court in detail who after recording its satisfaction, granted detention of the accused respondent for a further period of 90 days under its Order dated 22nd March, 2018.

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207. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 (1) (b) and 397
INDIAN PENAL CODE, 1860 – Sections 420, 465, 467, 468, 471, 477A and 120B

(i) Cognizance, of an offence under Section 190(1)(b) CrPC upon police report – Held, the Court is not required to record reasons for its satisfaction of sufficient grounds for issuance of summons – Only in case, when the charge-sheet is barred by law or where there is lack of jurisdiction or when thecharge-sheet is rejected or not taken on file, then recording of reasons for rejection of the charge-sheet is required.

(ii) Revision – Against an order of issuance of process – Held, an order directing issuance of process is an intermediate or quasi-final order and not on interlocutory order – Revisional jurisdiction under Section 397 CrPC can be exercised against such order.

(iii) Scope of Revisional Court, reiterated – Held, Revisional Court does not sit as an Appellate Court – It should not reappreciate the evidence unless the judgment of the lower Court suffers from perversity.

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 190 (1) (ख) एवं 397

भारतीय दण्ड संहिता, 1860 - धाराएं 420, 465, 467, 468, 471, 477क एवं 120ख

(i) पुलिस रिपोर्ट के आधार पर धारा 190(1)(ख) दंप्रसं के तहत अपराध का संज्ञान - अभिनिर्धारित, न्यायालय को समन जारी करने के पर्याप्त कारणों की स्वयं की संतुष्टि के कारण लिखना आवश्यक नहीं है - केवल उस मामले में, जहां अभियोग-पत्र विधि द्वारा वर्जित है या जहां क्षेत्राधिकार का अभाव है या जहां अभियोग-पत्र खारिज कर दिया जाता है या फाईल पर नहीं लिया जाता, तब अभियोग-पत्र निरस्त करने के कारण लेखबद्ध करना आवश्यक होते हैं।

(ii) पुनरीक्षण - आदेशिका जारी करने के आदेश के विरूद्ध - अभिनिर्धारित, आदेशिका जारी करने संबंधी आदेश मध्यवर्ती या अर्ध-अंतिम होता है, न कि अंतर्वर्ती आदेश - ऐसे आदेश के विरूद्ध धारा 397 दंप्रसं के तहत पुनरीक्षण क्षेत्राधिकार का उपयोग किया जा सकता है।

(iii) पुनरीक्षण न्यायालय का विस्तार पुनरोद्धरित - अभिनिर्धारित, पुनरीक्षण न्यायालय, अपीलीय न्यायालय की भांति नहीं बैठता - उसे साक्ष्य का पुर्नमूल्यांकन तब तक नहीं करना चाहिये जब तक कि अवर न्यायालय का निर्णय प्रतिकूलता से ग्रसित न हो।

State of Gujarat v. Afroz Mohammed Hasanfatta

Judgment dated 05.02.2019 passed by the Supreme Court in Criminal Appeal No. 224 of 2019, reported in 2019 (1) Crimes 56 (SC)

Relevant extracts from the judgment:

It is well-settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and the Magistrate is only to be satisfied that there are sufficient grounds for proceeding against the accused. It is fairly well-settled that when issuing summons, the Magistrate need not explicitly state the reasons for his satisfaction that there are sufficient grounds for proceeding against the accused. Reliance was placed upon ***Bhushan Kumar and another v. State (NCT of Delhi) and another, (2012) 5 SCC 424.***

In para (21) of ***Mehmood ul Rehman v. Khazir Mohammad Tunda and others, (2015) 12 SCC 420.***, this Court has made a fine distinction between taking cognizance based upon charge sheet filed by the police under Section 190(1)(b) Cr.P.C. and a private complaint under Section 190(1)(a) Cr.P.C.

In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The Court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 Cr.P.C. is not the same at the time of framing the charge. For issuance of summons under Section 204 Cr.P.C., the expression used is "there is sufficient ground for proceeding….."; whereas for framing the charges, the expression used in Sections 240 and246 IPC is " there is ground for presuming that the accused has committed an offence….. ". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 Cr.P.C., detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 Cr.P.C.

In so far as taking cognizance based on the police report, the Magistrate has the advantage of the charge sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating Officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the Investigating Officer and thereafter, charge sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge sheet. The Court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190 (1)(b) Cr.P.C., where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to

satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason. In case, if the charge sheet is barred by law or where there is lack of jurisdiction or when the charge sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge sheet and for not taking on file. In the present case, cognizance of the offence has been taken by taking into consideration the charge sheet filed by the police for the offence under Sections 420, 465, 467, 468, 471, 477A and 120B IPC, the order for issuance of process without explicitly recording reasons for its satisfaction for issue of process does not suffer from any illegality.

Whether revision under Section 397(2) Cr.P.C. against order of issue of process is maintainable?

> In the case of ***Amar Nath and others v. State of Haryana and another, (1977) 4 SCC 137,*** it was held by this Court that the term "interlocutory order" in Section 397(2) Cr.P.C. denotes orders of purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the right of the parties cannot be said to be an 'interlocutory order'. In ***K.K. Patel and another v. State of Gujarat and another, (2000) 6 SCC 195,*** this Court held as under:-
>
> > "…….. It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide ***Amar Nath and others v. State of Haryana and another, (1977) 4 SCC 137, Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551, V.C. Shukla v. State through CBI, 1980 Supp. SCC 92*** and ***Rajendra Kumar Sitaram Pande and others v. Uttam and another, (1999) 3 SCC 134***). The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code……".
>
> The question whether against the order of issuance of summons under Section 204 Cr.P.C., the aggrieved party can invoke revisional jurisdiction under Section 397 Cr.P.C. has been elaborately considered by this Court in ***Urmila Devi v. Yudhvir Singh, (2013) 15 SCC 624***. After referring to various judgments, it was held as under:-

"..... On the other hand, in the decision in ***Rajendra Kumar Sitaram Pande and others v. Uttam and another, (1999) 3 SCC 134,*** this Court after referring to the earlier decisions in ***Amar Nath and others v. State of Haryana and another, (1977) 4 SCC 137, Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 and V.C. Shukla v. State through CBI, 1980 Supp. SCC 92,*** held as under in para 6: (***Rajendra Kumar Sitaram Pande case***.

"... this Court has held that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final. This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore, the bar under sub-section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate or quasi-final and, therefore, the revisional jurisdiction under Section 397 could be exercised against the same. The High Court, therefore, was not justified in coming to the conclusion that the Sessions Judge had no jurisdiction to interfere with the order in view of the bar under sub-section (2) of Section 397 of the Code."

This decision makes it clear that an order directing issuance of process is an intermediate or quasi-final order and therefore, the revisional jurisdiction under Section 397 CrPC can be exercised against the said order. This view was subsequently reiterated by this Court in ***K.K. Patel and another v. State of Gujarat and another, (2000) 6 SCC 195***.

Therefore, the position has now come to rest to the effect that the revisional jurisdiction under Section 397 CrPC is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons." In a catena of judgments, it has been held that the aggrieved party has the right to challenge the order of Magistrate directing issuance of summons.

While hearing revision under Section 397 Cr.P.C., the High Court does not sit as an appellate court and will not reappreciate the evidence unless the judgment of the lower court suffers from perversity. Based on the charge sheet and the materials produced thereon when the Magistrate satisfied that there are sufficient grounds for proceeding, the learned Single Judge was not justified in examining the merits and demerits of the case and substitute its own view. When the satisfaction of the Magistrate was based on the charge sheet and the materials placed before him, the satisfaction cannot be said to be erroneous or perverse and the satisfaction ought not to have been interfered with.

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***208. CRIMINAL PROCEDURE CODE, 1973 – Section 311**
EVIDENCE ACT, 1872 – Section 145

(i) Recall of witness to confront him with deposition of another witness – Witness cannot be recalled for such examination – There is no procedure in Law of Evidence where statement of one witness made in the Court can be put forth to another witness, either to seek corroboration or contradiction.

(ii) Power to recall witness at any stage of enquiry or trial – Held, such power can be exercised by the Court at any point of time during enquiry or trial before pronouncement of judgment.

दण्ड प्रक्रिया संहिता, 1973 - धारा 311

साक्ष्य अधिनियम, 1872 - धारा 145

(i) किसी साक्षी को अन्य साक्षी के बयान से खंडन करने हेतु पुनः आहूत करना - साक्षी को इस प्रकार के परीक्षण हेतु पुनः आहूत नहीं किया जा सकता - साक्ष्य विधि में ऐसी कोई प्रक्रिया नहीं है, जहां किसी साक्षी के न्यायालयीन कथनों को किसी अन्य साक्षी के सम्मुख रखा जा सके, चाहे संपुष्टि अथवा खण्डन हेतु।

(ii) जांच या विचारण के किसी भी प्रक्रम पर साक्षी को पुनः आहूत किये जाने की शक्ति - अभिनिर्धारित, न्यायालय द्वारा ऐसी शक्ति का प्रयोग निर्णय सुनाये जाने के पूर्व जांच या विचारण के दौरान किसी भी समय किया जा सकता है।

Laxminarayan Agrawal and another v. State of Madhya Pradesh
Order dated 31.01.2019 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 42631 of 2018, reported in 2019 CriLJ 1962

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***209. CRIMINAL PROCEDURE CODE, 1973 – Section 320**

Compounding of offence – Discretion of Court – Whether Court can refuse to allow application for compounding of offence? Held, Yes – Court can exercise its discretion having regard to the nature of the offence and its adverse social impact on society – Accused working as Village Development Officer was convicted for cheating a rustic villager of amount allotted under Poor Persons Residential Scheme – Application for compounding of offence preferred before High Court, was rejected – Order upheld.

दण्ड प्रक्रिया संहिता, 1973 - धारा 320

अपराध का शमन - न्यायालय का विवेकाधिकार - क्या न्यायालय अपराध के शमन हेतु आवेदन को स्वीकार करने से इंकार कर सकता है? अभिनिर्धारित, हाँ - न्यायालय अपराध की प्रकृति और समाज पर इसके प्रतिकूल प्रभाव को विचार में लेकर अपने विवेक का उपयोग कर सकता है - अभियुक्त ग्राम विकास अधिकारी के पद पर कार्यरत था तथा उसे एक निरक्षर ग्रामीण को निर्धन व्यक्तियों की आवासीय योजना

के अंतर्गत आबंटित राशि छलने के लिये दोषी ठहराया गया था उच्च न्यायालय के समक्ष प्रस्तुत अपराध के शमन का आवेदन खारिज किया गया - आदेश स्थिर रखा गया।

Bhagyan Das v. The State of Uttarakhand and another

Judgment dated 11.03.2019 passed by the Supreme Court in Criminal Appeal No. 465 of 2019, reported in 2019 (2) Crimes 27 (SC)

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***210. CRIMINAL PROCEDURE CODE, 1973 – Section 330**

Whether an application to release lunatic u/s 330 of the Code can be rejected on the ground that accused is released on bail? Held, No – Power u/s 330 can be exercised only when accused is a person of unsound mind and is unable to defend himself and understand Court proceedings – Custody of the accused or release of accused on bail is immaterial to decide an application u/s 330.

दण्ड प्रक्रिया संहिता, 1973 - धारा 330

क्या संहिता की धारा 330 के अंतर्गत किसी विकृतचित्त को छोड़ने के लिये आवेदन, इस आधार पर नामंजूर किया जा सकता है कि अभियुक्त जमानत पर छोड़ा जा चुका है? अभिनिर्धारित, नहीं - संहिता की धारा 330 के अंतर्गत शक्ति का प्रयोग केवल तब किया जा सकता है जब अभियुक्त विकृतचित्त व्यक्ति है तथा वह स्वयं का बचाव करने और न्यायालय की कार्यवाहियों को समझने में असमर्थ है - अभियुक्त का अभिरक्षा में होना अथवा जमानत पर छोड़ा जाना धारा 330 के अंतर्गत आवेदन के विनिश्चय हेतु अतात्विक है।

Nanhu alias Ghanshyam Patel v. State of M.P.

Order dated 13.02.2019 passed by the High Court of Madhya Pradesh in Criminal Revision No. 2919 of 2017, reported in 2019 CriLJ 2017

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211. CRIMINAL PROCEDURE CODE, 1973 – Section 366

INDIAN PENAL CODE, 1860 – Sections 302, 376 (2)(f) and 201

Death penalty – Considerations for 'rarest of rare case' reiterated – Also held, that the punishment should be proportionate to the offence and a savage sentence is an anathema to the civilised jurisprudence of Article 21.

दण्ड प्रक्रिया संहिता, 1973 - धारा 366

भारतीय दण्ड संहिता, 1860 - धाराएं 302, 376 (2)(च) एवं 201

मृत्यु दण्ड - 'विरल से विरलतम मामले' के कारक पुनरोद्धरित - यह भी अभिनिर्धारित कि, दण्ड अपराध के अनुपात में होना चाहिए तथा एक बर्बर दण्ड अनुच्छेद 21 के सभ्य न्यायशास्त्र पर एक अभिशाप है।

Raju Jagdish Paswan v. The State of Maharashtra

Judgment dated 17.01.2019 passed by the Supreme Court in Criminal Appeal No. 88 of 2019, reported in 2019 (1) Crimes 87 (SC)(3 Judge Bench)

Relevant extracts from the judgment:

The punishment prescribed under Section 302 IPC for committing a murder is death or imprisonment for life. This Court in ***Jagmohan Singh v. State of Uttar Pradesh, (1973) 1 SCC 20,*** turned down the challenge to Section 302 IPC which prescribes the sentence of death for murder. It became necessary for this Court to reconsider the validity of Section 302 IPC in view of certain findings of Justice V.R. Krishna Iyer, speaking for the majority in ***Rajendra Prasad v. State of U.P., (1979) 3 SCC 646,*** being contrary to the judgment of the Constitution Bench in ***Jagmohan's case*** (supra).

This Court in ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684,*** concluded that Section 302 providing death penalty for the offence of murder is constitutional. Another question regarding the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (CrPC) being unconstitutional in view of the unguided and untrammeled discretion of the Court was considered in ***Bachan Singh's*** case (supra). According to Section 354(3) CrPC, when the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

It was held that imprisonment for life shall be the normal punishment for murder according to the changed legislative policy after introduction of Section 354(3) CrPC and death sentence an exception. It was further held that the sentencing discretion conferred on the Courts cannot be said to be untrammeled or unguided. The discretion has to be exercised judiciously in accordance with well-recognized principles crystallized by judicial decisions after balancing all the aggravating and mitigating circumstances. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the case.

More often than not, the aggravating and mitigating factors are so intertwined that it is difficult to give a separate treatment to each of them. (***Bachan Singh*** (supra) p.197, 201).A planned murder involving extreme brutality or exceptional depravity and the murder of any member of the armed forces or police force or a public servant were a few circumstances which were categorized as aggravating. The age of the accused, possibility of reformation and rehabilitation of the accused, probability that the accused would not indulge in a criminal act in future, the extreme mental or emotional disturbance due to which the offence was committed, the duress or domination of another person under which the accused committed the offence and the mental unsoundness or incapacity were listed as some of the mitigating circumstances.

Every relevant circumstance relating to the crime as well as the criminal has to be considered before imposing a sentence of death under Section 302 IPC. This Court in ***Bachan Singh's*** case (supra) ultimately concluded that life imprisonment is the rule and death sentence is an exception for persons convicted of murder. Taking a life through law's instrumentality can be done only in the rarest of rare cases when the alternative option is unquestionably foreclosed. (ibid p. 209). The application of the rule of the rarest of rare in ***Bachan Singh*** (supra) was considered by this Court in ***Machhi Singh and others v. State of Punjab, (1983) 3 SCC 470,*** p.33-37. It was held that the manner and motive for commission of murder, magnitude of the crime, anti-social or abhorrent nature of the crime and the personality of the victim of murder are certain factors which have to be taken into account for deciding whether a case would fall in the category of the rarest of rare cases.

The appellant dragged a girl of nine years into a sugarcane field, raped her and dumped her in a well. The cause of death according to the medical evidence was signs of recent sexual intercourse with death due to drowning. There is no doubt that the murder involves exceptional depravity which is one of the aggravating circumstances. The manner of commission of the crime is extremely brutal. However, we are of the considered opinion that the appellant does not deserve the sentence of death in view of the following mitigating circumstances:

a) On a thorough examination of the offence, we are unable to accept the prosecution version that the murder was committed in a pre-planned manner.
b) The appellant was a young man aged 22 years at the time of commission of the offence.
c) There is no evidence produced by the prosecution that the appellant has the propensity of committing further crimes, causing a continuing threat to the society.
d) The State did not bring on record any evidence to show that the appellant cannot be reformed and rehabilitated.

In view of the above, we are unable to agree with the Courts below that the sentence of death is appropriate in this case. Applying the guidelines laid down by this Court for sentencing an accused convicted of murder and being mindful that a death sentence can be imposed only when the alternative option is unquestionably foreclosed, we are of the opinion that this case does not fall within the rarest of rare cases.

Punishment should be proportionate to the offence. A savage sentence is an anathema to the civilised jurisprudence of Article 21. ***(1983) 2 SCC 277***. In ***Solem v. Helm, 463 US 277 (1983),*** the U.S. Supreme Court held that the general principle of proportionality was applicable to a sentence of imprisonment. Helm was sentenced under the Recidivist Statute of South Dakota to undergo imprisonment for life without possibility of parole after being found guilty of uttering a "no account" check for US$ 100. The gravity of the offence and the

harshness of the penalty was one of the criteria to be taken into account by the Court in its proportionality analysis.

Sentence of life imprisonment awarded to Helm was found to be disproportionate to the crime and hence prohibited under the 8th amendment to the U.S. Constitution. Imposition of capital punishment for rape of an adult woman was found to be 'grossly disproportionate' and a violation of the 'cruel and unusual punishments' clause in ***Coker v. Georgia, 433 US 584 (1977)***. In another case, the sentence of death penalty on a participant in a felony which resulted in murder, without any inquiry into the participant's intention to kill, was held to be violative of the 8th amendment to the U.S. Constitution because of disproportionality. (***Enmund v. Florida, 458 US 782 (1982)***.

The U.S. Supreme Court treated this line of authority as an aspect of the death penalty jurisprudence rather than a generalizable aspect of the 8th amendment to the U.S. Constitution. (***Rummel v. Estelle, 445 US 263 (1980)***). Justice Scalia, who delivered the plurality opinion in ***Harmelin v. Michigan, 501 US 957 (1991)***, reasserted that the proportionality review is applicable to cases involving death sentence. The principle of proportionality has been recognized by this Court in ***Vikram Singh @ Vicky v. Union of India, (2015) 9 SCC 502,*** wherein it was stated that punishment must be proportionate to the nature and gravity of offences.

Though imprisonment for life is a sentence for the rest of the convict's life, in practice, it amounted to 12 years imprisonment prior to the introduction of Section 433-A, CrPC. After the insertion of Section 433-A, CrPC, imprisonment for life works out to 14 years. In ***Swamy Shraddananda @ Murali v. State of Karnataka, (2008) 12 SCC 767,*** it was held that the Court is empowered to substitute a death sentence by life imprisonment of a term in excess of years and further directed that the convict must not be released from the prison for the rest of his life or for the actual term specified in the order, as the case may be.

While not endorsing the death sentence that was imposed on Swamy Shraddananda, this Court found that since life imprisonment, subject to remission, normally worked out to 14 years, it would be grossly disproportionate and inadequate. The view expressed in ***Swamy Shraddananda's*** case (supra) was upheld in ***Union of India v. Sriharan and others, (2016) 7 SCC 1,*** by a Constitution Bench.

Though we have already expressed our view that the appellant does not deserve to be put to death, he is not entitled to be released on completion of 14 years while serving life imprisonment. The brutal sexual assault by the appellant on the hapless victim of nine years and the grotesque murder of the girl compels us to hold that the release of the appellant on completion of 14 years of imprisonment would not be in the interest of the society. Considering the gravity of the offence and the manner in which it was done, we are of the opinion that the appellant deserves to be incarcerated for a period of 30 years.

To arrive at this conclusion, we have taken into consideration the opinion of this Court in similar cases - ***Tattu Lodhi v. State of M.P., (2016) 9 SCC 675 (25***

yrs), Selvam v. State, (2014) 12 SCC 274 (30 yrs), Rajkumar v. State of MP, (2014) 5 SCC 353 (30 yrs), Neel Kumar @ Anil Kumar v. State of Haryana, (2012) 5 SCC 766 (30 yrs), Anil @ Antony v. State of Maharashtra, (2014) 4 SCC 69 (30 years).

In the case of ***Rajendra Prasad*** (supra), the Court had suggested as follows:

> "Social defence against murderers is best insured in the short run by caging them but in the long run, the real run, by transformation through re-orientation of the inner man by many methods including neuro-techniques of which we have a rich legacy. If the prison system will talk the native language, we have the yogic treasure to experiment with on high-strung, high-risk murder merchants. Neuroscience stands on the threshold of astounding discoveries. Yoga, in its many forms, seems to hold splendid answers. Meditational technology, as a tool of criminology, is a nascent-ancient methodology. The State must experiment.
>
> It is cheaper to hang than to heal, but Indian life - any human life - is too dear to be swung dead save in extreme circumstances."

The Model Prison Manual of 2016 ("2016 Manual") which was approved by the Ministry of Home Affairs refers to the education of prisoners which is vital for the overall development of prisoners. Para 14.06 of the Chapter 14 in the 2016 Manual deals with the nature of educational programmes which includes physical education such as Yoga, health/hygiene education, moral and spiritual education among others. We do not have any material on record about how many States have adopted the 2016 Manual. We direct the States to consider implementing the reformative and rehabilitation programmes contained in the 2016 Manual. In addition, it is open to the States to adopt any other correctional measures.

Accordingly, the Appeals are partly allowed and the sentence of death is set aside. The Appellant shall suffer an imprisonment for a period of 30 years without remission.

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212. CRIMINAL PROCEDURE CODE, 1973 – Section 386

NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 118 and 139

(i) Appeal against acquittal for offence under Section 138 of N.I. Act – Ordinary rule is that the Appellate Court will not upset the judgment of acquittal unless the judgment of the trial Court is perverse – It cannot be applied with same rigour in a matter relating to the offence under Section 138 of the N.I Act – Particularly, where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability.

(ii) Presumption under Sections 118 and 138 of N.I. Act – After such presumption is drawn, while examining whether accused has been able to rebut such presumption or not – Want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds are not relevant factors for consideration. (*Arulvelu v. State represented by Public Prosecutor, (2009) 10 SCC 206* and *Rangappa v. Sri Mohan,(2010) 11 SCC 441,* referred)

दण्ड प्रक्रिया संहिता, 1973 - धारा 386

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 118 एवं 139

(i) धारा 138 पराक्राम्य लिखत अधिनियम के तहत अपराध में दोषसिद्धि के विरूद्ध अपील - सामान्य नियम यह है कि जब तक विचारण न्यायालय का निर्णय विपर्यस्त न हो तब तक अपील न्यायालय दोषमुक्ति के निर्णय को नहीं पलटेंगें - धारा 138 परक्राम्य लिखत अधिनियम से संबंधित मामलों में इसे समान कठोरता से लागू नहीं किया जा सकता है - विशेषकर तब, जब ऋण या दायित्व के पूर्णतः या भागतः उन्मोचन के लिये चैक प्राप्त किये जाने की उपधारणा की गई हो।

(ii) परक्राम्य लिखत अधिनियम की धाराओं 118 और 139 के अधीन उपधारणा - ऐसी उपधारणा कर लेने के पश्चात, यह परखने के लिये कि क्या अभियुक्त उपधारणा को खण्डित कर सका है अथवा नहीं; रसीद या लेखा के रूप में दस्तावेजी साक्ष्य का अभाव अथवा राशि प्राप्त करने के स्त्रोत का अभाव विचार योग्य कारक नहीं हैं। (***अरूवेलु विरूद्ध लोक अभियोजक द्वारा राज्य का प्रतिनिधित्व, (2009) 10 एससीसी 206 एवं रंगप्पा विरूद्ध श्री मोहन, (2010) 11 एससीसी 441*** संदर्भित)

Rohitbhai Jivanlal Patel v. State of Gujarat and another

Judgment dated 15.03.2019 passed by the Supreme Court in Criminal Appeal No. 508 of 2019, reported in 2019 (1) Crimes 291 (SC)

Relevant extracts from the judgment:

Ordinarily, the Appellate Court will not be upsetting the judgment of acquittal, if the view taken by trial Court is one of the possible views of matter and unless the Appellate Court arrives at a clear finding that the judgment of the trial Court is perverse, i.e., not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essentially to remind the Appellate Court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal further strengthens such presumption in favor of the accused. However, such restrictions need to be visualized in the context of the particular matter before the Appellate Court and the nature of inquiry therein. The same rule with same rigour cannot be applied in a matter relating to the

offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability. Of course, the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favor of his defense but while examining if the accused has brought about a probable defense so as to rebut the presumption, the Appellate Court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.

In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/ circumstances which could be of a reasonably probable defense.

Here in above, we have examined in detail the findings of the trial Court and those of the High Court and have no hesitation in concluding that the present one was clearly a case where the decision of the trial Court suffered from perversity and fundamental error of approach; and the High Court was justified in reversing the judgment of the trial Court. The observations of the trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt or even kachcha notes, or that there were inconsistencies in the statement of the complainant and his witness, or that the witness of the complainant was more in know of facts etc. would have been relevant if the matter was to be examined with reference to the onus on the complainant to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favor of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favor of the complainant. When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not. The other observations as regards any variance in the statement of complainant and witness; or want of knowledge about dates and other particulars of the cheques; or washing away of the earlier

cheques in the rains though the office of the complainant being on the 8th floor had also been irrelevant factors for consideration of a probable defense of the appellant. Similarly, the factor that the complainant alleged the loan amount to be ` 22,50,000/- and seven cheques being of ` 3,00,000/- each leading to a deficit of ` 1,50,000/-, is not even worth consideration for the purpose of the determination of real questions involved in the matter. May be, if the total amount of cheques exceeded the alleged amount of loan, a slender doubt might have arisen, but, in the present matter, the total amount of 7 cheques is lesser than the amount of loan. Significantly, the specific amount of loan (to the tune of ` 22,50,000/-) was distinctly stated by the accused-appellant in the aforesaid acknowledgment dated 21.03.2017.

On perusing the order of the trial Court, it is noticed that the trial Court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'. We are of the considered view that the trial Court appears to have proceeded on a misplacedassumptionthat by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.

The result of discussion in the foregoing paragraphs is that the major considerations on which the trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed here in above, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the trial Court and after examining the evidence on record as a whole, found that the findings of the trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter.

For what has been discussed here in above, the findings of the High Court convicting the accused-appellant for offence under Section 138 of the NI Act deserves to be, and are, confirmed.

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213. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence :

(i) Where there is ample ocular evidence on record, the motive for commission of the offence may not be so significant;

(ii) A related witness cannot be said to be an 'interested' witness merely by virtue of being a relative of the victim; and

(iii) The evidence of a related witness cannot automatically be discarded by labelling the witness as "interested".

साक्ष्य अधिनियम, 1872 - धारा 3

साक्ष्य का मूल्यांकन:

(i) जहां अभिलेख में पर्याप्त प्रत्यक्ष साक्ष्य उपलब्ध हो, वहां अपराध कारित करने का हेतु बहुत महत्वपूर्ण नहीं होता है;

(ii) आहत का रिश्तेदार होने मात्र से एक संबंधी साक्षी को 'हितबद्ध' साक्षी नहीं कहा जा सकता है; तथा

(iii) किसी संबंधी-साक्षी की साक्ष्य को मात्र हितबद्ध साक्षी होना प्रकट करते हुये यंत्रवत त्यक्त नहीं किया जा सकता है।

Md. Rojali Ali and others v. State of Assam Ministry of Home Affairs through the Secretary

Judgment dated 19.02.2019 passed by the Supreme Court in Criminal Appeal No. 1839 of 2010, reported in 2019 (1) Crimes 165 (SC)

Relevant extracts from the judgment:

In view of the ample ocular evidence on record, the motive for commission of the offence may not be so significant in this matter.

As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an 'interested' witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between 'interested' and 'related' witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see ***State of Rajasthan v. Kalki, (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 SCC 107 and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298***).Recently, this difference was reiterated in ***Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** in the following terms, by referring to the three-Judge bench decision in ***State of Rajasthan v. Kalki*** (supra):

> "14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be "interested"..."

In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labeling the witness as interested. Indeed, one of the earliest statements

with respect to interested witnesses in criminal cases was made by this Court in ***Dalip Singh v. State of Punjab, 1954 SCR 145,*** wherein this Court observed:

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in ***Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199***:

> "23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

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214. FOREST ACT, 1927 – Section 52

WILD LIFE (PROTECTION) ACT, 1972 – Section 50

(i) Whether confiscation proceeding and criminal proceeding in forest or wild life offences can be undertaken simultaneously? Held, Yes – Confiscation is not a punishment – Authorities have right to initiate both; confiscation and criminal proceedings, against any individual.

(ii) Supurdnama – Seizure of vehicle – Forest and wild life offences – Release of vehicle during pendency of confiscation proceedings – Liberal approach for release of vehicle should not be adopted.

वन अधिनियम, 1927 - धारा 52

वन्य जीव (संरक्षण) अधिनियम, 1972 - धारा 50

(i) क्या वन अथवा वन्य जीव अपराधों के संबंध में अधिहरण कार्यवाही तथा आपराधिक कार्यवाही एक साथ प्रारंभ की जा सकती है? अभिनिर्धारित, हाँ - अधिहरण कोई दण्ड नहीं है - प्राधिकारियों को किसी व्यक्ति के विरूद्ध अधिहरण तथा आपराधिक कार्यवाही दोनों आरंभ करने का अधिकार है।

(ii) सुपुर्दनामा - वाहन की जब्ती - वन तथा वन्य जीव अपराध - अधिहरण कार्यवाही के लंबित रहने के दौरान वाहन की निर्मुक्ति - वाहन की निर्मुक्ति में उदार दृष्टिकोण नहीं अपनाया जाना चाहिए।

Rajpati Yadav v. State of MP and others

Judgment dated 18.01.2019 passed by the High Court of Madhya Pradesh in Writ Petition No. 605 of 2019, reported in 2019 (2) MPLJ 395 (DB)

Relevant extracts from the judgment:

The provisions of Section 52 of the Indian Forest Act, lays down the procedure for initiating proceedings for confiscation in respect of the tools, machines and vehicle involved in the commission of the forest offence. The provisions of the said Act also provide for taking up action for criminal prosecution and punishment of the person concerned in respect of the forest offence committed by him. Similar provisions are also contained in the Wild Life Protection Act as well as the M.P. Minor Mineral Rules 1996.

It is settled law that confiscation is not a punishment as has been held by the Supreme Court in the cases of ***Yogendra Kumar Jaiswal and others v. State of Bihar and others, (2016) 3 SCC 183, State of M.P. and others v. Kallo Bai, (2017) 14 SCC 502 and Maqbool Hussain v. State of Bombay, AIR 1953 SC 325***, which has also been followed by this Court while interpreting the provisions of Section 53 of the Minor Mineral Rules, in the cases of ***Kailash Chand and another v. State of M.P. and others, AIR 1995 MP 1; Ramkumar Sahu v. State of M.P and others, 2018 (4) MPLJ 171, Biswanath Bhattacharya v. Union of India and others, (2014) 4 SCC 392; Divisional Forest Officer and another v. G. V. Sudhakar Rao and others, (1985) 4 SCC 573,*** wherein it has clearly been held that confiscation is not a punishment and that the authorities have a right to initiate both, confiscation and criminal proceedings, against any individual.

As far as the contention of the learned counsel for the petitioner regarding release of the vehicle during the pendency of the confiscation proceedings is concerned, the Supreme Court in the case of ***State of Karnataka v. K. Krishnan, (2000) 7 SCC 80,*** has held that a liberal approach for release of vehicles or implements involved in forest offences should not be adopted by the Courts and the same should not normally be returned to a party till the culmination of the proceedings in respect of such offence including confiscatory proceedings except in exceptional cases, in the following terms:-

> ".....The liberal approach in the matter would perpetuate the commission of more offences with respect to the forest and its produce which, if not protected, is surely to affect the mother-earth and the atmosphere surrounding it. The courts cannot shut their eyes and ignore their obligations indicated in the Act enacted for the purposes of protecting and safeguarding both the forests and their produce. The

forests are not only the natural wealth of the country but also protector of human life by providing a clean and unpolluted atmosphere. We are of the considered view that when any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence, including confiscatory proceedings, if any. Nonetheless, if for any exceptional reasons a court is inclined to release the vehicle during such pendency, furnishing a bank guarantee should be the minimum condition. No party shall be under the impression that release of vehicle would be possible on easier terms, when such vehicle is alleged to have been involved in commission of a forest offence. Any such easy release would tempt the forest offenders to repeat commission of such offences. Its casualty will be the forests as the same cannot be replenished for years to come."

The same view has again been reiterated and reaffirmed by the Supreme Court in the cases of ***State of W.B v. Gopal Sarkar, (2002) 1 SCC 495 and State of West Bengal and another v. Mahua Sarkar, (2008) 12 SCC 763***.

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215. FOREST ACT, 1927 – Sections 52 and 52A

CRIMINAL PROCEDURE CODE, 1973 – Section 451

Release of vehicle by Magistrate – Vehicle seized for illegal excavation of sand from river – Initiation of confiscation proceedings under Section 52 of the Act – Once the Magistrate receives information regarding initiation of confiscation proceedings under Section 52(4) of the Act, Magistrate ceases to have jurisdiction to release the vehicle as per Section 52C of the Act.

वन अधिनियम, 1927 - धाराएं 52 एवं 52क

दण्ड प्रक्रिया संहिता, 1973 - धारा 451

मजिस्ट्रेट द्वारा वाहन की निर्मुक्ति - नदी से रेत के अवैध उत्खनन के लिये वाहन को जब्त किया गया - अधिनियम की धारा 52 के अंतर्गत अधिहरण की कार्यवाहियाँ आरंभ की गईं - जब एक बार मजिस्ट्रेट को अधिनियम की धारा 52(4) के अंतर्गत अधिहरण कार्यवाहियों की सूचना प्राप्त हो जाती है तो अधिनियम की धारा 52ग के अंतर्गत वाहन को निर्मुक्त करने का मजिस्ट्रेट का क्षेत्राधिकार समाप्त हो जाता है।

State of Madhya Pradesh v. Rakesh Lavaniya

Judgment dated 26.03.2019 passed by the Supreme Court in Criminal Appeal No. 525 of 2019, reported in AIR 2019 SC 1597

Relevant extracts from the judgment:

Our analysis of the amendments brought by MP Act 25 of 1983 to the Indian Forest Act, 1927 leads to the conclusion that specific provisions have been made for the seizure and confiscation of forest produce and of tools, boats, vehicles and articles used in the commission of offences. Upon a seizure under Section 52(1), the officer effecting the seizure has to either produce the property before the Authorised Officer or to make a report of the seizure under sub-section (2) of Section 52. Upon being satisfied that a forest offence has been committed, the Authorised Officer is empowered, for reasons to be recorded, to confiscate the forest produce together with the tools, vehicles, boats and articles used in its commission. Before confiscating any property under sub-section (3), the Authorised Officer is required to send an intimation of the initiation of the proceedings for the confiscation of the property to the Magistrate having jurisdiction to try the offence. Where it is intended to immediately launch a criminal proceeding, a report of the seizure is made to the Magistrate having jurisdiction to try the offence. The order of confiscation under Section 52(3) is subject to an appeal under Section 52-A and a revision under Section 52-B. Subsection (5) of Section 52-B imparts finality to the order of the Court of Sessions in revision notwithstanding anything contained to the contrary in the CrPC and provides that it shall not be called into question before any Court. Section 52-C stipulates that on the receipt of an intimation by the Magistrate under sub-section (4) of Section 52, no Court, tribunal or authority, other than an Authorised Officer, an Appellate Authority or Court of Sessions (under Sections 52, 52-A and 52-B) shall have jurisdiction to pass orders with regard to possession, delivery, disposal or distribution of the property in regard to which confiscation proceedings have been initiated. Sub-section (1) of Section 52-C has a non obstante provision which operates notwithstanding anything to the contrary contained in the Indian Forest Act, 1927 or in any other law for the time being in force. The only saving is in respect of an officer duly empowered by the State government for directing the immediate release of a property seized under Section 52, as provided in Section 61. Hence, upon the receipt of an intimation by the Magistrate of the initiation of confiscation proceedings under sub-section (4)(a) of Section 52, the bar of jurisdiction under sub-section (1) of Section 52-C is clearly attracted. The scheme contained in the amendments enacted to the Indian Forest Act, 1927 in relation to the State of Madhya Pradesh, makes it abundantly clear that the direction which was issued by the High Court in the present case, in a petition under Section 482 of the CrPC, to the Magistrate to direct the interim release of the vehicle, which had been seized, was contrary to law. The jurisdiction under Section 451 of the CrPC was not available to the Magistrate, once the Authorised Officer initiated confiscation proceedings.

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216. INDIAN PENAL CODE, 1860 – Sections 90 and 375

'Rape' and 'consensual sex', distinction between – Explained – Held, *malafide* intention and false promise without intending to marry the prosecutrix on the part of the accused – It would be a case of rape – But, where the prosecutrix agrees to have sexual intercourse on account of her love for the accused – Not solely on the account of the misconception created by the accused – It would be a case of 'consensual sex'.

भारतीय दण्ड संहिता, 1860 - धाराएं 90 एवं 375

'बलात्कार' एवं 'सह संवेदी यौन क्रिया' में भेद - समझाया गया - अभिनिर्धारित, अभियुक्त का दुर्भावनापूर्ण आशय तथा अभियोक्त्री के विवाह न करने के आशय से झूठा वचन दिया जाना - यह 'बलात्कार' का मामला होगा - परंतु, जहां अभियोक्त्री, अभियुक्त के प्रति उसके प्रेम के कारण संभोग के लिए तैयार होती है - अभियुक्त की ओर से मात्र तथ्य के भ्रम के कारण नहीं - यह 'सह संवेदी यौन क्रिया' का मामला होगा।

Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and others

Judgment dated 22.11.2018 passed by the Supreme Court in Criminal Appeal No. 1443 of 2018, reported in AIR 2019 SC 327

Relevant extracts from the judgment:

Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the women is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth, when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her 'will'" means that the act must have been done inspite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

In ***Uday v. State of Karnataka, (2003) 4 SCC 46,*** this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus:-

> "It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under amisconception of fact.
>
> In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.
>
> Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to.
>
> That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and

in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

In ***Deelip Singh alias Dilip Kumar v. State of Bihar, (2005) 1 SCC 88,*** the Court framed the following two questions relating to consent:-

''(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?''

In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February, 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions.

After she became pregnant, she revealed the matter to her parents. Even thereafter, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time. With this factual back-ground, the Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is *prima facie* accountable for damages under civil law. It was held thus:-

"The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also

too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact.

On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in ***Uday case*** (supra) at para 24 come to the aid of the appellant".

In ***Deepak Gulati v. State of Haryana, (2013) 7 SCC 675,*** the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him.

She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives.

Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the Court in Ambala. At the bus station, the accused was arrested by the police.

The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be leveled against the accused.

Recently, this Court, in ***Shivashankar @ Shiva v. State of Karnataka and another,*** in Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under:-

> "In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

Thus, there is a clear distinction between rape and consensual sex. The Court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had *mala fide* motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape.

There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any *mala fide* intention and if he had clandestine motives, it is a clear case of rape.

The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the I.PC.

In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/ appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow.

She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside

sometimes at my home whereas some time at his home." Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint.

It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since complainant has failed to *prima facie* show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained.

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***217. INDAIN PENAL CODE, 1860 – Sections 107 and 306**

Abetment of suicide – Deceased lent her gold ornaments to the accused for wearing in a marriage ceremony – On refusal by the accused to return the ornaments, deceased committed suicide by hanging herself – Held, in normal circumstances, the course of action available to the victim is to lodge FIR and then follow the procedure as per law – Mere refusal to return the jewellery borrowed by the accused is not enough to establish *prima facie* case for constituting an offence of abetment defined in Section 107 r/w/s 306 IPC.

भारतीय दण्ड संहिता, 1860 - धाराएं 107 एवं 306

आत्महत्या का दुष्प्रेरण - मृतक ने अपने सोने के जेवरात अभियुक्त को विवाह समारोह में पहनने के लिए उधार दिए - अभियुक्त द्वारा जेवरात वापस करने से इंकार करने पर मृतिका ने फांसी लगाकर आत्महत्या कर ली - अभिनिर्धारित, सामान्य परिस्थितियों में, पीड़ित के पास प्रथम सूचना रिपोर्ट दर्ज करने तथा तत्पश्चात् विधि अनुसार प्रक्रिया का पालन करने का मार्ग रहता है - मात्र अभियुक्त द्वारा उधार लिए गए जेवरात वापस करने से इंकार करना, धारा 107 सहपठित धारा 306 भा.द.वि. में परिभाषित दुष्प्रेरण के अपराध को गठित करने वाला प्रथम दृष्टया मामला स्थापित करने के लिए पर्याप्त नहीं है।

Laxmi Bai Raghuvanshi (Smt.) and another v. State of M.P.

Order dated 02.04.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in M.Cr.C. No. 2063 of 2016, reported in ILR (2018) MP 1308

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***218.INDIAN PENAL CODE, 1860 – Sections 120B, 302 r/w/s 34, 302 r/w/s 114 and 379 r/w/s 34**

EVIDENCE ACT, 1872 – Section 8

Circumstantial evidence, absence of motive – Held, when the links in the chain of circumstances have been completely established which lead to the only conclusion that all the accused had entered into a conspiracy to commit murder of the deceased and that infact, the accused persons had committed the murder – Motive may not have much relevance.

भारतीय दण्ड संहिता, 1860 - धाराएं 120ख, 302 सहपठित धारा 34, 302 सहपठित धारा 114 तथा 379 सहपठित धारा 34

साक्ष्य अधिनियम, 1872 - धारा 8

परिस्थितिजन्य साक्ष्य, हेतु का अभाव - अभिनिर्धारित, जब परिस्थितियों की श्रृंखला में कड़ियां पूर्णतः साबित हैं जो केवल एक ही निष्कर्ष की ओर इंगित करती हैं कि सभी अभियुक्तगण ने मृतक की हत्या करने का षड़यंत्र रचा तथा वास्तव में अभियुक्तगण ने हत्या कारित भी की - तब हेतु अधिक सुसंगत नहीं रहेगा।

Vidyalakshmi @ Vidya v. State of Kerala

Judgment dated 15.02.2019 passed by the Supreme Court in Criminal Appeal No. 971 of 2012, reported in 2019 (1) Crimes 101 (SC)

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***219.INDAIN PENAL CODE, 1860 – Sections 148, 149 and 302**

APPRECIATION OF EVIDENCE:

(i) Difference of opinion between two doctors about injuries – Held, the evidence of doctor who supports the ocular evidence is reliable. (*Sanjay Khanderao Wadane v. State of Maharashtra, (2017) 11 SCC 842* and *Prahlad Patel v. State of Madhya Pradesh, (2011) 4 SCC 262,* referred)

(ii) Contradiction between ocular evidence and medical evidence – Held, where medical evidence completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. (*Mahavir Singh v. State of Madhya Pradesh, (2016) 10 SCC 220,* referred)

भारतीय दण्ड संहिता, 1860 - धाराएं 148, 149 एवं 302

साक्ष्य का मूल्यांकनः

(i) चोटों के संबंध में दो चिकित्सकों के मत में भिन्नता - अभिनिर्धारित, उस चिकित्सक की साक्ष्य विश्वसनीय है जो चक्षुदर्षी साक्ष्य को समर्थित करती है। (***संजय खांडेराव वडाने विरूद्ध महाराष्ट्र राज्य, (2017) 11 एससीसी 842 तथा प्रहलाद पटेल विरूद्ध मध्यप्रदेश राज्य, (2011) 4 एससीसी 262,*** संदर्भित)

(ii) चक्षुदर्शी साक्ष्य एवं चिकित्सीय साक्ष्य में विरोधाभास - अभिनिर्धारित, जहां चिकित्सीय साक्ष्य, चक्षुदर्शी साक्ष्य के सत्य होने की संभावना को पूर्णतः नकारती हो, वहां चक्षुदर्शी साक्ष्य पर अविश्वास किया जा सकता है। (***महावीर सिंह विरूद्ध मध्यप्रदेश राज्य, (2016) 10 एससीसी 220,*** संदर्भित)

Pintoo @ Lakhan Singh and another v. State of M.P.

Judgment dated 05.04.2018 passed by the High Court ofMadhya Pradesh in Criminal Appeal No. 56 of 2009, reported inILR (2018) MP 1223 (DB)

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***220. INDIAN PENAL CODE, 1860 – Section 149**

"Common object" of an assembly – Can be ascertained by considering following factors – (i) The nature of weapons used by members of the assembly; (ii) the manner and sequence of attacks made by those members on the deceased; and (iii) the circumstances under which the occurrence took place – It is an inference to be deduced from the facts and circumstances of each case.

भारतीय दण्ड संहिता, 1860 - धारा 149

जमाव का "सामान्य उद्देश्य" - निम्न कारकों पर विचार करते हुए अवधारित किया जा सकता है - (i) जमाव के सदस्यों द्वारा प्रयुक्त किये गये हथियारों की प्रकृति, (ii) ऐसे सदस्यों द्वारा मृतक पर किये हमले का क्रम एवं ढंग, एवं (iii) वे परिस्थितियां जिनके अधीन घटना घटित हुई - यह प्रत्येक प्रकरण के तथ्यों से निकाला जाने वाला निष्कर्ष है।

Mahendran v. State of Tamil Nadu

Judgment dated 21.02.2019 passed by the Supreme Court in Criminal Appeal No. 1260 of 2010, reported in 2019 (1) Crimes 191 (SC)

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221. INDIAN PENAL CODE, 1860 – Sections 149, 302 and 304 Part-I

APPRECIATION OF EVIDENCE:

(i) Injury on the person of accused, non-explanation of, effect –Explained – Generally, non-explanation of injuries on the person of the accused is a manifest defect in prosecution case – But mere non-explanation may not affect the prosecution case in all cases – For instance, where injuries sustained by accused are simple and minor or whereprosecution version is supported by eye-witnesses and medical evidence, non-explanation of injuries on person of accused has no effect.

(ii) Common object – Proof of an overt act of every member of unlawful assembly – Whether required? Held, No – Once common object of assembly is established, overt act of individual member loses its significance.

भारतीय दण्ड संहिता, 1860 - धाराएं 149, 302 एवं 304 भाग-प्

साक्ष्य का मूल्यांकनः

(i) अभियुक्त के शरीर पर आई चोटों के स्पष्टीकरण का अभाव - प्रभाव की व्याख्या की गई - सामान्यतया, अभियुक्त के शरीर पर आई चोटों को स्पष्ट न किया जाना अभियोजन मामले में प्रत्यक्ष त्रुटि दर्शाता है - परन्तु ऐसे स्पष्टीकरण का अभाव मात्र समस्त दशाओं में अभियोजन मामले को प्रभावित नहीं करता है - उदाहरण के लिए, जहां अभियुक्त को आई चोटें साधारण एवं मामूली हैं अथवा जहां कि अभियोजन कथानक का समर्थन चक्षुदर्शी साक्षियों एवं चिकित्सीय साक्ष्य द्वारा होता है, वहां अभियुक्त के शरीर पर आई चोटों को स्पष्ट न किया जाना किसी महत्व का नहीं है।

(ii) सामान्य उद्देश्य - विधिविरूद्ध जमाव के प्रत्येक सदस्य के किसी प्रत्यक्ष कृत्य का प्रमाण - क्या आवश्यक है? अभिनिर्धारित, नहीं - एक बार जमाव का सामान्य उद्देश्य स्थापित होने पर व्यक्तिगत प्रत्यक्ष कृत्य महत्वहीन हो जाता है।

Munishamappa and others v. State of Karnataka

Judgment dated 24.01.2019 passed by the Supreme Court in Criminal Appeal No. 96 of 2011, reported in (2019) 3 SCC 393

Relevant extracts from the judgment:

The trial Court, as we have noted earlier, was persuaded despite this state of the evidentiary record to acquit the accused primarily on the ground that the injuries on the accused (except accused No. 2) had not been satisfactorily explained. In ***Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394,*** a two judge Bench of this Court held thus:

> "12...Indeed if the eyewitnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence."

The decision in ***Lakshmi Singh*** (supra) has been considered in a later judgment of this Court in ***Amar Malla v. State of Tripura, (2002) 7 SCC 91.*** A two judge Bench of this Court held thus:

> "9...From the nature of injuries said to have been received by these accused persons, it would appear that the same were simple and minor ones. It is well settled that merely because the prosecution has failed to explain injuries on the accused persons, ipso facto the same cannot be taken to be a ground for throwing out the prosecution case, especially when the same has been supported by eyewitnesses, including injured ones as well, and their evidence is corroborated by medical evidence as well as objective finding of the investigating officer."

The same principle has been followed by another Bench of two judges in ***State of MP v. Ramesh, (2005) 9 SCC 705,*** where it was held that:

> "11...Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

In ***Raghubir Singh v. State of Rajasthan, (2011) 12 SCC 235,*** a two judge Bench of this Court held thus:

> "14...each and every injury on an accused is not required to be explained and more particularly where all the injuries caused to the accused are simple in nature (as in the present case) and the facts of the case have to be assessed on the nature of probabilities..."

The evidence of PW 20 notes the injuries which were sustained by accused No. 2 thus:

> "1. A white blast injury tearing of the skin sub-cutaneous tissue and partly of quadriceps muscle covering almost entire half of left thigh with profused bleeding a doubtful fracture of left femur.
>
> 2. Multiple pellet wounds are present over left inguinal area in lower left iliac area and suprapubic area."

These injuries have been duly explained in the evidence of the prosecution witnesses as having been sustained when the bomb which accused no. 2 was carrying exploded in the course of the incident. The injuries sustained by the other accused were evidently simple injuries. The pellet injuries suffered by accused no. 3 were traceable to the bomb blasts caused by accused no. 2. The injuries suffered by accused nos. 4 and 5 were of a simple nature.

On the above state of the record, it is abundantly clear that the judgment of the trial Court suffers from a manifest perversity. The trial Court at one stage, adverted to the injuries sustained by the four accused persons as "fatal injuries" ignoring that there had been no death in the course of the incident on the side of the accused. At other places in the course of the judgment, the trial Court opined that the injuries were severe. Here again, there was an evident and manifest error on the part of the trial Court in failing to notice that the pellet injuries which were sustained by accused no. 3 were a result of the explosion of the bomb which had been handled by accused no. 2. The other injuries sustained by the accused were relatively of a minor nature. That apart, it has emerged on the record that in the cross complaint which was filed by the side of the accused, the police, after investigation, submitted a summary report which was accepted by the Magistrate.

x x x

The provisions of Section 149 have been explained by this Court in ***Mijazi v. State of U. P., AIR 1959 SC 572*** and in ***Masalti v. State of U.P., AIR 1965 SC 202.*** Two elements are crucial to the above definition: (i) the offence must be committed by a member of an unlawful assembly; (ii) the offence must be committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once a common object of an unlawful assembly is established, it is not necessary that all persons who form the unlawful assembly must be demonstrated to have committed the overt act. The common object is ascertained from considering the acts of its members and on the basis of all surrounding circumstances. In ***Sikandar Singh v. State of Bihar, (2010) 7 SCC 477,*** this Court held thus:

> "17. A "common object" does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly,

the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful."

In a more recent decision in ***Sanjeev Kumar Gupta v. State of Uttar Pradesh, (2015) 11 SCC 69,*** this Court held that a common object does not always require a prior concert and it may form even on the spur of the moment. In taking this view, this Court relied on the earlier decision in ***Ramachandran v. State of Kerala, (2011) 9 SCC 257*** and held thus:

"In this case all the accused were very well known to the witnesses. So their identification, etc. has not been in issue. As their participation being governed by the second part of Section 149 IPC, overt act of an individual lost significance."

In the present case, applying the same rationale, we are of the view that the common object within the meaning of Section 149 is evident from the genesis of the incident, the manner in which the accused returned after the initial altercation armed with lethal weapons and the nature of the injuries which were inflicted in concert.

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222. INDIAN PENAL CODE, 1860 – Section 193

CRIMINAL PROCEDURE CODE, 1973 – Sections 195 and 340

Whether Magistrate can take cognizance of an offence under Section 193 IPC on the basis of a private complaint? Held, No – Prosecution can be initiated only after sanction of Court under whom proceedings of offence referred to in Section 195(1)(b) CrPC were allegedly committed.

भारतीय दण्ड संहिता, 1860 - धारा 193

दण्ड प्रक्रिया संहिता, 1973 - धाराएं 195 एवं 340

क्या प्राइवेट परिवाद के आधार पर मजिस्ट्रेट, धारा 193 भा.दं.वि. के अपराध का संज्ञान ले सकता है? अभिनिर्धारित, नहीं - अभियोजन केवल उस न्यायालय की स्वीकृति के पश्चात प्रारंभ हो सकता है जिसकी कार्यवाहियों में धारा 195 (1)(ख) दं.प्र.सं. में संदर्भित अपराध कथित रूप से कारित किया गया था।

Sh. Narendra Kumar Shrivastava v. State of Bihar and others

Judgment dated 04.02.2019 passed by the Supreme Court in Criminal Appeal No. 211 of 2019, reported in 2019 (1) Crimes 49 (SC)

Relevant extracts from the judgment:

It is clear from sub-Section (1)(b) of Section 195 of the Cr.P.C. that the Section deals with two separate set of offences:

(i) of any offence punishable under Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228 of IPC, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court; [Section 195(1)(b)(i)]

(ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of IPC, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court. [Section 195(1)(b)(ii)].

On the reading of these Sections, it can be easily seen that the offences under Section 195(1)(b)(i) and Section 195(1)(b)(ii) are clearly distinct. The first category of offences refers to offences of false evidence and offences against public justice, whereas, the second category of offences relates to offences in respect of a document produced or given in evidence in a proceeding in any Court.

Section 195 of the Cr.P.C. lays down a rule to be followed by the Court which is to take cognizance of an offence specified therein but contains no direction for the guidance of the Court which desires to initiate prosecution in respect of an offence alleged to have been committed in or in relation to a proceeding in the latter Court. For that purpose, one must turn to Section 340 which requires the Court desiring to put the law in motion to prefer a complaint either suo motu or an application made to it in that behalf.

Section 340 of the Cr.P.C. reads as follows:

"340. Procedure in cases mentioned in Section 195.-

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-Section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-Section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-Section (4) of Section 195.

(3) A complaint made under this Section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court [or by such officer of the Court as the Court may authorise in writing in this behalf].

(4) In this Section, "Court" has the same meaning as in Section 195."

Section 340 of Cr.P.C. makes it clear that a prosecution under this Section can be initiated only by the sanction of the Court under whose proceedings an offence referred to in Section 195(1)(b) has allegedly been committed. The object of this Section is to ascertain whether any offence affecting administration of justice has been committed in relation to any document produced or given in evidence in Court during the time when the document or evidence was in custodia legis and whether it is also expedient in the interest of justice to take such action. The Court shall not only consider prima facie case but also see whether it is in or against public interest to allow a criminal proceeding to be instituted.

This Court in ***Chajoo Ram v. Radhey Shyam, (1971) 1 SCC 774,*** at page 779, held that the prosecution under Section 195 could be initiated only by the sanction of the Court and only if the same appears to be deliberate and conscious. It emphatically held as under:

> "The prosecution for perjury should be sanctioned by Courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the Court should

be satisfied that there is reasonable foundation for the charge....."

In ***Santokh Singh v. Izhar Hussain and anather, (1973) 2 SCC 406,*** this Court has held that every incorrect or false statement does not make it incumbent on the Court to order prosecution. The Court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The Court orders prosecution in the larger interest of the administration of justice and not to gratify the feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that the Court should direct prosecution.

This Court in ***M.S. Ahlawat v. State of Haryana and another, (2000) 1 SCC 278,*** has clearly held that private complaints are absolutely barred in relation to an offence said to have been committed under Section 193 IPC and that the procedure prescribed under Section 195 of the Cr.P.C. are mandatory. It was held that:

> "Chapter XI IPC deals with "false evidence and offences against public justice" and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (CrPC) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC etc. or to an offence relating to documents actually used in a Court, private prosecutions are barred absolutely and only the Court in relation to which the offence was committed may initiate proceedings. Provisions of Section 195 CrPC are mandatory and no Court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that Section. It is settled law that every incorrect or false statement does not make it incumbent upon the Court to order prosecution, but (sic) to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice."
>
> Section 340 CrPC prescribes the procedure as to how a complaint may be preferred under Section 195 CrPC. While under Section 195 CrPC, it is open to the Court before which the offence was committed to prefer a complaint for the prosecution of the offender, Section 340 CrPC prescribes the procedure as to how that complaint may be preferred. Provisions under Section 195 CrPC are mandatory and no Court can take cognizance of offences referred to therein

(sic). It is in respect of such offences the Court has jurisdiction to proceed under Section 340 CrPC and a complaint outside the provisions of Section 340 CrPC cannot be filed by any civil, revenue or criminal Court under its inherent jurisdiction."

As already mentioned, clauses under Section 195(1)(b) of the Cr.P.C. i.e. sub-Section 195(1)(b)(i) and sub-Section 195(1)(b)(ii) cater to separate offences. Though Section 340 of the Cr.P.C. is a generic section for offences committed under Section 195(1)(b), the same has different and exclusive application to clauses (i) and (ii) of Section 195(1)(b) of the Cr.P.C.

In ***Sachida Nand Singh and another v. State of Bihar and another, (1998) 2 SCC 493,*** relied on by the learned counsel for the appellant, this Court was considering the question as to whether the bar contained in Section 195(1)(b)(ii) of the Cr.P.C. is applicable to a case where forgery of the document was committed before the document was produced in a Court. It was held:

"A reading of the clause reveals two main postulates for operation of the bar mentioned there. First is, there must be allegation that an offence (it should be either an offence described in Section 463 or any other offence punishable under Sections 471, 475, 476 of the IPC) has been committed. Second is that such offence should have been committed in respect of a document produced or given in evidence in a proceeding in any Court. There is no dispute before us that if forgery has been committed while the document was in the custody of a Court, then prosecution can be launched only with a complaint made by that Court. There is also no dispute that if forgery was committed with a document which has not been produced in a Court then the prosecution would lie at the instance of any person. If so, will its production in a Court make all the difference?"

"The sequitur of the above discussion is that the bar contained in Section 195(1)(b) (ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a Court. Accordingly we dismiss this appeal."

In ***Sachida Nand Singh*** (supra), this Court had dealt with Section 195(1)(b)(ii) of the Cr.P.C unlike the present case which is covered by the preceding clause of the Section. The category of offences which fall under Section 195(1)(b)(i) of the Cr.P.C. refer to the offence of giving false evidence and offences against public justice which is distinctly different from those offences under Section 195(1)(b)(ii) of Cr.P.C, where a dispute could arise whether the offence of forging a document was committed outside the Court or when it was in the custody of the Court. Hence, this decision has no application to the facts of the present case.

The case in hand squarely falls within the category of cases falling under Section 195(1)(b)(i) of the Cr.P.C. as the offence is punishable under Section 193 of the IPC. Therefore, the Magistrate has erred in taking cognizance of the offence on the basis of a private complaint.

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223. INDIAN PENAL CODE, 1860 – Section 300

Exception I to Section 300 I.P.C. – Culpable homicide is murder if the provocation was voluntary on the part of the offender.

भारतीय दण्ड संहिता, 1860 - धारा 300

भा.दं.सं. की धारा 300 का अपवाद 1 - यदि प्रकोपन, अभियुक्त की ओर से स्वेच्छया है, तब आपराधिक मानव वध हत्या है।

State of Uttar Pradesh v. Faquirey

Judgment dated 11.02.2019 passed by the Supreme Court in Criminal Appeal No. 1842 of 2012, reported in 2019 (1) Crimes 126 (SC)

Relevant extracts from the judgment :

There is no dispute that the shot fired from the pistol by the Respondent is due to the grudge that he had against the deceased. Immediately after the deceased arrived at the place of incident, the respondent's attention was diverted from the dispute that was being settled in the panchayat. He turned to the deceased and shot him in view of his past conduct relating to the visit of the deceased to his house to become close with his wife.

According to Exception I to Section 300 IPC, culpable homicide is not murder if the offender causes the death of the person who gave the provocation, whilst deprived of the power of self-control by grave and sudden provocation. It would be relevant to refer to the first proviso to Exception I which provides that the provocation should be one which is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. No overt act is alleged against the deceased by which it can be stated that the respondent was provoked. From the proved facts of this case it appears that the provocation was voluntary on the part of the offender. Such provocation cannot come to the rescue of the respondent to claim that he is not liable to be convicted under Section 302 IPC.

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224. INDIAN PENAL CODE, 1860 – Sections 302 and 326A

CRIMINAL PROCEDURE CODE, 1973 – Section 354

Death sentence – Rarest of rare cases – Accused committed murder by pouring acid on the deceased who was out on bail – There was a gap of almost 10 years in both the incidents – Both incidents were totally unrelated – Held, previous conviction for murder is not special reason to bring this case in the category of the rarest of rare cases – Judges should never be blood thirsty – Death sentence commuted to imprisonment for life.

भारतीय दण्ड संहिता, 1860 - धाराएं 302 एवं 326क

दण्ड प्रक्रिया संहिता, 1973 - धारा 354

मृत्यु दण्ड - विरल से विरलतम मामले - अभियुक्त ने मृतक पर तेजाब डालकर उसकी हत्या की जब वह हत्या के लिये दोषसिद्ध मामले जमानत पर था - दोनों घटनाओं में लगभग 10 वर्षों का अंतराल था - दोनों घटनाएं पूर्णतः असंबद्ध थीं - अभिनिर्धारित, हत्या के लिए पूर्व दोषसिद्ध इस मामले को विरल से विरलतम मामले की श्रेणी में लाने के लिये विशेष कारण नहीं हैं - न्यायाधीशों को रक्तपिपासु कभी नहीं होना चाहिए - मृत्यु दण्ड को आजीवन कारावास में लघुकृत किया गया।

Yogendra @ Jogendra Singh v. The State of Madhya Pradesh

Judgment dated 17.01.2019 passed by the Supreme Court in Criminal Appeal No. 84 of 2019, reported in 2019 (1) ANJ SC (Supplementary) 91

Relevant extracts from the judgment:

The question that remains to be considered is whether there are special reasons as to why the appellant should be sentenced to death. The term 'special reasons' undoubtedly means reasons that are one of a special kind and not general reasons. In the present case there is one factor, which might warrant the imposition of the death sentence, as vehemently, urged by the learned counsel for the State. The reason is that the appellant committed this crime when he was out on bail in another case wherein he has been convicted for murder and his sentence has been upheld.

It is undoubtedly difficult to ignore this fact but we find that it is safer to consider the imposition of sentence based on the facts of this particular case. Unquestionably, if there is a pattern discernible across both the cases then a second conviction for murder would warrant the imposition of a death sentence. But that does not appear to be so in the present case. The earlier incident is totally unrelated to the circumstance of this case. The appellant was charged along with co-accused one Kiran Nurse for committing the murder of one Laxminarayan alias Laxman Singh in the intervening night of 27.07.1994 and 28.07.1994. The present incident took place on 21.07.2013 and the last one almost ten years before the present incident.

In the case before us, the incident is related to the appellant being disappointed in his relation with the deceased who he believed deserted him. The circumstance of the case and particularly the choice of acid do not disclose a cold-blooded plan to murder the deceased. Like in many cases the intention seems to have been to severely injure or disfigure the deceased; in this case we think the intention resulted into an attack more severe than planned which then resulted in the death of the deceased. It is possible that what was premeditated was an injury and not death.

We have not made the above observation in any way to condone the acts of the appellant but merely to hold that there appear to be no special reasons in

the present case that warrants an imposition of a death sentence on the appellant. In ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684,*** this Court held as follows:—

> "There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."

Nonetheless, it cannot be overemphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

Therefore, the sentence of death imposed by the High Court is set aside and instead the appellant shall undergo imprisonment for life.

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225. INDIAN PENAL CODE, 1860 – Sections 302 and 394
CONSTITUTION OF INDIA – Article 20(3)
EVIDENCE ACT, 1872 – Section 27
IDENTIFICATION OF PRISONERS ACT, 1920 – Sections 4 and 5
APPRECIATION OF EVIDENCE:

(i) Circumstantial evidence – Omission of important fact in FIR – Effect of – Prosecution case depends upon last seen evidence – One witness saw accused persons entering house of deceased and the other one saw them coming out and leaving in a hurried manner – Both stated to inform the complainant about this fact before FIR – However, FIR was lacking of these facts – Statement of last seen witnesses were also recorded next day even though they were present on the spot – Held, statements of last seen witnesses are clearly an afterthought.

(ii) Delay in arrest of accused – Effect of – Held, delay in arrest despite clear knowledge of whereabouts of the accused in extreme cases, casts a serious doubt over the case of prosecution.

(iii) Recovery of stolen articles – Theory of confirmation by subsequent facts – Use of custodial statements – Whether self incriminatory statements given by accused leading to recovery of relevant material would be admissible even if it is caused by inducement, threat or promise? Held, No – Recovery based on involuntary statements severely undermines the prosecution case. [*Selvi v. State of Karnataka, (2010) 7 SCC 263* followed].

(iv) Identification of accused – Fingerprint samples – Whether order of a Magistrate is mandatory for taking fingerprints of an accused? Held, No – However, if suspicious circumstances arise relating to lifting of fingerprints, it is advisable in order to dispel or ward off such suspicious circumstances, to get orders from the Magistrate.

भारतीय दण्ड संहिता, 1860 - धाराएं 302 एवं 394

भारत का संविधान - अनुच्छेद 20(3)

साक्ष्य अधिनियम, 1872 - धारा 27

बन्दी शिनाख्त अधिनियम, 1920 - धाराएं 4 एवं 5

साक्ष्य का मूल्यांकनः

(i) परिस्थितिजन्य साक्ष्य - प्रथम सूचना रिपोर्ट में महत्वपूर्ण तथ्य का लोप - प्रभाव - अभियोजन का मामला अंतिम बार देखे जाने की साक्ष्य पर आधारित था - एक साक्षी ने अभियुक्तगण को मृतक के घर में प्रवेश करते हुए और अन्य ने उन्हें बाहर आते एवं जल्दबाजी में भागते हुए देखा था - दोनों ने यह कथन किया कि उन्होंने परिवादी को प्रथम सूचना रिपोर्ट लेख कराने के पूर्व यह तथ्य बता दिया था - हालांकि, प्रथम सूचना रिपोर्ट में यह तथ्य नहीं थे - इन अंतिम बार देखे गये साक्षियों के कथन भी अगले दिन अभिलिखित किए गए थे यद्यपि वे घटनास्थल पर उपस्थित थे - अभिनिर्धारित, इन साक्षियों के कथन स्पष्टतः बाद विचारित हैं।

(ii) अभियुक्त की गिरफ्तारी में विलंब - प्रभाव - अभिनिर्धारित, अभियुक्त कहां है, इस बारे में स्पष्ट जानकारी होने के बावजूद गंभीर मामलों में अभियुक्त की गिरफ्तारी में विलंब अभियोजन मामले में एक गंभीर संदेह उत्पन्न करता है।

(iii) चुराई हुई सामग्री की बरामदगी - पश्चातवर्ती तथ्यों द्वारा पुष्टि का सिद्धांत - अभिरक्षा में किए गए कथनों का प्रयोग - क्या अभियुक्त द्वारा दिए गए आत्म-अभियोगात्मक कथन, जो सुसंगत सामग्री की बरामदगी को अग्रसर करते हैं, साक्ष्य में ग्राह्य होंगे भले ही वे उत्प्रेरणा, धमकी अथवा वचन के अधीन प्राप्त

किये गये हों? अभिनिर्धारित, नहीं - अनैच्छिक कथनों पर आधारित बरामदगी अभियोजन के मामले को गंभीर रूप से कमजोर बनाती है। (***सेल्वी वि. कर्नाटक राज्य, (2010) 7 एस.सी.सी. 263,*** अनुसरित)

(iv) अभियुक्त की पहचान - अंगुलछाप नमूने - क्या किसी अभियुक्त का अंगुलछाप लिए जाने के लिए मजिस्ट्रेट का आदेश आज्ञापक है? अभिनिर्धारित, नहीं - हालांकि, यदि अंगुलछाप एकत्रित करने से संबंधित संदिग्ध परिस्थितियां हैं, तो ऐसी संदिग्ध परिस्थितियों को स्पष्ट करने एवं हटाने के लिए, मजिस्ट्रेट से आदेश प्राप्त करना उचित है।

Ashish Jain v. Makrand Singh and others

Judgment dated 14.01.2019 passed by the Supreme Court inCriminal Appeal No. 1980 of 2008, reported in 2019 (1) ANJ (SC) (Supplementary) 76

Relevant extracts from the judgment:

The present case of circumstantial evidence primarily hinges on two main aspects, which is the last seen evidence and the recovery of stolen property.

PW12 and PW20, as discussed above, are the last seen witnesses who saw the entry and the exit of the accused persons from the crime scene, respectively. It has been deposed by the witnesses that soon after the bodies were found, they had discussed amongst themselves about the participation of the accused persons based on the fact that PW12 saw them enter the house of the deceased at around 06:30 p.m. on the preceding day, and that PW20 saw them coming out of the house and leaving the area in a hurried manner at around 09:00 - 09:30 p.m. These two witnesses have categorically stated that they had conveyed this piece of valuable information to the complainant PW26 right before he filed the first information. However, there is no whisper of such an important fact anywhere in the first information, Ex. P5 nor the FIR arising from it, Ex. P6. It is only stated in these documents that there was a suspicion that the accused might have caused the said incident as they were seen loitering around the house of deceased Premchand at around 9:00 p.m. of the night of the incident. PW26 has also stated that he learnt about the presence of the accused persons from the verbal dialogue between him and the said witnesses. If PW12 and PW20 had really seen the accused as deposed, the same would have been reflected in the FIR, and the absence of such a crucial piece of information that PW26 learnt right before filing the first information casts a dark shadow of suspicion over the testimony of the last seen witnesses. Moreover, PW12 and PW20 have deposed that they were present at the spot when the bodies were found.

However, their statements were not taken by the police on the same day, rather they were taken subsequently on the next day. Considering the fact that the details of the last seen circumstance as deposed by PW12 and PW20 are not found in the first information (though PW26, the informant was informed

about the same by PW12 and PW20 before filing the First Information Report), we are of the opinion that PW12 and PW20 did not see the accused entering or exiting the house of the deceased, as is sought to be made out by the prosecution. Moreover, there was deliberate delay in recording the statements of these important witnesses with regard to the last seen circumstance. Hence, the statements of PW12 and PW20 were clearly an afterthought.

x x x

The first information given by the complainant PW26 clearly mentions the name of the accused as well as their addresses. It is also stated by the witnesses that they are acquainted with the accused persons as they are electricians who frequented the house of the deceased for repair works. Based on the same and corroborated by the statement of PW26, the police could have easily arrested the accused. It was stated by the Investigating Officer K.D. Sonakiya, PW35, that the police went in search of the accused in order to arrest them at different locations that night itself. However, the material on record shows that the arrests were made only the next morning between 11:00 a.m. and 11:30 a.m., that too at the houses of the accused persons, which also, incidentally, shows that the accused persons were not absconding, which is unnatural conduct on the part of an offender who knows that he has been observed entering the house of the deceased on the day of the offence. Be that as it may, the delay in the arrest, despite clear knowledge of the whereabouts of the accused persons, casts a serious shadow of doubt over the case of the prosecution.

x x x

As regards the recovery of incriminating material at the instance of the accused, the Investigating Officer K.D. Sonakiya, PW 35, has categorically deposed that all the confessions by the accused persons were made after interrogation, but the mode of this interrogation does not appear to be of normal character, inasmuch as he himself has deposed that the accused persons were further grilled and interrogated multiple times before extracting the confessions which led to the recovery of the ornaments, cash, weapons and key.

We find from the totality of facts and circumstances that the confessions that led to the recovery of the incriminating material were not voluntary, but caused by inducement, pressure or coercion. Once a confessional statement of the accused on facts is found to be involuntary, it is hit by Article 20(3) of the Constitution, rendering such a confession inadmissible. There is an embargo on accepting self-incriminatory evidence, but if it leads to the recovery of material objects in relation to a crime, it is most often taken to hold evidentiary value as per the circumstances of each case. However, if such a statement is made under undue pressure and compulsion from the investigating officer, as in the present matter, the evidentiary value of such a statement leading to the recovery is nullified.

It is noteworthy to reproduce the observations of this Court regarding the relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution in ***Selvi v. State of Karnataka, (2010) 7 SCC 263*** :

> "As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possiblethata person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.
>
> x x x
>
> *This provision reads as follows:*
>
> **'27. How much of information received from accused may be proved.—** Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'
>
> 134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda [***Miranda v. Arizona, 384 US 436 (1966)***] warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in ***State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.*** It was observed in the majority opinion by Jagannadhadas, J., at AIR pp. 1815-16, para 13)

> '13. … The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that Section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information.' "

We are of the opinion that the recovery of the stolen ornaments, etc. in the instant matter was made on the basis of involuntary statements, which effectively negates the incriminating circumstance based on such recovery, and severely undermines the prosecution case.

x x x

Another incriminating factor as argued by the counsel for the complainant is that the fingerprints of Accused 1 were found upon the tea tumblers found at the scene of the crime. We do not agree with the conclusion of the High Court that the fingerprint samples of the accused (used for comparison with the fingerprints on the tumblers) were illegally obtained, being in contravention of the Identification of Prisoners Act, 1920, inasmuch as they were obtained without a Magisterial order. Importantly, Section 4 refers to the power of a pollice officer to direct taking of measurements, including fingerprints:

> **"4. Taking of measurements, etc., of non-convicted persons.—** Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner."

However, as affirmed recently by this Court in ***Sonvir v. State (NCT of Delhi), (2018) 8 SCC 24,*** Section 5 is not mandatory but is directory, and affirms the bona fides of the sample-taking and eliminates the possibility of fabrication of

evidence. The Court also relied on various judgments on the point, including ***Shankaria v. State of Rajasthan, (1978) 3 SCC 435,*** a three-Judge Bench decision of this Court to reach this conclusion. While discussing the decision of this Court in ***Mohd. Aman v. State of Rajasthan, (1997) 10 SCC 44,*** the Court observed at paras 60-62 as follows:

> "60. This Court observed that the prosecution has failed to establish that the seized articles were not or could not be tampered with before it reached the Bureau for examination. Further the following was stated in para 8: (***Mohd. Aman case*** (supra))
>
> > '8 ... Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also casts a serious mistrust as to genuineness of the evidence. Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate.'
>
> 61. The above observation although clearly mentions that under Section 4 police officer is competent to take fingerprints of the accused but to dispel as to its bona fide or to eliminate the fabrication of evidence it was eminently desirable that they were taken before or under the order of the Magistrate.
>
> 62. The observation cannot be read to mean that this Court held that under Section 4 police officers are not entitled to take fingerprints until the order is taken from the Magistrate. The observations were made that it is desirable to take the fingerprints before or under the order of the Magistrate to dispel any suspicion."

Even otherwise, pursuant to Section 8 of the Identification of Prisoners Act, rules have been framed by the Madhya Pradesh Government for the purpose of carrying into effect the provisions of the said Act. The relevant rules for the matter on hand are Rules 3, 4 and 5, which are reproduced herein:

> **"3. Taking of photographs or measurements.—** Allow his photograph or measurements to be taken under Section 3 or Section 4, shall allow them to be taken under the directions of a police officer.

4. Places at which measurements and photographs can be taken.—(1) Measurements and photographs may be taken—

(a) in jail, if the person whose photograph, or measurements are to be taken, is in jail;

(b) at a police station or at any other place at which the police officer may direct the taking of the measurements or photographs, if the person whose photograph or measurements are to be taken is in police custody.

(2) If the person whose photograph or measurements are to be taken has been released from jail before his measurements or photographs have been taken or is not in police custody, he shall on receipt of an order in writing from an officer in charge of a police station attend at such place as may be specified in such order, on the date and at the time stated therein, for the purpose of having his measurements or photograph taken.

5. Measurements how to be taken.— (1) Measurements of the whole or of any part of the body may be taken.

(2) The measurements of a woman shall be taken by another woman with strict regard to decency."

A bare reading of these Rules makes it amply clear that a police officer is permitted to take the photographs and measurements of the accused. Fingerprints can be taken under the directions of the police officer.

As held by this Court in ***Sonvir*** (supra), although Section 4 mentions that the police officer is competent to take measurements of the accused, but to dispel doubts as to its bona fides and to rule out the fabrication of evidence, it is eminently desirable that they were taken before or under the order of a Magistrate. However, the aforesaid observations cannot be held to mean that this Court observed that under Section 4, police officers are not entitled to take fingerprints until the order is taken from a Magistrate. If certain suspicious circumstances do arise from a particular case relating to lifting of fingerprints, in order to dispel or ward off such suspicious circumstances, it would be in the interest of justice to get orders from the Magistrate. Thus, there cannot be any hard-and-fast rule that in every case, there should be a Magisterial order for lifting the fingerprints of the accused. Thus, it cannot be held that the fingerprint evidence was illegally obtained merely due to the absence of a Magisterial order authorising the same.

At the same time, we find that in the current facts and circumstances, the absence of a Magisterial order casts doubts on the credibility of the fingerprint evidence, especially with respect to the packing and sealing of the tumblers on which the fingerprints were allegedly found, given that the attesting witnesses were not independent witnesses, being the family members of the deceased.

Thus, we cannot rule out the possibility of tampering and post-facto addition of fingerprints, and concur with the High Court in discarding the fingerprint evidence.

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***226. INDIAN PENAL CODE, 1860 – Sections 302, 307, 364, 380 and 201**

Death sentence – Accused killed six innocent people in a meticulously and preplanned manner – He first kidnapped three persons by way of deception and took them to the canal – After drugging them with sleeping tablets, pushed them in the canal at midnight to ensure that the crime is not detected – Thereafter, he killed another three persons in the second stage/instalment – Case would fall in the category of the "rarest of rare case" warranting death sentence – Aggravating circumstances are in favour of the prosecution and against the accused – Crime is committed with extreme brutality and the collective conscience of the society is shocked – In the facts and circumstances of the case, there is no alternative punishment suitable, except the death sentence.

भारतीय दण्ड संहिता, 1860 - धाराएं 302, 307, 364, 380 एवं 201

मृत्यु दण्ड - अभियुक्त ने योजनाबद्ध एवं सूक्ष्मतापूर्वक ढंग से 6 व्यक्तियों की हत्या की - उसने पहले प्रवंचना पूर्वक तीन व्यक्तियों का रास्ते से अपहरण किया और उन्हें नहर के किनारे ले गया - उन्हें नींद की गोलियां खिलाकर आधी रात को नहर में धक्का देकर यह सुनिश्चित किया कि उसका अपराध ज्ञात न हो सके - इसके बाद उसने द्वितीय प्रक्रम/किश्त में तीन अन्य व्यक्तियों की हत्या की - यह प्रकरण ''विरल से विरलतम'' श्रेणी में आयेगा और मृत्यु दण्ड वांछित है - दण्ड में गुरूतरकारी परिस्थितियां अभियोजन के पक्ष में और अभियुक्त के विरूद्ध हैं - अपराध अत्यंत बरबता पूर्वक किया गया और वह समाज की सामूहिक चेतना को झकझोर देने वाला है - प्रकरण को इन तथ्य व परिस्थितियों में मृत्युदण्ड के आलावा कोई अनुकल्पित/अन्य दण्ड उचित नहीं है।

Khushwinder Singh v. State of Punjab

Judgment dated 05.03.2019 passed by the Supreme Court in Criminal Appeal No. 1433 of 2014, reported in (2019) 4 SCC 415 (3 Judge Bench)

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***227.INDIAN PENAL CODE, 1860 – Section 304A**

PROBATION OF OFFENDERS ACT, 1958 – Section 4

Sentencing – Principles narrated in *Alister Anthony Pereira v. State of Maharashtra, (2012) 2 SCC 648, State of M.P. v. Ghansyam Singh, (2003) 8 SCC 13* and *Dalbir Singh v. State of Haryana, (2000) 5 SCC 82* re-emphasized – When automobiles have become death traps – Any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents – Criminal Courts cannot treat the nature of the offence under Section 304A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offencers Act.

भारतीय दंण्ड संहिता, 1860 - धारा 304क

अपराधी परिवीक्षा अधिनियम, 1958 - धारा 4

दण्डनीति -***ऐलिस्टर एन्थोनी परेरा विरूद्ध स्टेट आफ महाराष्ट्र, (2012) 2 एससीसी 648, स्टेट आफ एम.पी. विरूद्ध धनश्याम सिंह, (2003) 8 एससीसी 13*** एवं ***दलबीर सिंह विरूद्ध स्टेट आफ हरियाणा, (2000) 5 एस.सी.सी 82*** में प्रतिपादित सिद्धान्त पर पुनः बल दिया गया - जब वाहन मृत्यु कारित करने का जाल बन रहे हों - उतावलेपन से वाहन चलान के कारण दोषसिद्ध हुये वाहन चालक के विरूद्ध उदारता बरता जाना आगे भी सड़क दुर्घटना में वृद्धि का जोखिम उत्पन्न करेगा - दण्ड न्यायालय धारा 304क भा.दं.सं. की प्रकृति के अपराधों में अपराधी परिवीक्षा अधिनियम की धारा 4 के लाभदायक उपबन्धों को आकर्षित नहीं कर सकते हैं।

Thangasamy v. State of Tamil Nadu

Judgment dated 20.02.2019 passed by the Supreme Court in Criminal Appeal No. 698 of 2010, reported in 2019 (1) Crimes 185 (SC)

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228. INDIAN PENAL CODE, 1860 – Section 307

Attempt to murder, essentials of – Causing hurt with the intention or knowledge that death may be caused – Attracts Section 307 IPC – Inflicting bodily injury capable of causing death is not essential.

भारतीय दण्ड संहिता, 1860 - धारा 307

हत्या के प्रयास के आवश्यक तत्व - ऐसे आशय अथवा ज्ञान के साथ उपहित कारित करना कि मृत्यु कारित हो सकती है - धारा 307 भा.दं.सं. को आकर्षित करेगा - मृत्यु कारित करने योग्य शारीरिक क्षति पहुँचाया जाना आवश्यक नहीं है।

State of Madhya Pradesh v. Harjeet Singh and another

Judgment dated 19.02.2019 passed by the Supreme Court in Criminal Appeal No. 1190 of 2009, reported in 2019 (1) Crimes 179 (SC)

Relevant extracts from the judgment :

The act of stabbing a person with a sharp knife, which is a dangerous weapon, near his vital organs, would ordinarily lead to the death of the victim.

The weapon of offence was a 4 inch long knife which is a dangerous weapon. The accused/respondent no. 1 had assaulted the complainant with the said knife, and inflicted multiple injuries on his chest, scapula, back, and buttocks. The multiple blows inflicted by the accused/respondent no. 1 would prove the intention of causing bodily injury likely to cause the death of the victim. Stabbing a person with a knife, near his vital organs would in most circumstances lead to the death of the victim, thereby falling squarely within the meaning of Section 307.

Section 307 uses the term “hurt” which has been explained in Section 319, I.P.C. and not “grievous hurt” within the meaning of Section 320 I.P.C. If a person causes hurt with the intention or knowledge that he may cause death, it would

attract Section 307. This Court in ***R. Prakash v. State of Karnataka, (2004) 9 SCC 27,*** held that :

> "...The first blow was on a vital part, that is on the temporal region. Even though other blows were on nonvital parts, that does not take away the rigor of Section 307 IPC..... It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof.
>
> It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section."

If the assailant acts with the intention or knowledge that such action might cause death, and hurt is caused, then the provisions of Section 307 I.P.C. would be applicable. There is no requirement for the injury to be on a "vital part" of the body, merely causing 'hurt' is sufficient to attract Section 307 I.P.C. [***State of Madhya Pradesh v. Mohan & ors; (2013) 14 SCC 116***]. This Court in ***Jage Ram v. State of Haryana, (2015) 11 SCC 366,*** held that:

> "12. For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc."

This Court in the recent decision of ***State of M.P. v. Kanha @ Omprakash,*** Criminal Appeal No. 1589/2018 decided on 04.2.2019, held that:

> "The above judgements of this Court lead us to the conclusion that proof of grievous or life threatening hurt is not a sine qua non for the offence under Section 307 of the Penal Code. The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent."

In view of the above mentioned findings, it is evident that the ingredients of Section 307 have been made out, as the intention of the accused/respondent no.1 can be ascertained clearly from his conduct, and the circumstances surrounding the offence.

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229. INDIAN PENAL CODE, 1860 – Section 376

EVIDENCE ACT, 1872 – Section 9

(i) Test Identification Parade – Appreciation of evidence – Rape of a minor girl of 6 years by a fully grown accused – Prosecutrix could not identify the accused in the Test Identification Parade conducted by the police as she being minor, was frightened – But during dock identification, after great persuasion by the Court, she looked at the accused and immediately identified him as the person who had committed rape on her – Held, prosecutrix being a 6 year old minor, her conduct in not looking at the accused during TIP out of fear cannot be said to be unnatural or doubtful – Further, Test Identification Parade conducted by the police can be treated as corroborative piece of evidence but the substantive piece of evidence is identification of the accused in the dock.

(ii) Sentencing – Deterrence is one of the essential ingredients of sentencing policy – Principle of proportionality between offence committed and punishment imposed are to be kept in mind – Court must try to visualize the impact of the offence on society as a whole as well as on the victim – Minor girl of 6 years raped – Held, life imprisonment awarded is just and proper.

भारतीय दण्ड संहिता, 1860 - धारा 376

साक्ष्य अधिनियम, 1872 - धारा 9

(i) पहचान परेड - साक्ष्य का मूल्यांकन - एक पूर्ण विकसित अभियुक्त द्वारा 6 वर्षीय अवयस्क बालिका के साथ बलात्कार - पुलिस द्वारा कराई गई पहचान परेड में अभियोक्त्री अभियुक्त को नहीं पहचान पाई क्योंकि वह अवयस्क होकर

डरी हुई थी - परंतु न्यायालय में कठघरे की पहचान के दौरान, न्यायालय द्वारा बहुत मनाने पर उसने अभियुक्त की ओर देखा और तुरंत उसे उस व्यक्ति के रूप में पहचान लिया जिसने उसके साथ बलात्कार किया था - अभिनिर्धारित, अभियोक्त्री का 6 वर्षीय अवयस्क होने से, पहचान परेड के दौरान उसका डर के कारण अभियुक्त की ओर न देखने का आचरण अस्वाभाविक या संदेहास्पद नहीं कहा जा सकता - आगे यह भी कि, पुलिस द्वारा कराई गई पहचान परेड को एक संपुष्टीकारक साक्ष्य के रूप में माना जा सकता है किंतु कठघरे में अभियुक्त की पहचान साक्ष्य का एक सारभूत अंश है।

(ii) दण्डादेश - निवारण दण्डादेश नीति के आवश्यक घटकों में से एक है - कारित किए गए अपराध और अधिरोपित किए गए दण्ड के बीच अनुपात का सिद्धांत ध्यान में रखना चाहिए - न्यायालय को समाज पर संपूर्णता में एवं साथ ही पीड़ित पर अपराध के प्रभाव की कल्पना करने का प्रयास करना चाहिए - 6 वर्षीय अवयस्क बालिका के साथ बलात्कार - अभिनिर्धारित, दिया गया आजीवन कारावास का दण्डादेश न्यायसंगत एवं उचित है।

Aftab Khan v. State of M.P.

Judgment dated 28.03.2018 passed by the High Court ofMadhya Pradesh (Gwalior Bench) in Cr.A. No. 653 of 2006, reported in ILR (2018) MP 1194 (DB)

Relevant extracts from the judgment:

The prosecutrix (PW-4) is aged about 6 years. She had stated that about few days ago, one person had given her a chocolate and money and thereafter he took her towards public toilet. A note has been appended by the trial Court that the prosecutrix was initially hesitating to look at the appellant but with great difficulty, he looked at the appellant and immediately identified him. The prosecutrix, by pointing towards the appellant specifically said that the appellant, who is standing in the dock, had given her chocolate and money. It is further stated by this witness that thereafter the appellant took the prosecutrix towards the public toilet, where he took off her clothes and after taking out her underwear, the appellant had caused her to bleed. Her mouth was gagged by the appellant. Her maternal uncle had picked her from a place situated near public toilet and, thereafter, he took her to the hospital. When a question was put by the Court with regard to the Test Identification Parade conducted by the police, then she could not understand the question and could not give reply. This witness was cross-examined and it was admitted that one pig had given a bite, however, it was specifically stated that the blood had come out not because of any pig bite but because of the appellant, who is standing in the dock. Again in the cross examination, she pointed out towards the appellant and stated that it is the same person, who had given her toffee and money. A suggestion was denied by her that the offence was not committed by the appellant but somebody else had committed the offence. This witness once again specifically stated that it is the

same person, who had committed the offence. In reply to a specific question, it was stated by the prosecutrix that in fact, she had seen the appellant at the time of incident and it is incorrect to say that she is narrating the incident as she has been tutored by her mother.

K.D. Sharma (PW-9) was working as Tahsildar and he has stated that on 24.04.2006, he had conducted the Test Identification Parade of the appellant and Ayodhya Prasad had identified the appellant and the Test Identification Parade is Ex. P-3. Both the witnesses were cross-examined. They have specifically stated that the police was not present at the time of Test Identification Parade. Nothing could be elucidated from the evidence of these two witnesses, which may make their evidence doubtful. Thus, it is clear that Ayodhya Prasad (PW-2) and Rishabh Vijay (PW-5) had identifed the appellant. Although Rishabh Vijay (PW-5) has not stated in his evidence with regard to the identification of the appellant in the Test identification Parade conducted by the police but it is well established principle of law that the Test Identification Parade conducted by the police, at the best, can be treated as corroborative piece of evidence but the substantive piece of evidence is identification of the appellant in the dock.

From the facts and circumstances of the case, it is clear that the prosecutrix is a minor girl aged about 6 years. She was raped by the appellant and, therefore, her conduct in not looking at the appellant is natural. Her mental condition can be imagined, where a girl was forced to face the harsh realities of the life at the very early stage of her life. The girl, who is aged about 6 years, is not expected to know anything except to enjoy her childhood and when she is physically and sexually violated by a fully grown man, then under these circumstances, because of fear, if she was not looking at the appellant, then the conduct of the prosecutrix cannot be treated to be unnatural or doubtful. On the contrary, when after great persuasion by the Court, the prosecutrix looked at the appellant, then she immediately identified him as the person, who has committed rape on her. The identification of the appellant by the prosecutrix and the other witness is proved beyond reasonable doubt.

In the facts of the present case, if along with the impact of the incident on the mind of the prosecutrix as well as on the Society, are considered, then it leaves no iota of doubt in the mind of the Court, that the act committed by the appellant was the most gruesome one. When the Test Identification Parade of the appellant was conducted by the police, the prosecutrix, who is aged about 6 years, could not dare to look at the appellant, therefore, it was mentioned by the Executive Magistrate, that the prosecutrix is minor and too young and because of fear, is moving from one place to another and is not able to identify the accused. Similarly, when the prosecutrix appeared before the trial Court, to get her evidence recorded, it was mentioned by the trial Court, that only after great persuasion, the prosecutrix looked at the appellant, who is standing in the dock, and immediately identified him. Thus, this conduct of the prosecutrix, after the incident, at the time of Test Identification Parade and at the time of recording of

evidence, clearly shows the impact of the incident in her mind. Unfortunately, the prosecutrix at the age of 6 years, has learnt the harsh realities of gender discrimination and gender insecurity. The parents of the small children, are not expected to keep them inside the house, so that they are not sexually violated. Every child, be a boy or girl, has a fundamental and human right to live his/her childhood with all freedoms. The incident has left so much of adverse impact on the mind of the prosecutrix, that she was even afraid of looking at the appellant. This Court can only imagine the horrifying experience of the prosecutrix and its impact on her young, innocent mind. We cannot allow the humanity to die. The effect and aftermath of rape may include both physical and psychological trauma. The possibility of development of post-traumatic stress disorder in the rape victim cannot be ruled out. The subsequent conduct of the prosecutrix clearly indicates that she was afraid of the appellant with horrible memories of the incident. The effects of trauma may be short term or long term after the sexual assault or rape. The common emotional effects of sexual assault may be loss of trust in others, shock, fear, sense of insecurity, hopelessness etc. and if a minor girl, aged about 6 years, is compelled to undergo such mental trauma apart from the physical trauma, then even the time may not heal the injury sustained by the prosecutrix. Under these circumstances, one can imagine that the prosecutrix was not only shattered physically but also mentally with no healing ointment. Under these circumstances, any leniency shown to the appellant would be nothing but adding insult to the injury sustained by the prosecutrix. Deterrence is one of the essential ingredient of sentencing policy. The principle of proportionality between an offence committed and the penalty imposed are to be kept in mind, therefore, the Court must try to visualize the impact of the offence on the society as a whole as well as on the victim.

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230. INDIAN PENAL CODE, 1860 – Section 376 (2) (g)
EVIDENCE ACT, 1872 – Sections 3, 8, 32, 45 and 157
APPRECIATION OF EVIDENCE:

(i) Rape – Suicide note written by prosecutrix in her ownhandwriting after five days of incident of rape trying to convey that accused were hungry for sex and she became their victim – Prosecutrix committted suicide on the same day on which suicide note was written – Suicide note was corroborated by the statement of other witnesses – Held, such suicide note can be treated as a dying declaration.

(ii) Statement of prosecutrix; relevancy under Section 157, Evidence Act – Statement made by prosecutrix narrating the incident to her brother and FIR recorded by Investigating Officer on the statement of the victim are relevantunder Section 157 Evidence Act.

(iii) Consent of prosecutrix; inference of – Statement of doctor was to the effect that prosecutrix was habitual to sexual intercourse and that there were no injuries on her person – Held, even if the prosecutrix was habitual to sexual intercourse, that does not mean that she consented to sex with the accused – Also, absence of injuries on her person is also not sufficient to infer consent.

(iv) Medical evidence; corroboration of statement of victim– Vaginal slide was prepared within six hours of the occurrence – Such vaginal slide was found to have spermatozoa – Underwear of the accused recovered soon after the occurrence at their behest also had stains of human semen – Held, medical evidence corroborates the statement of the victim given to the Investigating Officer.

(v) Appeal against acquittal; scope of interference in – Held, judgment of acquittal passed by the trial Court can be interfered with when it is clearly perverse, untenable and defeats the cause of justice.

भारतीय दण्ड संहिता, 1860 - धारा 376 (2)(छ)

साक्ष्य अधिनियम, 1872 - धारांए 3, 8, 32, 45 एवं 157

साक्ष्य का मूल्यांकनः

(i) बलात्संग - अभियोक्त्री द्वारा बलात्संग की घटना के पांच दिन बाद स्वयं की हस्तलिपि में आत्महत्या लेख यह दर्शाने का प्रयास करते हुये लिखा गया कि अभियुक्त यौन क्रिया के भूखे थे और वो उनकी शिकार बन गयी - जिस दिन आत्महत्या लेख लिखा गया उसी दिन अभियोक्त्री द्वारा आत्महत्या कर ली गयी - अन्य साक्षीगण के कथनों से आत्महत्या लेख की संपुष्टी हो रही थी -अभिनिर्धारित, ऐसे आत्महत्या लेख को मृत्युकालिक कथन माना जा सकता है।

(ii) अभियोक्त्री के कथन की धारा 157 साक्ष्य अधिनियम के तहत सुसंगता - भाई को घटना का वर्णन देते हुये अभियोक्त्री द्वारा किये गये कथन तथा अन्वेषण अधिकारी द्वारा पीड़िता के कथन पर लेखबद्ध प्रथम सूचना रिपोर्ट, साक्ष्य अधिनियम की धारा 157 के तहत सुसंगत हैं।

(iii) पीड़िता की सम्मति का निष्कर्ष - चिकित्सक का कथन इस आषय का था कि अभियोक्त्री यौन क्रिया की अभ्यस्थ थी और उसके शरीर पर चोटों के निशान नहीं थे - अभिनिर्धारित, चाहे अभियोक्त्री संभोग की अभ्यस्थ थी किंतु इसका अर्थ यह नहीं है कि उसने अभियुक्त के साथ यौन क्रिया की सहमति दी - यह भी कि, उसके शरीर पर चोंटो का अभाव भी सम्मति का निष्कर्ष निकालने के लिए पर्याप्त नहीं है।

(iv) चिकित्सीय साक्ष्य से पीड़िता के कथन की संपुष्टि - घटना के छः घण्टे के अन्दर वैजाइनल स्लाइड तैयार की गयी थी - ऐसी वैजाइनल स्लाइड में स्परमैटोजोआ होना पाया गया - घटना के तुरंत बाद अभियुक्तगण के बताये अनुसार जप्त अन्डरवियर में भी मानव सीमन के धब्बे पाये गये - अभिनिर्धारित, पीड़िता द्वारा अन्वेषण अधिकारी को दिये गये कथन की सम्पुष्टि चिकित्सीय साक्ष्य से होती है।

(v) दोषमुक्ति के विरूद्ध अपील में हस्तक्षेप का विस्तार - अभिनिर्धारित, विचारण न्यायालय द्वारा पारित दोषमुक्ति के निर्णय में तब हस्तक्षेप किया जा सकता है जब वह स्पष्टतः विपर्यस्त, असमर्थनीय है तथा न्याय के उद्देश्य को विफल करता है।

State of Madhya Pradesh v. Mohammad Shahid and another

Judgement dated 01.11.2018 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 541 of 2000, reported in 2019 CriLJ 803 (DB)

Relevant extracts from the judgment:

Whether Suicide Note can be treated as Dying Declaration:

Nilesh (PW-7), brother of the victicm has also produced the suicide note (Ex.P-6) written by the deceased, taken in possession vide memo Ex.P-7 on 23.10.1998 at about 7.30 am. Her dead body was taken in possession on 23.10.1998 vide Memo Ex. P-10. The time of death is mentioned as 22/23.10.1998 before 3.00 am. In the suicide note (Ex.P-6) dated 22.10.1998, she has written that she does not want to live the life of disgrace nor the police will permit her to live gracefully. She has stated that to avoid disgrace to her and her parents, she is taking this step. She stated that it was her fault that she sat in their vehicle. They were drunk and that she sat in their vehicle by mistake and they thought that she is the girl of loose-character. In the suicide note she is categorical that she will not be able to live a life of disgrace. She stated that it will be better if she dies rather than to live a life of disgrace to her and her family members. She has stated that both of the accused had liquor and that whatever has happened to her has disrupted and ruined the life and that she does not want to ruin the life of the boys by punishing them. She was violated on 17.10.1998. She committed suicide after four days. From her suicide note, it is clear that she was violated and that she does not want to live life of disgrace. She has tried to convey that the accused were hungry (for sex) and that she became their food (victim). The entire reading of the dying declaration does not absolve the accused though she said that they be not punished.

On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that

a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.

The suicide note which is a dying declaration and just on the day of writing of such letter and five days of the occurrence, the dead body was taken in possession at about 9.30 a.m. on 23.10.1998 vide memo Ex.P-10 and the time of death is mentioned as 22/23.10.1998 before 3.00 am in the intervening night of 22nd and 23rd October, 1998. However, the suicide note is corroborated by the other evidence on record, which we discuss hereinafter.

In view of the evidence on record, the statement Ex.P-6 in the handwriting of the victim proved by Nilesh (PW-7) is a dying declaration, as she died on the same day, which fact is evident from the memo Ex.P-10 having been prepared around 9.30 a.m. on 23.10.1998, wherein the time of death is mentioned as "before 3.00 a.m. on 23.10.1998". The argument that the suicide note does not name the accused, is of no consequence, as the presence of the victim with the accused at the place of occurrence is proved from the statement of Kashi Singh (PW-1), Kishan Singh (PW-4) and also Manoj Sharma (PW-14), who recorded the first information report. The suicide note has to be read as a whole and not a line can be picked up from out of context. She is referring to the accused as she is the one who has taken lift in the car and that she cannot take disgrace. The disgrace is the violation of her person.

Relevancy of the Statement of the Victim under Section 157 of the Evidence Act, 1872:

Section 157 of the Act makes it clear that the previous statement made by a victim is admissible in evidence if it is made at or about the time when the fact took place or before any Authority legally competent to investigate the fact. Section 157 of the Act reads as under:-

> **"157. Former statements of witness may be proved to corroborate later testimony as to same fact.—** In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

Nilesh (PW-7), brother of the deceased, has made a statement that his sister told him that she was forcibly taken by accused Shahid and Shamim and that the constables have taken her to the police station. The statement made by the deceased to her brother is relevant evidence in terms of Section 157 of the Evidence Act. The writing in the suicide note (Ex.P-6) that the accused were drunk is corroborated by the statement of Kashi Singh (PW-1) and Kishan Singh (PW-4). Kashi Singh (PW-1) stated that the victim told him in the police station that she was sexually assaulted. The statement of Kashi Singh made by the victim soon after the incident is relevant in terms of Section 157 of the Act. Similarly the statement made by brother of the victim is also relevant in terms of said provisions.

Manoj Sharma (PW-14), the Investigating Officer, has recorded the FIR. The statement of the victim recorded by PW-14 is part of the investigation, which is relevant in terms of Section 157 of the Act. The said provision contemplates that any former statement made by a witness relating to the fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, is relevant.

The statement of the victim to her brother Nilesh (PW-7), Kashi Singh (PW-1) are admissible in terms of first part of Section 157 of the Act whereas,

statement made to Investigating Officer Manoj Sharma (PW-14) is relevant in terms of second part of Section 157 of the Evidence Act to corroborate the other evidence on record.

Whether the Victim was Consenting party:

The learned trial Court has returned a finding that the victim was more than 18 years of age and has consented to have sex with the accused. Such inference is based upon the statement of Dr. Sushma Nigam (PW-11) which is to the effect that she was habitual to sex and that there are no injuries on her person. Even if the victim was habitual of sex but that does not mean that she consented to have sex with the accused.

The question of consent does not arise in view of statement of Nilesh (PW-7) and her suicide note (Ex.P-6). Even if she is habitual to sexual intercourse but that does not mean that she consented for being violated by the accused.

The question: as to whether absence of injuries on the prosecutrix is sufficient to infer consent, has been found to be untenable. In the case of***N.K. the accused*** (supra), the Court held as under:-

Even if the victim was habitual to have sexual intercourse, it does not allow the accused to violate her. The evidence of the witnesses and the statement of the accused under Section 313 of CrPC does not show that accused knew the victim and that she voluntarily submitted to the accused. The accused have offered no explanation in their Section 313 statement as to why the prosecution witnesses have deposed against them. The material witnesses, except the brother of the victim are independent witnesses, who have no axe to grind against the accused and in fact, there is no such suggestion as well.

Medical Evidence:

The vaginal slide prepared by PW-11, Dr. Sushma Nigam has human spermatozoa and on the underwear of the accused, there are stains of sperm. From the writing Ex.P-8 and P-9 given to the Medical Officer, the accused have categorically stated that they have not changed their clothes nor they had taken bath. Such statement is accepted by the accused in their statement under Section 313 of the CrPC. The underwear of Shahid was taken in possession after the same was got removed from the accused whereas underwear of the other accused Shamim was recovered from the back seat of the car.

The vaginal slide was prepared by Dr. Sushma Nigam (PW-11) at about 5 a.m. on 18.10.1998 i.e. almost within six hours of the occurrence, which is said to have taken place between 7 p.m. to 11 p.m. The FIR was lodged at 0.10 a.m. on 18.10.1998. The accused were arrested at 1.55 a.m. on 18.10.1998. Before the arrest, accused Shamim suffered a disclosure statement (Ex.P-15) at 00.40 a.m. on 18.10.1998 that he can get his underwear recovered. The underwear of the other accused Shahid was taken in possession after he was asked to remove the underwear. In the statement under Section 313 Cr.P.C. the accused have accepted having made such statement as correct. In the FSL Report (Ex.P-26),

Salvar of the prosecutrix in packet (A), vaginal slide in packet (B), underwear of accused Mohd. Shahid in packet (C) and underwear of accused Mohd. Shamim in packet (D) were found with stains of semen but the quantity was not sufficient for serological examination of the semen. Keeping in view the proximity of preparation of vaginal slide and also the recovery of undergarments of the accused and the fact that the same was found to be stained with semen, corroborates the version of the victim given to the Investigating Officer, Manoj Sharma (PW-14), Kishan Singh (PW-1) and to her brother Nilesh (PW-7) apart from the dying declaration contained in suicide note (Ex.P-6).

The vaginal slide was prepared within six hours of the occurrence and such vaginal slide is found to have spermatozoa. The underwear of the accused also have stains of human semen. Such underwear were also taken in possession soon after the occurrence. Therefore, medical evidence corroborates the other evidence, as discussed hereinabove.

Scope of Interference in Appeal against Acquittal:

The Supreme Court in ***State of Uttar Pradesh v. Munshi, (2008) 9 SCC 390,*** set aside the order of acquittal passed by the High Court on the ground that it is not only cryptic but also non-reasoned. In the present case, the learned Sessions Judge has reproduced the statements but granted benefit of doubt to the accused on the ground that it was a case of consent of the victim only because in the medical report she was found to be habitual to sex.

In ***N.K. the accused*** (supra), the Supreme Court held that an unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists.

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231. INDIAN PENAL CODE, 1860 – Sections 376 (A), 302 and 201

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 – Section 5(i) and (m) r/w/s 6

Rape and murder – Life imprisonment is a rule – Death penalty is an exception – Death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime.

भारतीय दण्ड संहिता, 1860 - धाराएं 376(क), 302 एवं 201

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 - धारा 5 (झ) एवं (ड) सहपठित धारा 6

बलात्संग एवं हत्या - आजीवन कारावास नियम है - मृत्युदण्ड अपवाद है - मृत्यु दण्ड केवल तब आदेशित किया जाना चाहिये जब अपराध के तथ्यों एवं परिस्थितियों को देखते हुये आजीवन कारावास का दण्ड बिल्कुल ही अनुपयुक्त प्रतीत होता हो।

Sachin Kumar Singhraha v. State of Madhya Pradesh

Judgment dated 12.03.2019 passed by the Supreme Court in Criminal Appeal No. 473 of 2019, reported in 2019 (1) Crimes 278 (SC) (3 Judge Bench)

Relevant extracts from the judgment:

In our considered opinion, the Courts may not have been justified in imposing the death sentence on the accused/appellant.

As has been well settled, life imprisonment is the rule to which the death penalty is the exception. The death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime. As held by this Court in the case of ***Santosh Kumar Singh v. State through C.B.I., (2010) 9 SCC 747,*** sentencing is a difficult task and often vexes the mind of the Court, but where the option is between life imprisonment and a death sentence, if the Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser punishment be awarded.

We have considered the aggravating and mitigating circumstances for the imposition of the death sentence on the accused/appellant. He has committed a heinous offence in a premeditated manner, as is indicated by the false pretext given to PW4 to gain custody of the victim. He not only abused the faith reposed in him by PW4, but also exploited the innocence and helplessness of a child as young as five years of age. At the same time, we are not convinced that the probability of reform of the accused/appellant is low, in the absence of prior offending history and keeping in mind his overall conduct.

Therefore, with regard to the totality of the facts and circumstances of the case, we are of the opinion that the crime in question may not fall under the category of cases where the death sentence is necessarily to be imposed. However, keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment simpliciter would be grossly inadequate in the instant case. In this respect, we would like to refer to our observations in the recent decision dated 19.02.2019 in ***Parsuram v. State of M.P. (Criminal Appeal Nos. 314-315 of 2013)*** on the aspect of non-permissible sentencing:

> "As laid down by this Court in ***Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767,*** and subsequently affirmed by the Constitution Bench of this Court in ***Union of India v. V. Sriharan, (2016) 7 SCC1,*** this Court may validly substitute the death penalty by imprisonment for a term exceeding 14 years, and put such sentence beyond remission. Such sentences have been awarded by this Court on several occasions, and we may fruitfully refer to some

of these decisions by way of illustrations. In ***Sebastian alias Chevithiyan v. State of Kerala, (2010) 1 SCC 58,*** a case concerning the rape and murder of a 2 year-old girl, this Court modified the sentence of death to imprisonment for the rest of the appellant's life. In ***Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353,*** a case concerning the rape and murder of a 14 year-old girl, this Court directed the appellant therein to serve a minimum of 35 years in jail without remission. In ***Selvam v. State, (2014) 12 SCC 274,*** this Court imposed a sentence of 30 years in jail without remission, in a case concerning the rape of a 9-year-old girl. In ***Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675,*** where the accused was found guilty of committing the murder of a minor girl aged 7 years, the Court imposed the sentence of imprisonment for life with a direction not to release the accused from prison till he completed the period of 25 years of imprisonment."

In the matter on hand as well, we deem it proper to impose a sentence of life imprisonment with a minimum of 25 years' imprisonment (without remission). The imprisonment of about four years as already undergone by the accused/appellant shall be set off. We have arrived at this conclusion after giving due consideration to the age of the accused/appellant, which is currently around 38 to 40 years.

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232. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2006 – Section 7-A

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007 – Rule 12

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2001 – Rule 22

Plea of juvenility, determination of – Incident took place on 24.05.2000 – Held, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 was not in force on that date and the relevant Rule applicable for determination of juvenility present case is Rule 22 of Juvenile Justice (Care and Protection of Children) Rules, 2001.

किशोर न्याय (बालकों की देखरेख और संरक्षण) संशोधन अधिनियम, 2006 - धारा 7-क

किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2007 - नियम12

किशोर न्याय (बालकों की देखरेख और संरक्षण) नियम, 2001 - नियम22

किशोर होने के अभिवाक् का निर्धारण - घटना दिनांक 24.05.2000 की थी -

अधिनिर्धारित, इस दिनांक को, किशोर न्याय (बालकों की देखरेख व संरक्षण) नियम, 2007 का नियम 12 प्रभाव में नहीं था और वर्तमान मामले का अवधारण करने के लिए लागू सुसंगत नियम, किशोर न्याय (बालकों की देखरेख व संरक्षण) नियम, 2001 का पूर्व का नियम 22 है।

Gaurav Kumar @ Monu v. The State of Haryana

Judgment dated 15.02.2019 passed by the Supreme Court in Criminal Appeal No. 283 of 2019, reported in 2019 (1) Crimes 113 (SC)

Relevant extracts from the judgment:

The submissions raised by learned counsel for appellant based on Rule 12(3) of 2007 Rules could have been considered by us in detail but we notice that in the present case, there is no applicability of Rule 12 of 2007 Rules. The date of occurrence in the present case is 23/24.05.2000 on which date Rule, 2007 were not enforced. Even on the date when learned District and Sessions Judge submitted his report on 08.05.2003 after holding inquiry, Rule 2007 was not in force. Rule 100 of 2007 Rules repealed the earlier Rule of Juvenile Justice (Care and Protection of Children) Rules, 2001. Rule 100 of 2007 Rules is as follows:

> "100. Repeal. - The Juvenile Justice (Care and Protection of Children) Rules, 2001, notified vide F.No.1-3/2001-SD, dated the 22nd June, 2001 in the Gazette of India, Extraordinary, Part I, Section 1 of the same date is hereby repealed."

Thus, the relevant Rule occupying the field in the present case were 2001 Rules. Rule 22 of 2001 Rules dealt with "procedure to be followed by a board in the holding inquiry in the determination of age." Rule 22 sub-Rule (5) which is relevant for the present case is as follows:

> "22(5). In every case concerning a juvenile or a child, the Board shall either obtain, - (i) a birth certificate given by a corporation or a municipal authority; (ii) a date of birth certificate from the school first attended; or (iii) matriculation or equivalent certificates, if available; and (iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age; and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age."

We are of the view that the relevant Rules which were required to be looked into are the Juvenile Justice (Care and Protection of Children) Rules, 2001.

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233. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 4 and 12

CRIMINAL PROCEDURE CODE, 1973 – Section 438

Whether child in conflict with law is entitled to move application for anticipatory bail? Held, No – As no provision in the Act or in the Code enables the child to move an application for anticipatory bail either before the Court of Sessions or High Court or even before the Board, the application cannot be entertained.

किशोर न्याय (बालकों की देखरेख) और संरक्षण अधिनियम, 2015 - धाराएं 4 एवं 12

दण्ड प्रक्रिया संहिता, 1973 - धारा 438

क्या विधि का उल्लंघन करने वाला बालक अग्रिम जमानत हेतु आवेदन प्रस्तुत करने का पात्र है? अभिनिर्धारित, नहीं - चूंकि इस अधिनियम या संहिता में बालक को अग्रिम जमानत हेतु आवेदन या तो सेशन न्यायालय में या उच्च न्यायालय में या बोर्ड में भी प्रस्तुत करने का पात्र होने संबंधी कोई प्रावधान नहीं है अतएव ऐसा आवेदन पोषणीय नहीं है ।

Kamlesh Gurjar v. State of M.P.

Judgment dated 20.03.2019 passed by the High Court Madhya Pradesh (Indore Bench) in Miscellaneous Criminal Case No.10345 of 2019, reported in 2019 LawSuit (MP) 329

Relevant extract from the judgment:

According to Section 4 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the 'Act'), a duly constituted Juvenile Justice Board shall have the powers conferred by the Code of Criminal Procedure, 1973 to consider the case of the petitioner. More particularly, Section 12(1) of the Act confers powers to Juvenile Justice Board to grant bail to a 'child', who is an accused of a bailable or nonbailable offence.

It is manifest that the above provision provides certain specific conditions for consideration for releasing a 'child' who is accused of a bailable or non-bailable offence, and the said authorization begins with non obstinate clause "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force." According to sub-Section (1) of Section 12 of the Act, a child shall be released on bail with or without surety notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force. The provision appears to be mandatory in nature for release of a 'child' on bail.

A Juvenile Justice Board has been constituted under Section 4 of the Act to deal exclusively with all proceedings in respect of children in conflict with law.

A conjoint reading of both Sections 4 and 12 of the Act reveals that to deal with all the proceedings in respect of juvenile, including bail, Juvenile Board,

constituted exclusively for this purpose, is the appropriate authority. The Act envisages that the powers conferred on the Board by or under this Act can be exercised by the High Court and the Court of Sessions, only when the proceeding comes before them in appeal, revision or otherwise. Section 52 of the Act gives right to a juvenile, who is accused of any bailable or non-bailable offence, to file appeal against the order of refusal of bail by the Board and Section 53 of the Act provides that he can also file revision against any order passed by the competent authority or by Sessions Court before the High Court.

The Act, 2015 further makes it clear that bail plea of a juvenile can only be entertained when he is arrested or detained or appears or is brought before the Board, and not otherwise. In fact, no provision in the Act or in the Code of Criminal Procedure enables the juvenile to move an application for anticipatory bail either before the Court of Sessions or High Court or even before the Board, which has been exclusively constituted for the purpose of dealing with the proceedings pertaining to a juvenile. Reason appears behind this is that the Act makes the bail a rule and jail an exception.

The issue regarding anticipatory bail of a Juvenile has been dealt with by this Court in para 16, 21 to 23 of ***Satendra Sharma v. State of Madhya Pradesh, 2014 (4) MPHT 133,*** which are as under:

> "On bare perusal of this provision, it is clear that the bail application of a juvenile can be entertained by the Board only when he is arrested or detained or appears or is brought before the Board otherwise application cannot be entertained. If the juvenile is arrested or detained or appears or is brought before the Board then certainly bail application will be filed under Section 12 and the same be decided by the Board only but not by the High Court or Court of Session as discussed above.
>
> The anticipatory bail can be granted in anticipation of arrest but such proceedings are not inserted in the Act. The only provision for bail of Juvenile is given under Section 12 of the Act which has been discussed as above.
>
> In view of the aforesaid discussion, this Court is of the view that application for grant of anticipatory bail preferred by the juvenile cannot be entertained by the High Court or the Court of Session by applying the provision contained under Section 6(2) of the Act. The powers conferred on the Board can be used by High Court and the Court of Session only when proceedings come before them in appeal, revision or otherwise except under Section 438 and 439 of Cr.P.C. Therefore, I respectfully disagree with the interpretation made by the learned Single Judge of the Hon. Rajasthan High Court and Hon. Chhattisgarh High Court.

> Accordingly, application for grant of anticipatory bail by the applicant is hereby dismissed. ....”

In ***Kapil Durgawani v. State of Madhya Pradesh, 2010 (IV) MPJR 155,*** the High Court of Madhya Pradesh has held that even the Juvenile Board has no jurisdiction to entertain anticipatory bail application. Relevant portion of the decision is extracted as under:

> ‘’Provisions of Section 12 of the Act, 2000 do not provide such powers to the Board which is equivalent to Section 438 of Cr.P.C. The Board has no jurisdiction to entertain application under Section 438 of Cr.P.C.”

Similar view is taken by the High Court of ***Chattisgarh in Preetam Pathak v. State of Chattisgarh,*** in ***M.Cr.C. (A) no. 1104 of 2014*** and it has held as under:

> “A close and careful perusal of Section 12 of the Act, 2000 would show that an application for bail of juvenile would be entertainable by the Board only if he is arrested and brought before the Board where he is accused of bailable or nonbailable offences and the condition precedent to the juvenile would be, he is arrested or detained or appears or is brought before a Board, then only his application filed under Section 12 of the Act, 2000 shall be decided by the Board. Apart from Section 12 of the Act, 2000, there is no other provision in the Act, 2000 like Section 438 of Cr.P.C. giving powers to the Board to grant anticipatory bail to the juvenile and thus, power and jurisdiction to grant anticipatory bail has not been conferred to the Juvenile Justice Board, and therefore, the provisions contained in Section 438 of Cr.P.C. cannot be exercised by this Court or Court of session to grant anticipatory bail to the juvenile by virtue of provisions contained in Section 6(2) of the Act, 2000.”

The aforesaid question came to be considered before the High Court of Madhya Pradesh in case of ***Kapil Durgawani*** (supra) in which, after consideration it has been held that provisions of Section 12 of the Act, 2000 do not provide such power to the Board which is equivalent to Section 438 of Cr.P.C. and the Board has no jurisdiction to entertain application under Section 438 of Cr.P.C. by holding as under:

> “Provisions of Section 12 of the Act, 2000, do not provide such powers to the Board which is equivalent to Section 438 of Cr.P.C. The Board has no jurisdiction to entertain application under Section 438 of Cr.P.C.”

Again similar view was reiterated by MP High Court in case of ***Sandeep Singh Tomar v. State of M.P., passed in M.Cr.C. no. 9816 of 2013,*** decided on 10th

March, 2014.Therefore, in my considered opinion, in absence of specific provisions in the Act, 2015, juvenile is not entitled to move application under Section 438 of Cr.P.C.

In view of the foregoing discussion, the application filed under Section 438 of Cr.P.C. for anticipatory bail is dismissed as not maintainable in law.

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234. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 15 and 25

Preliminary assessment as mandated by Section 15 of the Act is not required to be conducted in respect of a child who is involved in an offence committed prior to commencement of the Act.

किशोर न्याय (बालकों की देखरेख) और संरक्षण अधिनियम, 2015 -धाराएं 15 एवं 25

प्रारंभिक निर्धारण जो कि अधिनियम की धारा 15 द्वारा आज्ञापक है, ऐसे बालक के संबंध में किया जाना आवश्यक नहीं है जो इस अधिनियम के प्रवृत्त होने के पूर्व किसी अपराध के कारित करने में संलिप्त है।

Bhanwarlal v. State of Rajasthan

Order dated 16.11.2018 passed by the Rajasthan High Courtin S.B. Criminal Revision No. 1232 of 2018, reported in 2019 (1) Rajasthan Law Weekly 586

Relevant extracts from the order:

Child in conflict with law was produced before the Board on 2.9.2015 and the charge-sheet was filed on 2.12.2016. The matter was pending before the Board on the date of commencement of the Juvenile Justice (Care and Protection of Children) Act, 2015 and juvenile was in juvenile home, as per order passed by the Juvenile Justice Board, hence, the proceedings would continue before the Board as per Section 25 of the Act. The Act has prospective effect and preliminary assessment as mandated by Section 15 of the Act is not required to be conducted in respect of a child who is involved in an offence committed prior to commencement of the Act.

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235. LAND ACQUISITION ACT, 1894 – Sections 12(2) and 18

Period of limitation – For reference against the award for enhancement of compensation u/s 18 – When does it commence? Held, such period commences not from the service of notice without copy of award or information about the award – But, only on valid service of notice of award u/s 12(2) i.e. when notice is accompanied by a certified copy of the award.

भूमि अर्जन अधिनियम, 1894 - धाराएं 12(2) एवं 18

परिसीमा की अवधि - धारा 18 के तहत क्षतिपूर्ति में वृद्धि के लिये पंचाट के विरूद्ध निर्देश - कब प्रारंभ होती है? अभिनिर्धारित, यह अवधि पंचाट की प्रति के बिना तामील किये गये नोटिस अथवा पंचाट के बारे में जानकारी से प्रारंभ नहीं होती - परंतु, धारा 12(2) के तहत नोटिस की वैध तामीली पर ही अर्थात जब नोटिस के साथ पंचाट की प्रमाणित प्रति भेजी गई हो।

Vijay Mahadeorao Kubade v. State of Maharashtra

Judgment dated 04.07.2018 passed by the Supreme Court in Civil Appeal No. 6003 of 2018, reported in 2019 (2) MPLJ 529

Relevant extracts from the judgment:

The main contention canvassed by the appellants, in these Civil Appeals, is whether an effective notice of the award was provided to the appellant herein, as per the mandate of Section 12(2) of the Land Acquisition Act, 1894?

Learned counsel for the petitioner, relies on the judgment of ***Premji Nathu v. State of Gujarat and another, (2012) 5 SCC 250,*** wherein this Court has observed as under

> "In the light of the above, it is to be seen whether the conclusion recorded by the Reference Court, which has been approved by the High Court that the application filed by the appellant was barred by time is legally sustainable.
>
> A careful reading of the averments contained in para 2 of the application filed by the appellant under Section 18(1) shows that the notice issued by the Collector under Section 12(2) was served upon him on 22.02.1985. Thereafter, his advocate obtained certified copy of the award and filed application dated 08.04.1985 for making a reference to the Court. This implies that the copy of the award had not been sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference.
>
> On behalf of the State Government, no evidence was produced before the Reference Court to show that the copy of the award was sent to the appellant along with the notice. Unfortunately, while deciding Issue 3, this aspect has been totally ignored by the Reference Court which mechanically concluded that the application filed on 08.04.1985 was beyond the time specified in Section 18(2)(b).
>
> The learned Single Judge of the High Court also committed serious error by approving the view taken by the Reference Court, albeit without considering the fact that the notice

issued by the Collector under Section 12(2) was not accompanied by a copy of the award which was essential for effective exercise of right vested in the appellant to seek reference under Section 18(1)."

The learned counsel appearing on behalf of the Government has not disputed the aforesaid proposition of law. Accordingly, we are of the opinion that the aforesaid observations are squarely applicable to the present case as the notice dated 04.12.1987, was not accompanied with the award. In this case, there could not have been a valid notice of the award, by letter dated 04.12.1987, under sub-Section (2) of Section 12 of the Land Acquisition Act, until the appellant received a certified copy of the award, which he did on 03.02.1988. Therefore, the reference for enhancement was, accordingly, not barred by limitation.

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236. LAND ACQUISITION ACT, 1894 – Sections 28A and 53
SUCCESSION ACT, 1925 – Section 214
CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 5 and 12
Execution proceedings – Recovery of compensation – Award passed in land acquisition proceedings – Award holder died during pendency of execution – Whether legal heirs of the award holder may be brought on record of execution proceedings? Held, No – Executing Court is not competent to decide the entitlement of said legal heirs to recover the amount of compensation – The person intending to prosecute the execution proceedings is required to produce Succession Certificate – Further held, award passed in land acquisition proceedings is also 'debt' as defined under section 214(2) of the Succession Act, 1925.

भू-अर्जन अधिनियम, 1894 - धाराएं 28क एवं 53

उत्तराधिकार अधिनियम, 1925 - धारा 214

सिविल प्रक्रिया संहिता, 1908 - आदेश 22 नियम 5 एवं 12

निष्पादन कार्यवाहियाँ - प्रतिकर की वसूली - भू-अर्जन कार्यवाहियों में पारित पंचाट - निष्पादन के लंबित रहने के दौरान पंचाट धारक की मृत्यु हो गई - क्या पंचाट धारक के विधिक उत्तराधिकारियों को निष्पादन कार्यवाहियों में अभिलेख पर लाया जा सकता है? अधिनिर्धारित, नहीं - निष्पादन न्यायालय विधिक उत्तराधिकारियों द्वारा प्रतिकर की राशि को वसूल करने के हकदार होने संबंधी प्रश्न का विनिश्चय करने के लिये सक्षम नहीं है - जो व्यक्ति निष्पादन कार्यवाही को संचालित करने का प्रस्ताव करता है, उससे उत्तराधिकार प्रमाण पत्र प्रस्तुत किया जाना अपेक्षित है - आगे अभिनिर्धारित, भू-अर्जन कार्यवाहियों में पारित पंचाट भी उत्तराधिकार अधिनियम, 1925 की धारा 214(2) के अंतर्गत परिभाषित 'ऋण' है।

Lalji v. State of MP and others

Judgment dated 30.11.2018 passed by the High Court ofMadhya Pradesh in Writ Petition No. 10768 of 2013, reported in2019 (2) MPLJ 373

Relevant extracts from the judgment:

The petitioners are legal heirs of Lalji s/o Bihari Lal in whose favour award has been passed under Section 11 of the Land Acquisition Act, 1894 (for brevity 'Act, 1894') as his land got acquired under the provisions of the Act, 1894 and an award of ` 96,334/- per acre for irrigated land and ` 89,891/- for unirrigated land has been passed. Thereafter, a reference was made under section 18 of the Act, 1894 and the said amount has been enhanced by the Reference Court vide award dated 6.5.2011 (Annexure-P-1). Thereafter, an execution was proceeded by the land owner, namely, Lalji s/o Bihari Lal and during the pendency of the execution proceeding, the award holder Lalji expired on 25.12.2012.

The application under Section 151 of the Code of Civil Procedure was filed by the present petitioners claiming themselves to be the legal heirs of the original land owner Lalji. The judgment debtor/State Government raised an objection to the application saying that since the decree holder died during the pendency of execution case, therefore, provisions of Order 22 of the Code of Civil Procedure would not be applicable and accordingly the said application be rejected. The Executing Court considering the objection raised by the respondent/State, passed an order on 15-3-2013, which is impugned in this petition holding that the petitioners are required to obtain succession certificate and then only their names can be substituted in place of the decree holder Lalji.

Before weighing the arguments advanced by the learned counsel for the petitioners, it is necessary to see section 214 of the Indian Succession Act, 1925, which reads as under:-

> **"214. Proof of representative title a condition precedent to recovery through the Courts of debts from debtors ofdeceased persons. -**
>
> (1) No Court shall-
>
> (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effect of the deceased person or to any part thereof, or
>
> (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming of-
>
> (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under Section 31 or Section 32 of the Administrator-General's Act, 1913 (3 of 1913), and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889 (7 of 1889), or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May, 1889 having the debt specified therein.

(2) The word "debt" in sub-Section (1) includes any debt except rent, revenue of profits payable in respect of land used for agricultural purposes."

From a bare perusal of Section 214 of the Act, 1925, it is clear that the provision provides the requirement of producing succession certificate before the Court which is dealing with the proceedings of recovery in pursuance to a decree or order for payment of debts. Sub-Section (ii) of Section 214 although provides the meaning of word "debts" but the same cannot be considered to be exhaustive.

But, in the case at hand, during the pendency of the execution proceedings before the Executing Court, the award holder died and an application has been filed by the present petitioners claiming them to be the legal heirs. Thus, the Executing Court is not the Court of competence to decide the entitlement of the petitioners considering them to be legal heirs and to hold that they are entitled to recover the amount of compensation awarded in favour of the original land owner. Thus, in my opinion, the law relied upon by the Executing Court as laid down by the Division Bench of Nagpur in a case ***Tejraj Rajmal Marwadi v. Rampyari, AIR 1938 Nagpur 528,*** which was later on followed in case of ***Tarabai Jain and others v. Shivnarayan Kothari, 1997 (2) MPLJ 287,*** would be applicable, which is reproduced as under:-

"Now it is said she was not proceeding on her application but on his application and therefore Section 214(1)(b) does not apply: ***(1899)26 Cal 839*** and ***AIR (1920) 7 Cal 580*** which simply follows ***(1899) 26 cal 839*** dissents from a Full Bench judgment reported in ***(1894) 16 All 259*** The latter case however appears to us to be distinguishable, for it was concerned with a suit, not with execution proceedings. Since the new Rule, Order 22, Rule 12, was made, the old question whether execution proceedings abate on death has been set at rest. Abatement does not apply to execution proceedings. The result of that is however that the heirs need not take steps for substitution under Order 22, Rule 3 but

may apply to carry on the proceedings or may file a fresh application. In other words, execution proceedings do not abate but live on and, as some one must take the next step and death terminates all agencies, the person entitled, i.e. the personal representative or heir, can come before the Court. That person when he comes will be claiming for himself, at least where he, or she, is heir or beneficially interested.

The proper application is for leave to carry on (or proceed with) the pending execution proceedings. Such an application would fall within the words "upon an application of a person claiming to be so entitled.""To be so Entitled" means, as is plain from Section 214(1)(a) "to be entitled to any part of the deceased's estate." This widow claims to be so entitled and she makes an application, which is necessary before the Court can proceed with a pending execution. The Court cannot, on that application, proceed with the execution unless a succession certificate is produced. The appeal is accordingly dismissed with costs. We cannot but observe that in this case execution has been avoided for three and a half years because a succession certificate was not produced. We understand there is nodifficulty or expense involved in producing a succession certificate and it would seem to be wise in such cases whether a succession certificate is strictly necessary or not to take the course taken by counsel in ***(1894) 16 All 259*** and ask for time to produce the succession certificate."

Thereafter, this Court in case of ***Tarabai Jain*** (supra) has observed as under:-

"In the instant case, the decree-holder is trying to get fruits of litigation arising out of compromise decree. Since the debt is nothing but is a sum of money payable, therefore, under the present decree the sum of money alone is payable to the legal representatives. Considering the view, taken by the Division Bench of Nagpur High Court in the case of ***Tejraj Rajmal Marwadi*** (supra), the money due to the legal representatives is a debt."

Being a similar fact involved in the present case, I have no hesitation to say that there is no infirmity in the order passed by the Court below rejecting the application of the petitioners for substitution of the original owner in whose favour the award had been passed and was initiating execution proceedings, asking them to produce succession certificate.

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237. MOHAMMEDAN LAW:

(i) Marriage between a Muslim man and a Hindu woman, validity of – Marriage between a Hindu woman and a Muslim man is merely irregular (*fasid*) marriage – Children born from such wedlock are legitimate children.

(ii) Whether child born out of *fasid* (irregular) marriage is entitled to claim a share in his father's property? Held, Yes.

मुस्लिम विधिः

(i) मुस्लिम पुरूष तथा हिंदू महिला के मध्य विवाह की वैधता - एक मुस्लिम पुरूष तथा हिन्दू महिला के मध्य विवाह मात्र एक अनियमित (फासीद) विवाह है - ऐसे विवाह से पैदा होने वाली संताने धर्मज संतान हैं।

(ii) क्या फासीद (अनियमित) विवाह से पैदा होने वाली संतान अपने पिता की संपत्ति के अंश में दावा करने की हकदार है? अभिनिर्धारित, हां।

Mohammad Salim (dead) through Legal Representatives and others v. Shamsudeen (dead) through Legal Representatives and others

Judgment dated 22.01.2019 passed by the Supreme Court in Civil Appeal No. 5158 of 2013, reported in (2019) 4 SCC 130

Relevant extracts from the judgment:

The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See ***Aisha Bi v. Saraswathi Fathima, (2012) 3 LW 937 (Mad), Ihsan Hassan Khan v. Panna Lal, AIR 1928 Pat 19)***.

Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fire-worshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Any child born out of such wedlock (fasid marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage.

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238. MONEY LENDERS ACT, 1934 (M.P.) – Sections 11-B and 11-H

Suit for recovery of loan by money lending firm, maintainability of – Held, under Section 11-B, registration under Money Lenders Act, is compulsory – No suit shall proceed in the absence of such registration certificate.

साहूकार अधिनियम, 1934 (म. प्र.) - धाराएं 11-ख एवं 11-ज

साहूकार फर्म द्वारा ऋण की वसूली के लिये प्रस्तुत वाद की प्रचलनशीलता - अभिनिर्धारित, म.प्र. साहूकार अधिनियम की धारा 11-बी के तहत पंजीकरण अनिवार्य है - ऐसे पंजीकरण प्रमाण पत्र के अभाव में कोई दावा आगे नहीं चल सकेगा।

Firm M/s Modi Kevalchand Through Partners v. Balchand (dead) through Legal Representatives

Order dated 24.01.2019 passed by the High Court of Madhya Pradesh (Gwalior Bench) in F.A. No. 241 of 2008, reported in 2019 (2) MPLJ 717

Relevant extracts from the order:

Section 11-B provides for the compulsory registration of money lenders and registration certificate, which reads as under:-

> **''11-B. Registration of moneylenders and registration certificate. -** (1) Every person who carries on or intends to carry on the business of money lending shall get himself registered by an application made to the Registering Authority of that area in which he carries on or intends to carry on such business and, on such registration, the Registering Authority shall grant a registration certificate to him in such form as may be prescribed:
>
> Provided that no person being a firm or partner of a firm of moneylenders shall be so registered except upon production before the Registering Authority of a certified copy of an entry showing such person as the firm or partners, as the case may be, made in the register of firms under Section 59 of the Indian Partnership Act, 1932:
>
> Provided further that no registration certificate shall be granted to carry on the business of money lending in the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution.
>
> (2) The application made under sub-Section (1) shall be in writing and shall specify the area in which the applicant carries on or intends to carry' on the business of money lending and such other particulars as may be prescribed.''

Section 11-F bars to carry on business without registration Certificate, which reads as under:-

> **''11F. Bar to carry on business without registration certificate. -**
> (1) No person shall carry on the business of money lending in any area unless he holds a valid registration certificate in respect of that area:

Provided that the person who holds a valid registration certificate shall not carry on the business of money lending in the area of a Gram Panchayat or shall not lend money to a member of a Gram Sabha if a resolution to that effect is duly passed by the Gram Sabha of such Gram Panchayat.

(2) Whoever contravenes the provisions of sub-section (1), in any area other than the Scheduled Area, shall be punishable with fine which may extend to two thousand rupees or, if he has previously been convicted of an offence under that sub-Section, with fine which may extend to five thousand rupees.

(3) Whoever contravenes the provisions of sub-Section (1), in any Scheduled Area, shall be punishable with imprisonment which may extend to two years or with fine which may extend to ten thousand rupees or with both. ‘’

Section 11-H reads as under:-

‘’11-H. Suit not to proceed without registration certificate, etc. - No suit for the recovery of a loan advanced by a money-lender shall proceed in a civil Court until the Court is satisfied that he holds a valid registration certificate or that he is not required to have a registration certificate by reason of the fact that he does not carry on the business of money-lending [in any area of Madhya Pradesh:

Provided that this Section shall not apply to a suit instituted before the 1st October, 1940. ‘’

Thus, from the plain reading of aforesaid Sections, it is clear that no suit for recovery of loan advanced by money lender shall proceed in the Civil Court until the Court is satisfied that the plaintiff has a registration certificate. The plaintiffs/appellants had claimed that the plaintiffs’ Firm is having money lending registration, however, they have failed to prove that it was ever registered under Money Lenders Act, 1934. By incorporation of Section 11-B, the registration under Money Lenders Act has been made compulsory and any violation has been made punishable for the offence. Section 11-H clearly provides that no suit shall proceed in absence of registration certificate under Money Lenders Act, 1934. Thus, it is clear that as the appellants/plaintiffs have failed to prove that the plaintiffs’ Firm was having any registration under Money Lenders Act, 1934, accordingly, this Court is of the view that the Trial Court did not commit any mistake in dismissing the suit in to in spite of the fact that it was found that the defendant No.1 had borrowed money from the plaintiffs.

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

Pay and recover – When not permissible? Deceased was traveling on mudguard of tractor – Due to rash and negligent driving, deceased fell down from the tractor and died – The Tribunal passed the award of compensation against the owner and driver of the offending vehicle and directed that the Insurance Company will satisfy the award and thereafter, will be free to recover the amount from the owner of the vehicle – Held, there is no statutory obligation under Section 147 of the Act, for indemnifying the liability of Insurance Company on behalf of the insured to satisfy the award and in this view of the matter, the finding of Tribunal in respect of payment of compensation by the Insurance Company is not sustainable. ***(Aarif and another v. Urmilabai and others, 2004 ACJ 1496, United India Insurance Co. Ltd. v. Kamodi Bai and others, 2007 ACJ 2031, Nathu Singh Kushwaha and another v. Narayan Singh and others, (2011) ACJ 740, National Insurance Company Ltd. v. Bakaridan and others, 2017 (1) TAC 24 (MP)*** and ***Oriental Insurance Company Ltd. v. Brij Mohan and others, 2007 (7) SCALE 753,*** **relied on.)**

मोटर यान अधिनियम, 1988 - धारा 147

संदाय और वसूली - कब अनुमत नहीं? - मृतक ट्रेक्टर के मडगार्ड में यात्रा कर रहा था - लापरवाही और उतावलेपन से ट्रेक्टर चालन के कारण मृतक ट्रेक्टर से गिरा और मृत हो गया - अधिकरण ने वाहन स्वामी और चालक के विरूद्ध अधिनिर्णय पारित किया एवं निर्देशित किया कि बीमा कंपनी अधिनिर्णय को संतुष्ट कर राशि, वाहन स्वामी से वसूल ले - अभिनिर्धारित, अधिनियम, की धारा 147 के अधीन बीमा कंपनी पर बीमित के लिये क्षतिपूर्ति करने और अधिनिर्णय को संतुष्ट करने की संविधिक बाध्यता नहीं है और इस दृष्टि से बीमा कंपनी द्वारा भुगतान किये जाने संबंधी अधिकरण का निष्कर्ष पोषणीय नहीं है। (***आरिफ एवं अन्य विरूद्ध उर्मिलाबाई एवं अन्य, 2004 एसीजे 1496, यूनाईटेड इण्डिया इंश्योरेंस कं. लि. विरूद्ध कामोदी बाई एवं अन्य, 2007 एसीजे 2031, नाथू सिंह कुशवाहा एवं अन्य विरूद्ध नारायण सिंह एवं अन्य, (2011) एसीजे 740, नेशलन इंश्योरेंस कं. लि. विरूद्ध बकरीदन एवं अन्य, 2017 (1) टीएसी 24 (एमपी)*** एवं ***ओरिएंटल इंश्योरेंस कंपनी लि. विरूद्ध ब्रज मोहन तथा अन्य, 2007 (7) स्केल 753,*** अवलंबित)

The New India Assurance Company Limited v. Kiran and others

Order dated 28.06.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench), in Miscellaneous Appeal No. 647 of 2007, reported in 2019 ACJ 1027

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240. MOTOR VEHICLES ACT, 1988 – Section 147(1)

CIVIL PRACTICE:

(i) Liability of insurance company – Exclusion of passengers in goods vehicle from liability – There was an exception in the policy for employees coming under the purview of Workmen's Compensation Act, 1923 – Deceased was a labourer who was travelling in a truck carrying sand – Deceased was employed in extracting the sand by owner of truck – Held, deceased comes under the purview of Workmen's Compensation Act, 1923 who died in the course of employment – Insurance company held liable.

(ii) Strike – Call to abstain from work – Whether sufficient cause for non-appearance of counsel? Held, No – High Court proceeded to decide the appeal even though call for abstention from work was given by the State Bar Council.

मोटर यान अधिनियम, 1988 - धारा 147(1)

सिविल प्रथाः

(i) बीमा कम्पनी का दायित्व - माल वाहक वाहनों में यात्रियों के दायित्व से अपवर्जन - कर्मकार प्रतिकर अधिनियम, 1923 की परिधि के अंतर्गत आने वाले कर्मचारियों के लिये एक अपवाद था - मृतक एक मजदूर था जो रेत ढोने वाले ट्रक में यात्रा कर रहा था - मृतक ट्रक के स्वामी द्वारा रेत उत्खनन हेतु नियोजित किया गया था - अभिनिर्धारित, मृतक कर्मकार प्रतिकर अधिनियम, 1923 की परिधि में आता है जिसकी मृत्यु नियोजन के अनुक्रम में हुई - बीमा कम्पनी को दोषी ठहराया गया।

(ii) हड़ताल - कार्य से विरत रहने का आह्वान - क्या अधिवक्ता की अनुपसंजाति हेतु पर्याप्त कारण है ? अभिनिर्धारित, नहीं - उच्च न्यायालय द्वारा राज्य अधिवक्ता संघ के कार्य से विरत रहने के आह्वान के बाद भी अपील का विनिश्चय किया गया।

ICICI Lombard General Insurance Co. Ltd. v. Mamta Uikey and others

Judgment dated 10.04.2018 passed by the High Court of Madhya Pradesh in Miscellaneous Appeal No. 2513 and 2600 of 2011, reported in 2019 ACJ 1400

Relevant extracts from the judgment:

We do not find that the Insurance Company has been able to prove that it is not liable to pay compensation to the legal heirs of the deceased. The insurance policy (Ex.D.1) includes liability of the paid driver (Endorsement IMT 28) whereas condition regarding limitation as to use reads as under:-

> **"LIMITATION AS TO USE:** The policy covers use only under a permit within the meaning of the Motor Vehicles Act, 1988 or such a carriage falling under sub-Section (3) of Section 66 of the Motor Vehicles Act, 1988.
>
> The Policy does not cover
>
> (1) Use for organised racing, pace making, reliability trails or speed testing;
>
> (2) Use whilst drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle;
>
> (3) Use for carrying passengers in the vehicles; except employees (other than the driver) not exceeding the number permitted in the registration document and coming under the purview of Workmen's Compensation Act, 1923."

As per Insurance Company, only driver was insured and no other employee as such. We do not find that such an argument is available to the Insurance Company for the reason that the Insurance Company has not produced registration document of the vehicle insured by it to show that the vehicle cannot be used for carrying any other employee. As per condition no.3 reproduced above, the Insurance Company is liable except the employees not exceeding the number permitted in the registration document and that coming under the purview of the Workmen Compensation Act, 1923. The driver has been included specifically by payment of extra premium but the deceased was an employee of the owner, therefore, the Insurance Company was required to prove that the vehicle was not permitted to carry any other employees in the vehicle in question as per registration certificate. Still further, the deceased as an employee died during course of employment, therefore, he is covered under the Workmen's Compensation Act, 1923 as well.

It was for the Insurance Company to prove that it had no liability to pay compensation on account of death of deceased. The defence of not liable to pay compensation is required to be proved by the Insurance Company as the policy conditions are within its knowledge. Since, the Insurance is contract of indemnity, the Insurance Company can agree to pay compensation over and above the statutory requirements in terms of Section 147 of the Motor Vehicles Act, 1988. In the present case, the certificate of insurance includes liability in respect of employees, the number of which is mentioned in the registration certificate. The employees mentioned in the registration document can be carried in the vehicle. Still further, the deceased was an employee and covered under the Workmen's Compensation Act, 1923. Therefore, the Insurance Company is liable to pay compensation to the legal heirs of the deceased.

x x x

None has put in appearance on behalf of the appellant-Insurance Company due to call given by the State Bar Council to abstain from work on 21.3.2018 and 5.4.2018. In view of the judgment of the Hon'ble Supreme Court in ***Ex. Capt. Harish Uppal v. Union of India and another, (2003) 2 SCC 45,*** the call for strike is not sufficient cause for non-appearance of the counsel. Consequently, we have proceeded to decide the appeals as payment of half of the compensation amount has been stayed by this Court on 20.7.2011.

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241. MOTOR VEHICLES ACT, 1988 – Sections 147 and 149
GENERAL CLAUSES ACT, 1897 – Section 27
EVIDENCE ACT, 1872 – Section 114
INDIAN POST OFFICE RULES, 1933 – Rule 195
Cancellation of Insurance policy due to dishonour of cheque received towards premium – Law explained:

(i) Till when does the liability of the Insurance Company to indemnify the third parties subsists? Held, unless the insurance coverage is cancelled by the insurer and intimation thereof has reached the insured and the registering authority, the liability persists.

(ii) On whom does the burden lie to prove that the insurer has so intimated about the cancellation on the dishonour of the cheque received towards premium? Held, insurer is only required to *prima facie* establish that the letter about the cancellation of insurance coverage was sent under the Certificate of Posting or registered post – He is not required to establish conclusively that the intimation of such cancellation was infact served on the addressee – Further, the burden is on the addressee to rebut the presumption by conclusive evidence that he did not really receive the letter.

(iii) What time can be considered necessary to serve the letter in the ordinary course after which the intimation may be presumed to have been served on the addressee? Held, a period of one week from the date of dispatch can be safely adopted as such time.

मोटर यान अधिनियम, 1988 - धाराएं 147 एवं 149

साधारण खण्ड अधिनियम, 1897 - धारा 27

साक्ष्य अधिनियम, 1872 - धारा 114

भारतीय डाक घर नियम, 1933 - नियम 195

बीमा पॉलिसी का रद्दकरण - प्रीमियम हेतु प्राप्त चैक के अनादरण के कारण -विधि समझाई गईः

(i) तृतीय पक्षकारों की क्षतिपूर्ति करने हेतु बीमा कंपनी का उत्तरदायित्व कब तक विद्यमान रहता है? अभिनिर्धारित, जब तक बीमाकर्ता द्वारा बीमा कवरेज के रद्दकरण की सूचना न दे दी जाए और इसकी सूचना बीमाकृत तथा पंजीकरण प्राधिकारी तक न पहुंच जाए, तब तक उत्तरदायित्व विद्यमान रहता है।

(ii) इसे साबित करने का भार किस पर होता है कि प्रीमियम हेतु प्राप्त चैक के अनादरण के कारण रद्दकरण की सूचना बीमाकर्ता द्वारा दे दी गई है?अभिनिर्धारित, बीमाकर्ता को केवल यह प्रथम दृष्टया स्थापित करना होता है कि बीमाकवरेज के रद्दकरण का पत्र सर्टिफिकेट आॅफ पोस्टिंग या पंजीकृत डाक द्वारा भेजा दिया गया था - उसे यह अंतिम तौर से स्थापित नहीं करना होता है कि ऐसे रद्दकरण की सूचना प्राप्तकर्ता को वास्तव में प्राप्त हो गई थी - आगे यह भी कि, यह प्राप्तकर्ता पर भार है कि वह निश्चायक साक्ष्य से उपधारणा का खण्डन करे कि उसे वास्तव में पत्र प्राप्त नहीं हुआ था।

(iii) सामान्य अनुक्रम में पत्र प्राप्त होने के लिए कितना समय विचार में लिया जा सकता है जिसके पश्चात् सूचना प्राप्तकर्ता को प्रदान करने की उपधारणा की जा सकती है? अभिनिर्धारित, प्रेषण की तारीख से एक सप्ताह का समय, ऐसे समय के रूप में सुरक्षित रूप से अपनाया जा सकता है।

Prasanna B. v Kabeer P.K. and another

Judgment dated 31.10.2018 passed by the High Court of Kerala at Ernakulam in MACA No. 2017 of 2013, reported in 2019 ACJ 43

Relevant extracts from the judgment:

It is settled law that the liability of the insurer to indemnify the third parties subsists unless the insurance coverage is cancelled by the insurer and intimation thereof has reached the insured and the registering authority. On whom does the burden lie to prove that the insurer has so intimated about the cancellation on the dishonour of the cheque received towards premium? This is the question referred to the Full Bench for the sake of clarity in view of the following observations in ***United India Insurance Company Limited v. Laxmamma and others, (2012) 5 SCC 234***,

> "26. In our view, the legal position is this: where the policy of insurance is issued by an authorised insurer on receipt of cheque towards the payment of premium and such a cheque is returned dishonoured, the liability of the authorised insurer to indemnify the third parties in respect of the liability which that policy covered subsists and it has to satisfy the award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorised insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy

> of insurance is issued by an authorised insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonoured and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."
>
> (emphasis supplied)

Is it sufficient if there is proof that the insurer has sent intimation about the cancellation of the insurance coverage to the insured and the registering authority or is it necessary to prove that the addressees have received the same? A reference to Section 147(4) of the Motor Vehicles Act, 1988 ('the Act' for short) is apposite and the same is extracted hereunder:

> "147. Requirements of policies and limits of liability.-
>
> (1) xxxxxx xxxxxx xxxxxx xxxxxx
>
> (2) xxxxxx xxxxxx xxxxxx xxxxxx
>
> (3) xxxxxx xxxxxx xxxxxx xxxxxx
>
> (4) Where a cover note issued by the insurer under the provisions of this Chapter or the Rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe."

A cover note mentioned in Section 147(4) of the Act precedes the certificate of insurance and would normally be issued by the insurer or its agent on receipt of a cheque from the insured towards premium. The cover note is an interim insurance binding on the parties as per its terms till it is superseded by a certificate of insurance issued subject to the realisation of the cheque. The cheque issued by the insured towards premium may get dishonoured due to a variety of reasons like 'insufficiency of funds' or 'difference in the signature of the holder'. The insurer under such circumstances is justified in cancelling the insurance coverage and intimating the same to the insured as well as the registering authority. The insurer has on many occasions sent the intimation aforesaid under 'Certificate of Posting' as provided under Rule 195 of the Indian Post Office Rules, 1933 which was in vogue earlier. Such a certificate is issued to the sender to afford an assurance that the letter or other articles entrusted to servants or messengers for posting have actually been posted. The practice of Issuing a Certificate of Posting has since been discontinued by deleting

Rule 195 of the Rules aforesaid by Notification dated 31.1.2011 of the Union Government. A Certificate of Posting raises a presumption under Section 114 of the Indian Evidence Act, 1872 that the common course of business has been followed in the particular case. It is for the addressee to rebut the presumption that he did not in fact receive the intimation notwithstanding the Certificate of Posting produced by the sender.

The surest way to prove that the intimation has been sent by the insurer about the cancellation of the insurance coverage is to dispatch it by registered post with or without postal acknowledgment. The production of the receipt evidencing the dispatch by registered post raises a presumption in favour of the insurer that the intimation has been sent to the addressee for secured delivery. The fundamental difference between speed post and registered post is that the former is address specific and time bound whereas the latter is addressee specific. A presumption in favour of the sender for a properly addressed and prepaid post is supported in law too by Section 27 of the General Clauses Act, 1897 which is extracted hereunder:

> **"27. Meaning of service by post -** Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It would suffice if the insurer establishes *prima facie* that the letter about the cancellation of insurance coverage sent under Certificate of Posting or by registered post would have been delivered in the ordinary course.

A period of one week from the date of dispatch can safely be adopted as the time necessary to serve the letter in the ordinary course after which the intimation is presumed to have been served on the addressee. The period is so fixed in the absence of any provision to the contrary for the limited purpose of the cases of this nature to avoid disputes as to the date of receipt of the intimation. The insured in some cases may try to evade the service of notice and the letter would be returned with postal remarks like 'addressee left', 'house locked', 'insufficient address' etc. The burden is on the addressee to rebut the presumption by conclusive evidence that he did not really receive the letter and it is not a case of deliberate avoidance. The burden is not on the insurer to establish conclusively that the intimation of cancellation of insurance coverage was in fact served on the insured or the registering authority. The judgment in M.A.C.A. No. 2471/2015 to the effect that it is the obligation of the insurer to

establish the service of the intimation on the addressee is hereby overruled. Needless to say that no liability can be fastened on the insurer for any compensation payable in respect of an accident that occurs after the service of the intimation aforesaid. The reference is answered accordingly.

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242. MOTOR VEHICLES ACT, 1988 – Section 163

Compensation, assessment of – Deduction of amount received under insurance policy or other contract – When permissible? Held, when amount received under an insurance policy or contract has direct nexus with the accident, the same is liable to deduction, otherwise not – Instantly, deceased had an insurance policy of Rs. 5,00,000/-, but in case of accidental death, his dependants were entitled to Rs. 10,00,000/- – Held, Rs. 5,00,000/- would be deductible from the assessed compensation. [*Helen C. Rebello v. Maharashtra State Road Transport Corporation, 1999 ACJ 10 (SC),* followed.]

मोटर यान अधिनियम, 1988 - धारा 163

प्रतिकर का निर्धारण - बीमा पॉलिसी अथवा अन्य संविदा के अधीन प्राप्त राशि की कटौती - कब अनुज्ञेय है? अभिनिर्धारित, जब किसी बीमा पॉलिसी अथवा संविदा के अधीन प्राप्त राशि का घटना से सीधा संबंध हो, तो ही ऐसी राशि कटौती योग्य है अन्यथा नहीं - हस्तगत मामले में, मृतक की रूपये 5,00,000/- की बीमा पॉलिसी थी किन्तु दुर्घटना में मृत्यु होने पर उसके आश्रित रूपये 10,00,000/- के हकदार थे - अभिनिर्धारित, निर्धारित प्रतिकर से रूपये 5,00,000/- की राशि कटौती योग्य है। (***हेलेन सी. रिबेलो वि. महाराष्ट्र राज्य सड़क परिवहन निगम, 1999 एसीजे 10 (एससी),*** अनुसरित)

Sarla Devi and others v. Arvind Jain and others

Judgment dated 10.05.2018 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 1236 of 2012, reported in 2019 ACJ 1342

Relevant extracts from the judgment:

Grievance raised on behalf of the appellant/claimant is that the compensation is not awarded as per the verdict in ***Helen C. Rebello v. Maharashtra State Road Transport Corporation, 1999 ACJ 10 (SC), Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC)*** and ***National Insurance Company Limited v. Pranay Sethi and others, 2017 ACJ 2700 (SC)***. In ***Helen C. Rebello*** (supra), it is held:

> "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 co-relation between the two. Similarly, life insurance policy amount is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which 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 insurer indemnifies to pay the sum to the heirs, again in terms of the contracts 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 case, bank balance, shares, fixed deposits, etc. though all are 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 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 has no correlation to the compensation computed as against 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 the case at hand, it is borne out from the salary certificate of the victim that an amount of ` 650 x 12 = 7800/- per annum was deducted towards SPBY. It is further borne out from the evidence led on behalf of the claimant, in case if employee retires, he gets ` 5,00,000/- under the said head i.e. SPBY but in case of accidental death, his dependants would be entitled for ` 10,00,000/-; therefore, in terms of decision in ***Helen C. Rebello*** (supra), ` 5,00,000/- would be deducted from ` 36,29,895/-. The total compensation would stand computed to ` 31,29,895/- and after making an addition of ` 70,000/- on account of conventional head; the total compensation would be ` 31,99,895/-. This amount shall carry interest @ 6% from the date of claim petition before the Claims Tribunal. Apportionment shall be carried out in the terms of the award of the Tribunal.

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243. MOTOR VEHICLES ACT, 1988 – Section 163

(i) Compensation, assessment of – Death of a bachelor – Choice of multiplier – Whether age of deceased or the age of claimant should be taken into account? Held, age that should be taken into account for adoption of the multiplier is the age of deceased. (*National Insurance Co. Ltd. v. Pranay Sethi, 2017 ACJ 2700 (SC),* followed)

(ii) Compensation, assessment of – Future prospects – Whether future prospects can be awarded where deceased was self employed person? Held, Yes. (*Pranay Sethi* (supra), followed)

(iii) Compensation, assessment of – Damages for loss to estate, loss to love and affection and funeral expenses – What is the appropriate scale? Held, appropriate amount under the said head would be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. (*Pranay Sethi* (supra), followed)

मोटर यान अधिनियम, 1988 - धारा 163

(i) प्रतिकर का निर्धारण - अविवाहित व्यक्ति की मृत्यु - गुणांक का चुनाव - दावाकर्ता की आयु अथवा मृतक की आयु, किसे ध्यान में रखा जाना चाहिए? अभिनिर्धारित, आयु जो गुणांक के चुनाव हेतु ध्यान में रखी जानी चाहिए, वह मृतक की आयु है। (***नेशनल इंश्योरेंस कम्पनी लिमिटेड विरूद्ध प्रणय सेठी, 2017 एसीजे 2700 (एससी),*** अनुसरित)

(ii) प्रतिकर का निर्धारण -भविष्यवर्ती संभावनाएं - क्या भविष्यवर्ती संभावनाएं अधिनिर्णीत की जा सकती हैं, जहां मृतक स्वनियोजित था? अभिनिर्धारित, हां। (प्रणय सेठी (उपरोक्त) अनुसरित)

(iii) प्रतिकर का निर्धारण - संपत्ति की क्षति, प्रेम एवं स्नेह की क्षति एवं अंतिम संस्कार के खर्चों के लिये क्षतिपूर्ति - समुचित मापदण्ड क्या है? अभिनिर्धारित, उक्त मद के अंतर्गत समुचित राशि क्रमशः 15,000/-, रूपये 40,000/-,एवं रूपये 15,000/-होगी। (प्रणय सेठी (उपरोक्त), अनुसरित)

Kishan Devi and others v. Oriental Insurance Company Limited and others

Judgment dated 14.08.2018 passed by the Supreme Court in Civil Appeal No. 8262 of 2018, reported in 2019 ACJ 1366 (SC) (3 Judge Bench)

Relevant extracts from the judgment:

The first issue is with regard to the correct multiplier to be adopted in the case of death of a bachelor. Whether it is the age of the deceased or the age of the claimant that should be taken into account.

The second is whether a self-employed person, to which category the deceased (about 38 years of age) belonged would be entitled to future prospects.

The last question is whether the award of damages for loss of estate Rs. 25,000/- (Rupees Twenty five thousand); loss of love and affection Rs. 1,00,000 (Rupees one lakh) and funeral expenses Rs. 25,000/- (Rupees Twenty five thousand) is correct.

The above issues are no longer res integra in view of the decision of the Constitution Bench of this Court in the case of ***National Insurance Company Limited v. Pranay Sethi and others, 2017 ACJ 2700 (SC)***.

Answering the first question, after an elaborate discussion, the Constitution Bench of this Court in paragraph 59.7 of the decision in ***Pranay Sethi*** (supra) has categorically held that the age that should be taken into account for adoption of the multiplier is the age of the deceased.

Though an argument has been advanced on behalf of the Respondent Insurer that an exception should be carved out where the deceased is a bachelor, we find no room to accept the contention advanced in view of the clear enunciation of the law in this regard by the Constitution Bench of this Court in ***Pranay Sethi*** (supra).

The Constitution Bench of this Court in paragraph 59.4 of the report in ***Pranay Sethi*** (supra) has also held that depending on the age of the deceased future prospects can be awarded where the deceased was a self-employed person. In the present case, the deceased was about 38 years of age. Accordingly, the claimants would be entitled to future prospects at the rate of 40% of the income.

So far as the loss of estate, loss of consortium and funeral expenses are concerned, the Constitution Bench of this Court in paragraph 59.8 in ***Pranay Sethi*** (supra) has held that the appropriate amount under the said heads would

be Rs. 15,000/- (Rupees Fifteen thousand), Rs. 40,000/- (Rupees Forty thousand) and Rs. 15,000/- (Rupees Fifteen thousand) respectively, totalling ` 70,000/- (Rupees Seventy thousand) in all.

Consequently, so far as the loss of estate, loss of love and affection and funeral expenses are concerned, following the decision of the Constitution Bench in ***Pranay Sethi*** (supra) a total of ` 70,000/- (Rupees Seventy Thousand) is awarded. Calculated thus, the total entitlement of the claimants/appellants would work out to be Rs. 8,82,520/- Rs. 4,514/- (monthly loss of dependency taking into account the future prospects and after deducting 50%) x 12 x 15 (multiplier) = 8,12,520/- + 70,000 on account of loss of love and affection, loss of estate and funeral expenses]

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***244. MOTOR VEHICLES ACT, 1988 – Section 163**

Compensation, assessment of – Death cases – Deduction of personal expenses – Deceased survived by wife, two children and widowed mother as dependents – Held, deduction of ¼ as personal expenses, appropriate.

मोटर यान अधिनियम, 1988 - धारा 163

प्रतिकर का निर्धारण - मृत्यु के मामले - व्यक्तिगत खर्चों की कटौती - पत्नी, दो बच्चे तथा विधवा माता मृतक पर आश्रित थे - अभिनिर्धारित, व्यक्तिगत खर्चों के रूप में 1/4 की कटौती उपयुक्त है।

Babita and others v. Jubair and others

Judgment dated 08.02.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Appeal No. 351 of 2014, reported in 2019 ACJ 1403

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245. MOTOR VEHICLES ACT, 1988 – Sections 163 and 166

Compensation, assessment of – When victim of accident is not an earning person but a student – Guiding factors explained.

मोटर यान अधिनियम, 1988 - धाराएं 163 एवं 166

प्रतिकर का निर्धारण - जहाँ दुर्घटना का पीड़ित आय अर्जित करने वाला व्यक्ति न होकर विद्यार्थी हो - मार्गदर्शक कारक स्पष्ट किए गए।

M.R. Krishna Murthi v. New India Assurance Co. Ltd. and others

Judgment dated 05.03.2019 passed by the Supreme Court in Civil Appeal No. 2476 of 2019, reported in 2019 ACJ 1291

Relevant extracts from the judgment:

From the conjoint reading of the aforesaid judgments, inter alia, following principles can be culled out which would be relevant for deciding the instant appeal:

(i) In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poseer would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.

(ii) There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career etc.

If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances which are payable for such calling. In case, career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

(iii) There may be cases like Deo Patodi where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In such cases, these factors would also assume relevance.

(iv) After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in the case***N. Manjegowda v. Manager, United India Insurance Company Limited, (2014) 3 SCC 584,***.

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***246. MOTOR VEHICLES ACT, 1988 – Section 163A**

Accident arising out of the use of a motor vehicle – Dhanesh Jindal, the registered owner of car, was moving with his wife and two children, in the direction of Hotel Delite, Faridabad – The car had to be stopped on roadside due to heavy rains – The air conditioning system of the car was functional, all the occupants of the car waiting inside for the rains to stop – During the period of wait, carbon monoxide gas got generated and entered the chamber of the car which resulted in the death of all four persons due to suffocation – Held, it is an accident arising out of the use of a motor vehicle.

मोटर यान अधिनियम, 1988 - धारा 163क

मोटर यान के उपयोग से उत्पन्न दुर्घटना - धनेष जिन्दल, जो कि कार का पंजीकृत स्वामी था, अपनी पत्नी और दो बच्चों के साथ होटल डिलाईट फरीदाबाद की ओर जा रहा था - भारी वर्षा के कारण कार को रोड के किनारे रोकना पड़ा - कार मेंए.सी. चल रहा था और कार के अन्दर बैठे व्यक्ति वर्षा रूकने की प्रतीक्षा कर रहे थे - इसी दरम्यान कार्बन मोनोआक्साइड गैस उत्पन्न हुई और कार के अन्दर उसका रिसाव होने के परिणाम स्वरूप दम घुटने से चारों व्यक्तियों की मृत्यु हो गई - अभिनिर्धारित, यह मोटर यान के उपयोग से उत्पन्न हुई दुर्घटना है।

Iffco Tokio General Insurance Company v. Sohanpal and another
Judgment dated 20.07.2017 passed by the High Court of Delhi in MAC Appeal No. 45 of 2014, reported in 2019 ACJ 394

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***247. MOTOR VEHICLES ACT, 1988 – Sections 165 and 166**

Accident arising out of the use of motor vehicle – Deceased, who works as a coolie, was loading up the luggage on the rooftop of bus – Driver of the bus suddenly extended the bus and parked it at the place where electric line was passing – Due to this, the deceased came in contact with live wire, sustained injuries and lost his life – Parents of deceased are entitled for just compensation.

मोटर यान अधिनियम, 1988 - धाराएं 165 एवं 166

मोटर यान के उपयोग से उत्पन्न दुर्घटना - मृतक, जो कुली का कार्य करता था, बस की छत में सामान चढ़ा रहा था - चालक ने अचानक बस आगे बढ़ा दी और ऐसी जगह बस खड़ी की जहां से बिजली के तार जा रहे थे - इसके कारण, बिजली के प्रवाह युक्त तार के सम्पर्क में आने के कारण मृतक को चोटें आई और वह मृत हो गया - मृतक के माता-पिता उचित प्रतिकर पाने के हकदार हैं।

Puranchand and another v. Kishanlal and others
Order dated 27.02.2017 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 200 of 2006, reported in 2019 ACJ 1052

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248. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168

Compensation – Liability of insurance company – Composite negligence – Whether a claim petition against insurance company alone is maintainable in cases of composite negligence of both the vehicles? Held, Yes – Where the liability is joint and several, it is the choice of the claimant to claim from owner, driver or insurer or any of them.

मोटर यान अधिनियम, 1988 - धाराएं 166 एवं 168

प्रतिकर - बीमा कंपनी का दायित्व - सम्मिश्रित उपेक्षा - क्या दोनों वाहनों की सम्मिश्रित उपेक्षा की दशा में मात्र बीमा कंपनी के विरूद्ध दावा याचिका पोषणीय है? अभिनिर्धारित, हाँ - जहाँ कि दायित्व संयुक्त एवं पृथक होता है, वहां दावाकर्ता के पास विकल्प है कि वह स्वामी, चालक अथवा बीमाकर्ता अथवा उनमें से किसी के विरूद्ध भी दावा करे।

National Insurance Company Limited v. Ganga Devi and others

Judgment dated 21.01.2019 passed by High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 1296 of 2016, reported in 2019 (2) MPLJ 465

Relevant extracts from the judgment:

In ***Mahesh Matre and others v. Akhlesh Thakur and others, 2008 (2) MPHT 163 (DB),*** reliance whereas is placed by the Tribunal, the Division Bench of this High Court held:

> "13. From the aforesaid enunciation of law it is quite clear that where the liability is joint and several it is the choice of the claimant to claim from the owner, driver and the insurer of both the vehicles or any one of them. The entire amount of compensation on account of the injuries or death can be imposed on the owner, driver and insurer of that vehicle. In view of the aforesaid, the conclusion arrived at by the Tribunal that as the owner, driver and insurer of the jeep have not been made parties, therefore, 50% is to be deducted, is absolutely unsustainable. The liability in entirety can be imposed on the insurer of the truck. Therefore, the amount of compensation determined by the Tribunal in favour of the claimants has to be made good by the insurer of the truck."

Thus the contention regarding composite negligence and effect thereon that the appellant Insurance Company alone cannot be held liable, also fails.

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249. MOTOR VEHICLES ACT, 1988 – Sections 166, 168 and 169

Scheme and nature of provisions of the Act relating to compensation – The Act is a beneficial piece of legislation enacted to give solace to the victims of the motor accident – The Act is designed in a manner, which relieves the victims from ensuring strict compliance provided in law, which is otherwise applicable to the suits and other proceedings – The claim petition filed under the Act is neither a suit nor an adversarial *lis* in the traditional sense but it is a proceeding in terms of and regulated by the provisions of Chapter XII of the Act.

मोटर यान अधिनियम, 1988 - धाराएं 166, 168 एवं 169

अधिनियम के अधीन प्रतिकर संबंधी उपबधों की योजना एवं प्रकृति - अधिनियम मोटर दुर्घटना में आहत व्यक्तियों को सांत्वना देने के लिये अधिनियमित किया गया लाभप्रद विधायन है - अधिनियम को इस प्रकार प्रारूपित किया गया है जिससे सामान्य वादों या कार्यवाहियों में विधि द्वारा विहित कठोर अनुपालनाओं के पालन से आहतों को राहत दी जा सके - अधिनियम के अधीन प्रस्तुत दावा याचिकाएं न तो वाद हैं और न पारंपारिक संदर्भ में विरोधात्मक मुकदमेबाजी, बल्कि इसकी प्रक्रियाएं अधिनियम के अध्याय 12 में विहित उपबंधों से विनियमित होती हैं।

Vimla Devi and others v. National Insurance Company Limited and others

Judgment dated 16.11.2018 passed by the Supreme Court in Civil Appeal No. 11042 of 2018, reported in 2019 ACJ 454

Relevant extracts from the judgment:

At the outset, we may reiterate as has been consistently said by this Court in a series of cases that the Act is a beneficial piece of legislation enacted to give solace to the victims of the motor accident who suffer bodily injury or die untimely. The Act is designed in a manner, which relieves the victims from ensuring strict compliance provided in law, which are otherwise applicable to the suits and other proceedings while prosecuting the claim petition filed under the Act for claiming compensation for the loss sustained by them in the accident.

Section 158 of the Act casts a duty on a person driving a motor vehicle to produce certain certificates, driving license and permit on being required by a police officer to do so in relation to the use of the vehicle. Sub-Section (6), which was added by way of amendment in 1994 to Section 158 casts a duty on the officer in-charge of the police station to forward a copy of the information (FIR)/report regarding any accident involving death or bodily injury to any person within 30 days from the date of information to the Claim Tribunal having jurisdiction and also send one copy to the concerned insurer. This sub-Section also casts a duty on the owner of the offending vehicle, if a copy of the information is made available to him, to forward the same to the Claims Tribunal and the insurer of the vehicle.

The Claims Tribunal is empowered to treat the report of the accident on its receipt as if it is an application made by the claimant for award of the compensation to him under the Act by virtue of Section 166(4) of the Act and thus has jurisdiction to decide such application on merits in accordance with law.

The object of Section 158(6) read with Section 166(4) of the Act is essentially to reduce the period of pendency of claim case and quicken the process of determination of compensation amount by making it mandatory for registration

of motor accident claim within one month from the date of receipt of FIR of the accident without the claimants having to file a claim petition. (See ***Jai Prakash v. National Insurance Co. Ltd., (2010) 2 SCC 607***).

There are three Sections, which empower the Claims Tribunal to award compensation to the claimant, viz., Section 140, Section 163A and Section166 of the Act.

So far as Section 140 of the Act is concerned, it deals with the cases for award of compensation based on the principle of no fault liability.

So far as Section 163A of the Act is concerned, it deals with special provisions as to payment of compensation and is based on structured formula as specified in Second Schedule appended to the Act.

While claiming compensation payable under Section 140 and Section 163A of the Act, the claimant is not required to prove any wrongful act, neglect or default of the person concerned against whom the claim is made by virtue of Section 140(4) and Section 163A(2) of the Act.

So far as Section 166 of the Act is concerned, it also deals with payment of compensation. Section 168 of the Act deals with award of the Claims Tribunal whereas Section 169 of the Act provides procedure and powers of the Claims Tribunal. As has been held by this Court (Three Judge Bench), the claim petition filed under the Act is neither a suit nor an adversarial lis in the traditional sense but it is a proceeding in terms of and regulated by the provisions of Chapter XII of the Act, which is a complete Code in itself. (See ***United India Insurance Company Ltd. v. Shila Datta and others, (2011) 10 SCC 509***).

If the Court did not exhibit the documents despite the appellants referring them at the time of recording evidence then in such event, the appellants cannot be denied of their right to claim the compensation on such ground. In our opinion, it was nothing but a procedural lapse, which could not be made basis to reject the claim petition. It was more so when the appellants adduced oral and documentary evidence to prove their case and the respondents did nothing to counter them.

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250. Motor Vehicles Act, 1988 – Section 168

Can a Tribunal award compensation exceeding the claimed amount? Held, Yes – The Courts/Tribunals are duty bound to award just compensation.

मोटर यान अधिनियम, 1988 - धारा 168

क्या अधिकरण दावाकृत राशि से अधिक राशि का प्रतिकर अधिनिर्णीत कर सकते हैं? अभिनिर्धारित, हां - न्यायालय/अधिकरण न्यायसंगत अधिनिर्णय देने के लिये कर्तव्यबद्ध हैं।

Ramla and others v. National Insurance Company Limited and others
Judgment dated 30.11.2018 passed by the Supreme Court in Civil Appeal No.11495 of 2018, repeated in 2019 ACJ 559

Relevant extracts from the judgment:

There is no restriction that the Court cannot award compensation exceeding the claimed amount, since the function of the Tribunal or Court under Section 168 of the Motor Vehicles Act, 1988 is to award "just compensation". The Motor Vehicles Act is a beneficial and welfare legislation. A "just compensation" is one which is reasonable on the basis of evidence produced on record. It cannot be said to have become time barred. Further, there is no need for a new cause of action to claim an enhanced amount. The Courts are duty bound to award just compensation. (See the judgments of this Court in the cases of ***Nagappa v. Gurudayal Singh, (2003) 2 SCC 274, Magma General Insurance v. Nanu Ram, (2018) SCC Online SC 1546*** and ***Ibrahim v. Raju, (2011) 10 SCC 634***).

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251. MOTOR VEHICLES ACT, 1988 – Section 169
CIVIL PROCEDURE CODE, 1908 – Order 16 Rule 14
EVIDENCE ACT, 1872 – Section 165
Duties of the Presiding Officer of the Claims Tribunal – It is essential for the Presiding Officer of the Tribunal to ensure presence of the Doctor, who treated the injured, and/or the doctor who has issued Disability Certificate and employer/person issuing salary certificate/ salary slip by invoking the power under Section 169 (2) and (3) of the Motor Vehicles Act, Order XVI Rule 14 of CPC and Section 165 of the Evidence Act – In case the Tribunal is of the opinion that due to sheer poverty, if the party cannot afford the expenses of producing a witness, the Tribunal should direct the concerned Legal Services Authority to bear the expenses for procuring the presence of such witness.

मोटर यान अधिनियम, 1988 - धारा 169

सिविल प्रक्रिया संहिता, 1908 - आदेश 16 नियम 14

साक्ष्य अधिनियम, 1872 - धारा 165

मोटर दुर्घटना दावा अधिकरण के पीठासीन अधिकारी के कर्तव्य - अधिकरण के पीठासीन अधिकारी के लिये यह आवश्यक है वह मोटर यान अधिनियम की धारा 169(2) व (3), सिविल प्रक्रिया संहिता के आदेश 16 नियम 14 और साक्ष्य अधिनियम की धारा 165 का प्रयोग करते हुये आहत का इलाज करने वाले और/अथवा अशक्तता प्रमाण पत्र जारी करने वाले चिकित्सक और वेतन पर्ची/वेतन प्रमाण पत्र जारी करने वाले व्यक्ति या नियोक्ता की साक्ष्य के प्रयोजन से उपस्थिति सुनिश्चित करें - यदि अधिकरण के मत में पक्षकार अत्यधिक गरीबी के कारण ऐसे साक्षी की उपसंजाति के

व्यय वहन करने असमर्थ है तो अधिकरण को चाहिये कि वह ऐसे साक्षियों की उपस्थिति एवं साक्ष्य हेतु संबंधित विधिक सेवा प्राधिकरण को व्यय वहन करने का निर्देश दें।

Iqbal Ahamed v. Vice-Chairman, Patel Integrated Logistics Limited and other

Judgment dated 06.01.2017 passed by the High Court of Karnataka (Dharwad Bench) in M.F.A. No. 23227 of 2013 (MV), reported in 2019 ACJ 445 (DB)

Relevant extracts from the judgment:

This case is a classic example of the lackadaisical performance of many Tribunals dealing with motor accident claims while discharging their judicial duty. Repeatedly it has come to the notice of this Court that in large number of claim petitions, the claimants are unable to produce either the treating doctor, or the doctor who has issued the Disability Certificate, as a witness. The claimants may be prevented from producing such witness either because of their poverty, ignorance, illiteracy, or because such witness, being doctors, are invariably too busy to appear before the Tribunals. But in these circumstances, which are beyond the control of the claimant, invariably, it is the claimant who suffers for no fault of his or her. Considering the fact that the treating doctor, and the doctor who has issued the Disability Certificate are material witnesses in a claim petition, it is essential that their presence be ensured by the Presiding Officers of the Tribunal by invoking the power under Section 165 of the Evidence Act.

In the case of ***Raj Kumar v. Ajay Kumar, 2011 ACJ 1,*** the Hon'ble Supreme Court has reminded the Presiding Officers of the Tribunals, dealing with claim petitions, that they should function neither as a neutral umpire, nor as a silent spectator. In fact, a pro-active role needs to be played by the Presiding Officers of the Tribunals. Since the Tribunal has ample powers under Section 165 of the Evidence Act to summon a Court witness, the learned Tribunals are expected to exercise such powers in favor of the claimants. The Presiding Officers cannot shy away from exercising the said power on the flimsy ground that, in case such a power were to be exercised, the learned members of the Bar get agitated. Both the learned members of the Bar, and the Presiding Officers must realize that the duty of the Bar and the Bench is not only to discover truth, but is also to do justice to the parties. If the Presiding Officers were to call any person as Court witnesses, the Presiding Officers are merely adopting a means to discover the truth. By no stretch of imagination, it can be said that by calling a Court witness, the Presiding Officer is revealing his partiality in favour of the claimant. Therefore, no valid objection can be taken by the learned members of the Bar when the power vested in the Presiding Officer under Section 165 of the Evidence Act is invoked in favour of the claimant.

Moreover, it has come to the notice of this Court that many a times, the salary slips are produced by the claimants. But, they are not relied upon by the Presiding Officers ostensibly on the ground that neither the employer, nor the

person who has issued the salary slip has been called as a witness. Therefore, the salary certificate cannot be relied upon in order to adjudge the salary of the injured or the deceased. However, considering the fact that often it is be difficult for the claimants to produce the said witness, the claimant cannot be left to defend himself or herself before the Tribunal. Again in such a scenario, it is for the Presiding Officer to call the concerned employer or the person who has issued the salary certificate as a Court witness. For, justice must not only be done, but must appear to be done.

Calling of a Court witness may create certain practical difficulties, such as who is to pay for the travel allowances of the witness. In case the learned Tribunal is of the opinion that due to sheer poverty, the party cannot produce a witness, as he cannot afford the expenses of producing a witness, the learned Tribunal should direct the concerned Legal Services Authority to bear the expenses for procuring the presence of such witness. After all, it is the duty of the Legal Services Authority to assist the people in having access to justice and to a Court.

Surprisingly, the Tribunals are seldom invoking the jurisdiction conferred on them under Order XVI, Rule 14 of CPC, and Section 169(2) and (3) of the Motor Vehicles Act. According to Section 169(2) of the Act, the Claims Tribunal has all the powers of a Civil Court. It can compel the discovery and production of documents and material objects. Moreover, Section 169(3) of the Act empowers the Tribunal to call for any person possessing special knowledge on any matter relevant to the enquiry held for the adjudication of the claims. Order XVI, Rule 14 CPC can also be invoked by the Tribunal on its own motion for compelling the attendance of any person including a party to the suit or a case, in order to give evidence or to produce a document. Non-exercise of these powers by the learned Claims Tribunal, invariably leads to injustice to the claimant. Therefore, this Court expects the learned Presiding Officers to be vigilant, to play a pro-active role, and to invoke their powers in order to discover the truth hidden in the case.

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***252. N.D.P.S. ACT, 1985 – Sections 8/18(b) and (c) read with Section 29**

Test of samples – In all 6kg. 240 gms opium was seized from six separate packets each weighing 1kg. 40gms – But sample from only one packet taken and FSL report related to the said sample only – Held, on the basis of the said report, merely relying upon the smell and taste by the I.O., it cannot be presumed that other packets also contained opium – Further held, when the seized opium was found in six different packets each weighing 1kg 40 gms, the sample and FSL report of each packet must be called and proved to convict the appellants for the charge u/s 8/18 (b) for commercial quantity – Prosecution case proved only to the extent of quantity of one packet (1kg. 40 gms.) and not with respect to the other five packets – Hence, conviction u/s 8/18 (b) set aside and converted to charge u/s 8/18 (c) of NDPS Act.

स्वापक औषधि एवं मनःप्रभावी पदार्थ अधिनियम, 1985 - धाराएं 8/18 (ख) एवं (ग) सहपठित धारा 29

नमूनों का परीक्षण - 1 किलो 40 ग्राम के 6 विभिन्न पैकिटों में पाई गई कुल 6 किलो 240 ग्राम की अफीम जप्त - किंतु नमूना केवल एक पैकिट से लिया गया और एफएसएल रिपोर्ट भी उसी नमूने से संबंधित थी - अभिनिर्धारित, उक्त रिपोर्ट के आधार पर, मात्र विवेचना अधिकारी के द्वारा सूंघने व जीभ से स्वाद लेने पर निर्भरित कर यह उपधारित नहीं किया जा सकता कि अन्य पैकटिों में भी अफीम थी - आगे यह भी अभिनिर्धारित कि, जब जप्त अफीम 6 विभिन्न पैकिटों, प्रत्येक में 1 किलो तथा 40 ग्राम, में पाया गया था, तब वाणिज्यिक मात्रा के लिए धारा 8/18(ख) के तहत अभियुक्त को दोषसिद्ध करने के लिए प्रत्येक पैकिट का नमूना व एफएसएल रिपोर्ट को बुलाया तथा साबित किया जाना चाहिए - अभियोजन मामला मात्र एक पैकिट की मात्रा (1 किलो 40 ग्राम) तक साबित तथा अन्य 5 पैकिटों के संबंध में नहीं - अतः, धारा 8/18(ख) के तहत दोषसिद्धी अपास्त की गई तथा एनडीपीएस अधिनियम की धारा 8/18(ग) के तहत आरोप परिवर्तित किया गया।

Bhupendra Singh and another v. Government of India
Judgment dated 24.02.2018 passed by the High Court ofMadhya Pradesh (Indore Bench) in Criminal Aappeal No. 580 of 2013, reported in ILR (2018) MP 1183

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253. N.D.P.S. ACT, 1985 – Section 50
CRIMINAL PRACTICE – Precedents

(i) Section 50 of the NDPS Act has no application where recovery was not from the person of the accused but the gunny bags carried on the scooter.

(ii) Precedents – All pending criminal prosecutions, trials and appeals prior to the law laid down in *Mohan Lal v. State of Punjab, AIR 2018 SC 3853,* shall continue to be governed by the individual facts of the case.

स्वापक औषिधि एवं मनः प्रभावी पदार्थ अधिनियम 1985 -धारा 50

दाण्डिक प्रथा - निर्णयज् विधि

(i) जहां बरामदगी अभियुक्त व्यक्ति से नहीं की गई बल्कि स्कूटर में ले जाये जा रहे गन्नी-बैग्स से की गई हो, वहां पर धारा 50 स्वापक औषधि एवं मनः प्रभावी पदार्थ अधिनियम की प्रयोज्यता नहीं है।

(ii) निर्णयज् विधि -मोहन लाल विरूद्ध स्टेट आॅफ पंजाब, एआईआर 2018 एससी 3853, में निर्णय आने के पूर्व से लंबित सभी दांडिक आयोजन, विचारण व अपीलें, उन प्रकरण विशेष के तथ्यों से शासित होंगे।

Varinder Kumar v. State of Himachal Pradesh

Judgment dated 11.02.2019 passed by the Supreme Court in Criminal Appeal No. 2450 of 2010, reported in 2019 (1) Crimes128 (SC) (3 Judge Bench)

Relevant extracts from the judgment:

Section 50 of NDPS Act patently has no application since the recovery was not from the person of the appellant but the gunny bags carried on the scooter.

The only issue surviving for consideration is with regard to the prosecution being vitiated because PW-10 was the informant as also the Investigating Officer, in view of ***Mohan Lal v. State of Punjab AIR 2018 SC 3853***. The ground not having been raised at any earlier stage quite obviously, the prosecution never had a chance to contest the same. It has not even been pleaded in the appeal. Nonetheless in view of the reliance placed, we shall examine the issue.

In ***Mohan Lal*** (supra) our attention had been invited to the divergent views being taken on the issue with regard to the informant and the investigating officer being the same person in criminal prosecutions, and the varying conclusions arrived at in respect of the same. The facts in ***Mohan Lal*** (supra), were indeed extremely telling in so far as the defaults on part of the prosecution was concerned. In that background it was held that the issue could not be left to be decided on the facts of a case, impinging on the right of a fair trial to an accused under Article 21 of the Constitution of India, observing as follows:

> "In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the Courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

The paramount consideration being to interpret the law so that it operates fairly, the facts of that case did not show any need to visualize what all exceptions must be carved out and provided for. The attention of the Court was also not invited to the need for considering the carving out of exceptions.

Individual rights of the accused are undoubtedly important. But equally important is the societal interest for bringing the offender to book and for the system to send the right message to all in the society-be it the law-abiding citizen or the potential offender. 'Human rights' are not only of the accused but, extent apart, also of the victim, the symbolic member of the society as the potential victim and the society as a whole.

Law has to cater to wide variety of situations as appear in society. Law being dynamic, the certainty of the legislation appears rigid at times whenever a circumstance (set of facts) appears which is not catered for explicitly. Expediency then dictates that the higher judiciary, while interpreting the law, considers such exception(s) as are called for without disturbing the pith and substance and the original intention of the legislature. This is required primarily for the reason to help strike a balance between competing forces - justice being the end - and also because the process of fresh legislation could take a long time, which would mean failure of justice, and with it erosion of public confidence and trust in the justice delivery system.

The principle of fair trial now informs and energises many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing circumstances, and endeavoring to meet the exigencies of the situation - peculiar at times – and related to the nature of crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavor of the higher Courts, while interpreting the law, is to strike the right balance.

Societal interest therefore mandates that the law laid down in ***Mohan Lal*** (supra) cannot be allowed to become a spring board by an accused for being catapulted to acquittal, irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was nebulous. Criminal jurisprudence mandates balancing the rights of the accused and the prosecution. If the facts in ***Mohan Lal*** (supra) were telling with regard to the prosecution, the facts in the present case are equally telling with regard to the accused. There is a history of previous convictions of the appellant also. We cannot be oblivious of the fact that while the law stood nebulous, charge sheets which have been submitted, trials in progress or concluded, and appeals pending all of which will necessarily be impacted.

In ***Sonu alias Amar v. State of Haryana, (2017) 8 SCC 570,*** it was observed as follows:

> "..... A large number of trials have been held during the period between 4.8.2005 and 18.9.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in ***Anwar P.V. v. P.K. Basheer, (2014) 10 SCC 473,*** has to be retrospective in operation unless the judicial tool of "prospective overruling" is applied. However, retrospective

application of the judgment is not in the interest of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final."

That subsequent events noticed, may require revisiting of an earlier decision, to save actions already taken was considered in ***Harsh Dhingra v. State of Haryana and others, (2001) 9 SCC 550,*** observing as follows :

"Further, when the decision of the High Court in ***S.R. Dass v. State of Haryana, (1988) PLJ 123,*** had held the field for nearly a decade and the Government, HUDA and the parties to whom the allotments have been made have acted upon and adjusted their affairs in terms of the said decision, to disturb that state of affairs on the basis that now certain other rigorous principles are declared to be applied in ***Anil Sabharwal v. State of Haryana, (1997) 2 Punj LR 7,*** would be setting the rules of the game after the game is over, by which several parties have altered their position to their disadvantage. Therefore, we think that in the larger public interest and to avoid the discrimination which this Court had noticed in the Order dated 5.12.1997 ***HUDA v. Anil Sabharwal, (1998) 8 SCC 373,*** the decision of the High Court in ***Anil Sabharwal case*** (supra) should be made effective from a prospective date and in this, from the date on which interim order had been passed on 23.4.1996. Therefore, it would be appropriate to fix that date as the date from which the judgment of the High Court would become effective. If this course is adopted, various anomalies pointed out in respect of different parties referred to above and other instances which we have not adverted to will be ironed out and the creases smoothened so that discrimination is avoided.

Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty-

bound to apply such dictum to cases which would arise in future. Since it is indisputable that a Court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation. These principles are enunciated by this Court in ***Baburam v. C.C. Jacob, (1999) 3 SCC 362*** and ***Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201***."

The criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it unidirectional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in ***Mohan Lal*** (supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in ***Mohan Lal***(supra) shall continue to be governed by the individual facts of the case.

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***254. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 20, 138 and 139**

(i) Issuance of signed blank cheque, effect of – Where drawer of the cheque issues signed blank cheque to payee towards some payment, the payee has the authority to fill up the amount and other particulars – Filling up of cheque by any person other than drawer is also immaterial – Such circumstances will not invalidate such cheque, but rather presumption u/s 139 shall be attracted.

(ii) Dishonour of cheque–Presumption – Existence of fiduciary relationship between payee and drawer – Does not disentitle payee to the benefit of presumption in absence of evidence of undue influence and coercion.

(iii) Dishonour of cheque – Presumption – Onus to rebut presumption u/s 139 that the cheque had not been issued for payment of debt is upon drawer of cheque.

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 20, 138 एवं 139

(i) हस्ताक्षरित निरंक चैक जारी करने का प्रभाव - जहां चैक का लेखीवाल पाने वाले को किसी संदाय हेतू हस्ताक्षरित चैक जारी करता है, तो पाने वाले को राशि भरने तथा अन्य विशिष्टियां पूर्ण करने का अधिकार है - लेखीवाल से भिन्न किसी अन्य व्यक्ति द्वारा चैक का भरा जाना भी अतात्विक है - ऐसी परिस्थितियां चैक को अमान्य नहीं बनातीं, बल्कि धारा 139 की उपधारणा आकर्षित होगी।

(ii) चैक का अनादरण - उपधारणा - लेखीवाल तथा पाने वाले के मध्य वैश्वासिक संबंधों की विद्यमानता - असम्यक् असर एवं प्रपीड़न की साक्ष्य के अभाव में भी पाने वाले को इस उपधारणा का लाभ लेने से निर्हकित नहीं करती।

(iii) चैक का अनादरण - उपधारणा - धारा 139 के अधीन उपधारणा को खण्डित करने के सबूत का भार कि चैक किसी ऋण के भुगतान हेतु जारी नहीं किया गया था, चैक के लेखीवाल पर है।

Bir Singh v. Mukesh Kumar

Judgment dated 06.02.2019 passed by the Supreme Court in Criminal Appeal No. 230 of 2019, reported in (2019) 4 SCC 197

Relevant extracts from the judgment:

The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

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255. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Whether payment of balance consideration in pursuance of agreement to sale amounts to legally enforceable debt? Held, Yes.

परक्राम्य लिखत अधिनियम, 1881 - धारा 138

क्या विक्रय करार के पालन में शेष प्रतिफल का संदाय विधितः प्रवर्तनीय की श्रेणी में आता है? अभिनिर्धारित, हां।

Ripudaman Singh v. Balkrishna

Judgment dated 13.03.2019 passed by the Supreme Court in Criminal Appeal No. 483 of 2019, reported in AIR 2019 SC 1625

Relevant extracts from the judgment:

We find ourselves unable to accept the finding of the learned Single Judge of the High Court that the cheques were not issued for creating any liability or debt, but 'only' for the payment of balance consideration and that in consequence, there was no legally enforceable debt or other liability. Admittedly, the cheques were issued under and in pursuance of the agreement to sell. Though it is well settled that an agreement to sell does not create any interest in immovable property, it nonetheless constitutes a legally enforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liability for the purposes of Section 138.

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256. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Offence by Company – Necessary conditions for constituting offence under Section 138 against company summarized – Held:

(i) Where cheque is issued by Director of company, prosecution under Section 138 is not maintainable without arraigning company as accused.

(ii) Where necessary conditions under Section 138 are not complied with, company cannot subsequently be arraigned as accused in proceedings under Section 138.

परक्राम्य लिखत अधिनियम, 1881 - धारा 138

कंपनी द्वारा अपराध - कंपनी के विरूद्ध धारा 138 का अपराध गठित करने की आवश्यक शर्तें

संक्षेपित - अभिनिर्धारित-

(i) जहां चैक कंपनी के निदेशक द्वारा जारी किया गया है, वहां कंपनी को अभियुक्त के रूप में जोड़े बिना धारा 138 के तहत अभियोजन प्रचलनीय नहीं है।

(ii) जहां धारा 138 की आवश्यक शर्तों की पूर्ति नहीं हुई हो, वहां बाद में कंपनी को धारा 138 के तहत कार्यवाहियों में अभियुक्त के रूप में नहीं जोड़ा जा सकता।

Himanshu v. B. Shivamurthy and another

Judgment dated 17.01.2019 passed by the Supreme Court in Criminal Appeal No. 1465 of 2009, reported in 2019 (1) Crimes 93 (SC)

Relevant extracts from the judgment:

Learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. Learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous. The first submission on behalf of the appellant is no longer *res integra*.

A decision of a three Judge Bench of this Court in ***Aneeta Hada v. Godfather Travels and Tours Private Limited, (2012) 5 SCC 661,*** governs the area of dispute. The issue which fell for consideration was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three Judge Bench held thus:-

> "Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted."

In similar terms, the Court further held:

> "In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.... "

The judgment of the three Judge Bench has since been followed by a two Judge Bench of this Court in ***Charanjit Pal Jindal v. L.N. Metalics, (2015) 15 SCC 768.*** There is merit in the second submission which has been urged on behalf of

the appellant as well. The proviso to Section 138 contains the pre-conditions which must be fulfilled before an offence under the provision is made out. These conditions are;

(i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(ii) a demand being made in writing by the payee or holder in due course by the issuance of a notice in writing to the drawer of the cheque within thirty days of the receipt of information from the bank of the return of the cheques; and

(iii) the failure of the drawer to make payment of the amount of money to the payee or the holder in due course within fifteen days of the receipt of the notice.

In ***MSR Leathers v. S. Palaniappan, (2013) 1 SCC 177,*** this Court held thus:-

> "The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.
>
> The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque." The importance of fulfilling these conditions has been adverted to in a recent judgment of a two Judge Bench of this Court in ***N. Harihara Krishnan v. J. Thomas, (2018) 13 SC 663.*** Adverting to the ingredients of Section 138, the Court observed as follows:

"....Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are:

(1) that a person drew a cheque on an account maintained by him with the banker;

(2) that such a cheque when presented to the bank is returned by the bank unpaid;

(3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier;

(4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and

(5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid..."

In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable.

The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

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257. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 143-A

(i) Whether Section 143-A shall be applicable to pending trials? Held, Yes – The provision is applicable to pending trials irrespective of the fact as to when the offence was said to have been committed.

(ii) Whether opportunity of hearing is required to be given to the accused before imposing interim compensation under Section 143-A of the Act? Held, No – There is no provision of grant of any opportunity before imposing such condition – It is purely a discretion of the trial Court to impose a condition on the basis of the material available with the complaint.

परक्राम्य लिखत अधिनियम, 1881 - धाराएं 138 एवं 143-क

(i) क्या धारा 143-क लंबित विचारणों पर लागू होगी? अभिनिर्धारित, हां - यह प्रावधान इस तथ्य के होते हुए भी कि अपराध कब कारित किया गया था, लंबित विचारणों पर लागू होगा।

(ii) क्या अभियुक्त पर अधिनियम की धारा 143-क के अधीन अंतरिम प्रतिकर अधिरोपित करने के पूर्व उसे सुनवाई का अवसर दिया जाना आवश्यक है? अभिनिर्धारित, नहीं - ऐसी शर्त अधिरोपित करने के पूर्व कोई अवसर प्रदान किए जाने संबंधी कोई प्रावधान नहीं है - यह शुद्ध रूप में विचारण न्यायालय का विवेकाधिकार है कि वह परिवाद के साथ उपलब्ध सामग्री के आधार पर ऐसी शर्त अधिरोपित करे।

Padmesh S/o Devdutt Gupta and others v. Tirupati Natural Resources and Infra Private Limited and another

Order dated 22.02.2019 passed by the Madhya Pradesh High Court (Indore bench) in Miscellaneous Criminal Case No. 7943 of 2019, reported in 2019 LawSuit (MP) 330.

Relevant extracts from the order:

Learned counsel for the petitioners submits that in the present case the offence said to have been committed on 19.08.2017 when the cheque was returned unpaid, and the amendment under Section 143A came into existence in the year 2018. The aforesaid argument of the learned counsel is misconceived as Section 143A is applicable to pending trial in which the Trial Court has been given discretion to direct the drawer to pay interim compensation at the stage of pleading not guilty by accused and framing of charge against him. Therefore, the amendment is applicable to a pending trial irrespective of the fact that when the offence was said to have been committed.

Section 143A has been inserted in the Negotiable Instruments Act by way of amendment dated 2nd August, 2018 (Act No. 20 of 2018). For the compliance of the above Section, the Court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant where he pleads not guilty to the accusation made in the complaint and upon framing of charge. As per sub-Section (2) the interim compensation shall not exceed twenty per cent of the amount of the cheque. There is no provision of grant of any opportunity before imposing such condition. It is purely a discretion of the Trial Court to impose a condition on the basis of the material available with the complaint. The amount involved in the present case is more than four crores,

therefore, the learned Court has rightly imposed the maximum amount i.e. twenty per cent of the cheque amount. At this stage the defence of the accused is not liable to be considered as the same has not been disclosed so far.

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***258. PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Sections 17 and 28**

Cognizance of offence – Person competent to file complaint under the PC and PNDT Act – Whether CMHO of a district is competent to file complaint under Section 28 of the PC & PNDT Act? Held, No – In absence of any notification of the State Government or authorisation by the Appropriate Authority, CMHO is not competent to file complaint under the Act – Order taking cognizance on complaint of CMHO quashed.

गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का निषेध) अधिनियम, 1994 - धाराएं 17 एवं 28

अपराध का संज्ञान - पीसी एवं पीएनडीटी अधिनियम के अधीन परिवाद प्रस्तुत करने के लिए सक्षम व्यक्ति - क्या जिले के मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी पीसी एवं पीएनडीटी अधिनियम की धारा 28 के अधीन परिवाद प्रस्तुत करने के लिए सक्षम है? अभिनिर्धारित, नहीं - राज्य सरकार की किसी अधिसूचना या उपयुक्त प्राधिकारी के प्राधिकार के अभाव में, मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी, अधिनियम के अधीन परिवाद प्रस्तुत करने के लिए सक्षम नहीं है - सीएमएचओ की शिकायत पर संज्ञान लेने का आदेश अपास्त किया गया।

Das Motwani (Dr.) v. State of M.P.

Order dated 30.01.2017 passed by the High Court of Madhya Pradesh in M.Cr.C. No. 10264 of 2016, reported in ILR 2017 MP SN 102

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259. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16

EVIDENCE ACT, 1872 – Section 134

APPRECIATION OF EVIDENCE:

Sole testimony of Food Inspector – Appreciation of – Held, solitary evidence of Food Inspector may be accepted even without corroboration – Non-examination of independent witness is not always necessarily fatal.

खाद्य अपमिश्रण निवारण अधिनियम, 1954 - धारा 16

साक्ष्य अधिनियम, 1872 - धारा 134

साक्ष्य का मूल्यांकनः

खाद्य निरीक्षक की एकल साक्ष्य - मूल्यांकन - अभिनिर्धारित, खाद्य निरीक्षक के एकमात्र प्रमाण को संपुष्टि के बिना भी स्वीकार किया जा सकता है - स्वतंत्र साक्षी का परीक्षण न होना सदैव घातक नहीं होता है।

Manohar v. State of M.P. and another

Order dated 27.06.2017 passed by the High Court of Madhya Pradesh in Criminal Revision No. 246 of 2002, reported in ILR 2017 MP 2000

Relevant extracts from the order:

It is true that no independent witness has been examined in support of the testimony of S.I. Meer (PW/1). Now a general practice is that the public witnesses do not cooperate with Food Inspector while taking sample and preparing documents. As per Section 134 of the Indian Evidence Act, conviction can be based on testimony of a sole witness. Number of witnesses are not required to prove any fact. Only the quality of evidence has to be taken for consideration. S.I. Meer (PW/1) had no enmity with the applicant, he followed the procedure and rules in obtaining the sample oil. After public analyst examination the aforesaid sample of oil was found adulterated in report (Exh. P/9). In which it is also found that the seals on sample container were intact. The seals on cover of sample container as well as on the outer cover of sample parcel were also intact and tallied with the specimen impression of seal given on copy of memorandum forwarded separately.

In case of ***Babulal v. State of Gujrat, AIR 1971 SC 1277,*** the Apex Court held that it is not a rule of law that the evidence of Food Inspector cannot be accepted without corroboration. The evidence of the Food Inspector alone if believable can be relied on for proving that the samples were later on required by law. Procedure for sample taken is elaborately deposed by Food Inspector (PW/1) S.I. Meer which has not been challenged by the learned counsel for the applicant. (See also ***Ramalingam v. State, 1988 (1) (FAC) 256 (Madras), K.A. Muhammed Kunhi and another v. Food Inspector Kasaragod Circle, 1988 (1) (FAC) 365*** and ***State v. Sajjan Singh, 1990 (2) FAC 227 (MP)***)

In this case sample found below standard. Solitary evidence of Food Inspector rightly relied on. Provision of Section 13(2) of 1954 Act also complied with. No possibility of changing sample taken by the Food Inspector. The evidence of Food Inspector can be accepted without corroboration.

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260. SPECIFIC RELIEF ACT, 1963 – Section 19(b)

CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 4 and Order 20Rule 12A

(i) Legal representatives – Whether it is necessary to implead all the legal heirs of the deceased defendant as legal representatives? Held, No – If majority of legal representatives are already on record, contest the case on merits and have similar defence with other legal heirs, the estate and interest of deceased is sufficiently represented – Further held, such kind of objections must be taken at the earliest possible

opportunity – The defect may have been cured, if objection was raised.

(ii) Coparcenary property – Power of *Karta* to sell; nature of – Such power is inherent in *Karta*, however, subject to certain restrictions – Restrictions are that sale should be for legal necessity or benefit of family.

(iii) Coparcenary property – Sale by *Karta* – Determination of legal necessity – One son of *Karta* was also a signatory to the agreement to sale – Property was later sold to some other persons – Subsequent sale was not objected to by any of the legal heirs of *Karta* – Held, these facts prove the existence of legal necessity.

(iv) Specific performance of contract – Agreement to sale – Suits involving transferor, prior transferee and subsequent transferee – What should be the proper form of decree? Held, proper form of decree is to direct specific performance of contract between the transferor and the prior transferee and direct the subsequent transferee to join the conveyance so as to pass on the title which resides in him to prior transferee. (*Durga Prasad v. Deep Chand, AIR 1954 SC 75,* followed)

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 19(ख)

सिविल प्रक्रिया संहिता, 1908 - आदेश 22 नियम 4 एवं आदेश 20 नियम 12क

(i) विधिक प्रतिनिधिगण - क्या मृत प्रतिवादी के सभी विधिक उत्तराधिकारियों को विधिक प्रतिनिधिगण के रूप में संयोजित करना आवश्यक है? अभिनिर्धारित, नहीं - यदि अधिकांश विधिक प्रतिनिधिगण पूर्व से ही अभिलेख पर हों, मामले का गुणागुण पर प्रतिवाद कर रहे हों और अन्य विधिक उत्तराधिकारियों के साथ समान प्रतिरक्षा रखते हों, तो मृतक की संपदा और हित का पर्याप्त रूप से प्रतिनिधित्व है - आगे अभिनिर्धारित, ऐसी आपत्ति यथासंभव प्रथम अवसर पर उठाई जानी चाहिए - यदि आक्षेप लिया जाता तो त्रुटि को सुधारा जा सकता था।

(ii) सहदायिक संपत्ति -कर्ता के अंतरण की शक्ति की प्रकृति - ऐसी शक्ति कर्ता में निहित होती है, यद्यपि कि कुछ निर्बंधनों के अधीन - निर्बंधन यह हैं कि अंतरण विधिक आवश्यकता अथवा कुटुम्ब के लाभ के लिये होना चाहिए।

(iii) सहदायिक संपत्ति -कर्ता द्वारा अंतरण - विधिक आवष्यकता का निर्धारण -कर्ता का एक पुत्र विक्रय अनुबंध का हस्ताक्षरकर्ता भी था - बाद में संपत्ति किसी अन्य को विक्रय कर दी गई - पश्चातवर्ती विक्रय को कर्ता के किसी भी विधिक उत्तराधिकारी द्वारा चुनौती नहीं दी गई - अधिनिर्धारित, यह तथ्य विधिक आवश्यकता की विद्यमानता को प्रमाणित करते हैं।

(iv) संविदा का विनिर्दिष्ट अनुपालन - विक्रय अनुबंध - ऐसे वाद जिनमें अंतरणकर्ता, पूर्ववत अंतरिती एवं पश्चातवर्ती अंतरिती हों - आज्ञप्ति का उचित प्रारूप क्या होना चाहिए? अभिनिर्धारित, आज्ञप्ति का उचित प्रारूप यह है कि अंतरणकर्ता एवं पूर्ववत अंतरिती के मध्य संविदा का विनिर्दिष्ट अनुपालन आदेशित करना चाहिए तथा पश्चातवर्ती अंतरिती को आदेशित करना चाहिए कि वह अंतरण विलेख का भागीदार बनें जिससे उसमें निहित स्वत्व पूर्ववर्ती अंतरिती को अंतरित हो सके। (***दुर्गा प्रसाद विरूद्ध दीप चंद, एआईआर 1954 एससी 75,*** अनुसरित)

Vijay A. Mittal and others v. Kulwant Rai (Dead) and another

Judgment dated 28.01.2019 passed by the Supreme Court in Civil Appeal No. 5177 of 2009, reported in (2019) 3 SCC 520

Relevant extracts from the judgment:

The argument of learned counsel for the appellants (defendants) was that since the respondents (plaintiffs) got impleaded only some legal representatives out of eight legal representatives of late Amar Nath in their first appeal and remaining legal representatives were not impleaded, the decree of the trial Court dismissing the civil suit qua those legal representatives, who were not made parties in the appeal, had become final.

It was, therefore, urged that the first appellate Court by allowing the appeal filed by the plaintiffs and decreeing their suit has passed two conflicting decrees-one against some which has decreed the suit and other against some which has resulted in dismissal of the suit. It is not legally permissible.

This submission was dealt with by the High Court while answering 5th substantial question and was rejected. In our view, the High Court was right for the following reasons:

First, all the legal representatives of late Amar Nath were already on record in the Trial Court in the suit and all had taken similar defense in support of their case against the plaintiffs. In other words, there was no conflict of interest amongst them either inter se or qua the plaintiffs.

Second, those legal representatives, who filed the written statement, had filed a joint and common written statement whereas those, who did not file the written statement, had given their power of attorney in favour of the legal representatives, who had filed the written statement.

Third, one legal representative, who did not file his written statement remained ex-parte. In these circumstances, it was not necessary to implead him as party respondent in the first appeal.

Fourth, it is a trite law that if out of all the legal representatives, majority of them are already on record and they contested the case on merits, it is not necessary to bring other legal representatives on record. The reason is that the estate and the interest of the deceased devolved on the legal representatives is sufficiently represented by those who are already on record.

Fifth, the defendants, who were respondents in the first appeal, did not raise any objection before the first appellate Court. Had such objection been raised, the appellants (plaintiffs) would have cured the defect by impleading them as party respondents before the First appellate Court.

x x x

This Court in ***Sunil Kumar and another v. Ram Parkash and others, (1988) 2 SCC 77,*** examined the status and the powers of a Karta while dealing with the Joint Hindu Family property in the following words.

> "6. In this appeal we are called upon to decide the only question whether a suit for permanent injunction restraining the Karta of the joint Hindu family from alienating the house property belonging to the joint Hindu family in pursuance of the agreement to sell executed already in favour of the predecessor of the appellants, Jai Bhagwan, since deceased, is maintainable. It is well settled that in a Joint Hindu Mitakshara Family, a son acquires by birth an interest equal to that of the father in ancestral property. The father by reason of his paternal relation and his position as the head of the family is its Manager and he is entitled to alienate joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt. The power of the Manager of a joint Hindu family to alienate a joint Hindu family property is analogous to that of a Manager for an infant heir as observed by the Judicial Committee in ***Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree, (1854-57) 6 Moo IA 393***".

Keeping in view the aforementioned principle of law and applying the same to the facts of the case at hand, we are of the considered opinion that the Courts below were justified in holding that the agreement dated 12.6.1979 was binding on the legal heirs of Amar Nath for the following reasons:

First, no issue was framed on the question of "legal necessity". In our opinion, it should have been framed;

Second, yet the first appellate Court while allowing the plaintiffs' appeal recorded a categorical finding that one son of Amar Nath had signed the agreement in question and, therefore, it was a case where legal representatives of Late Amar Nath were aware of the existence of the agreement and also had given their consent; and

Third, this finding was upheld by the High Court while dismissing the defendants' appeal.

One cannot dispute the power of a Karta to sell the Joint Hindu Family property. It is, indeed, inherent in him. However, it is subject to certain restrictions, namely, the sale should be for the legal necessity and for the benefit of the family.

It is clear that Amar Nath had obtained the consent of the legal heirs before entering into an agreement for sale of the suit property to the plaintiffs. The very fact that one son of Amar Nath was a signatory to the agreement was sufficient to draw a presumption that the agreement to sell was made by Amar Nath with the consent of other coparceners. It is also for the reason because none of the coparceners had raised any objection till the filing of written statement in the suit. The very fact that Amar Nath sold the suit property to defendant Nos. 2 and 3 and which was not objected to by his legal heirs showed that the plea regarding legal necessity had no factual basis to sustain.

x x x

The question arose before this Court in ***Durga Prasad v. Deep Chand, 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."

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261. SPECIFIC RELIEF ACT, 1963 – Section 38

Mandatory injunction – Plaintiff need not always be an 'owner' or 'occupier' of suit property for seeking injunction – Plaintiff-seller retained the right to draw water from the well situated on sold property through pump and pipe for irrigation of his other property till his ownership – The said pump was being operated through electricity – Heir of the purchaser requested for removal of the electricity connection obtained by the plaintiff and further requested the electricity distribution company not to give new electricity connection without her written consent – Held, the defendant became the owner of the property by way of succession, therefore, she is also bound by condition of sale deed executed by her predecessor – By way of sale deed, right to use the well, through pump and pipe was retained by the seller – By way of denial of the electricity connection to operate the pump, the defendant is trying to violate the condition of the sale by which the seller retained the right to use the well – Defendant, in order to nullify the condition of the sale deed in respect of use and drawing the water, is creating obstruction in obtaining the electricity connection – Therefore, the word 'occupier' cannot be given a restricted meaning in order to deny an electricity connection to the plaintiff by electricity distribution company – Mandatory injunction for providing electricity connection rightly granted.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 - धारा 38

आज्ञापक व्यादेश - वादी को व्यादेश के अनुतोष की वांछा के लिए सदैव वादग्रस्त संपत्ति का 'स्वामी' अथवा 'अधिभोगी' होना आवश्यक नहीं है - वादी-विक्रेता ने अपनी अन्य संपत्ति की सिंचाई के लिए विक्रय की गई संपत्ति पर स्थित कुएं से पंप और पाइप के माध्यम से पानी खींचने का अधिकार अपने स्वामित्व तक के लिए सुरक्षित रखा था - उक्त पंप को विद्युत कनेक्षन के माध्यम से संचालित किया जा रहा था - वादी द्वारा प्राप्त विद्युत को विच्छेदित करने के लिए क्रेता के उत्तराधिकारी ने अनुरोध किया और आगे बिजली वितरण कंपनी से अनुरोध किया कि वह उसकी लिखित सहमति के बिना नया विद्युत न दें - अभिनिर्धारित, प्रतिवादी ने उत्तराधिकार के द्वारा संपत्ति का स्वत्व अर्जित किया है, इसलिए, वह अपने पूर्ववर्ती द्वारा निष्पादित विक्रय पत्र की शर्तों से बाध्य है - विक्रय पत्र के अधीन, पंप और पाइप के माध्यम से कुएं का उपयोग करने का

अधिकार, विक्रेता द्वारा सुरक्षित रखा गया था - पंप संचालित करने के लिए विद्युत से इंकार कर, प्रतिवादी विक्रय पत्र की उस शर्त का उल्लंघन कर रही है जिसके द्वारा विक्रेता ने कुंए का उपयोग करने का अधिकार बनाए रखा था -प्रतिवादी पानी लेने एवं उसका उपयोग करने की विक्रय पत्र की शर्त को विफल करने के उद्देश्य से विद्युत प्राप्त करने में व्यवधान भी उत्पन्न कर रही है - इसलिए, विद्युत वितरण कंपनी द्वारा वादी को विद्युत देने से इन्कार करने के लिए 'अधिभोगी' शब्द को एक सीमित अर्थ नहीं दिया जा सकता है - विद्युत कनेक्शन देने का शाश्वत व्यादेश उचित जारी किया गया।

Gayatri Rathore v. Yashpal Singh and others

Judgment dated 23.10.2018 passed by the High Court of Madhya Pradesh (Indore Bench) in Second Appeal No. 1723 of 2018, reported in 2019 (1) MPLJ 680

Relevant extracts from the judgment:

It is clear from the aforesaid terms and conditions of the sale deed that at the time of sale, pump and tap were fitted in the well situated over the survey No. 209 and the seller did not retain the right to remove the said pump. The seller had further retained the right to draw the water from Raghunath Sagar well through pump and pipe for irrigation of 20 Bigha land of survey No.132 till his ownership. The seller was drawing the water through said pump and pipeline. The said pump was being operated through electricity, which is established from Exhibit D/3, which is a letter dated 27.10.2014 by which the defendant No.1 requested for a removal of the electricity connection obtained by the plaintiff and further requested the defendant No.1 not to give new electricity connection without her written consent.

The defendant no.1 became the owner of the property by way of succession, therefore, she is also bound by condition of sale deed executed by her father–in–law. By way of sale deed right to use the well through pump and pipe was retained by seller, therefore, the plaintiff comes under the category of occupier for the limited purpose of using the well through pump. By way of denial of the electricity connection to operate the pump, the defendant is trying to violate the condition of the sale by which the seller retained the right to use the well and that right has been upheld by the trial Court. In landlord tenant dispute, if tenant is an occupier in the premise, he is having right to use the electricity or water as an easementary right. He is also permitted to obtain the electricity connection in his name. The landlord cannot deny him the electricity or water, so long he is in possession of the house because owner is not permitted to obstruct these facilities in order to get the eviction of tenant or create a situation that he may vacate the house.

Here in the present case also, the defendant no.1 in order to nullify the condition of the sale deed in respect of use and drawing the water is, creating obstruction in obtaining the electricity connection, therefore, the word 'occupier' cannot be given a restrict, meaning in order to deny an electricity connection to the plaintiff by defendant No.2.

The issue No.1 in respect of right has been answered in favour of the plaintiff, which has not been challenged by the defendant No.1. The first appellate court granted a decree in favour of the plaintiff by directing the defendant No.2, ie., electricity distribution company to provide the electricity connection, but the defendant No.2 has not preferred any appeal and the defendant no.1 is not challenging the right of plaintiff, therefore, the present judgment passed by appellate Court cannot be set aside at the instance of plaintiff as she cannot create hurdle or create a situation in order to deny the right of the plaintiff to draw the water from well through pump.

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262. WAKF ACT, 1995 – Sections 6 and 85

(i) Jurisdiction of Civil Court; bar of – Test to determine bar – Explained – Held, bar is confined only to those matters which are required to be determined by the Tribunal under the Act – The test is whether the issue raised in the suit is required to be decided under any provisions of the Act by the Tribunal or not ? If answer is 'Yes', Civil Court shall have no jurisdiction.

(ii) Whether a non-muslim or stranger to the Wakf can file suit before the Tribunal or raise dispute as to status of property before Tribunal? Held, Yes. [*Haryana Wakf Board v. Mahesh Kumar, (2014) 16 SCC 45,* followed].

वक्फ़ अधिनियम, 1995 - धाराएं 6 एवं 85

(i) सिविल न्यायालय की अधिकारिता का वर्जन - वर्जन के निर्धारण हेतु परीक्षण - व्याख्या की गई - अभिनिर्धारित, वर्जन मात्र उन मामलों तक ही सीमित है जिनका अधिनियम के अधीन अधिकरण द्वारा निर्धारण अपेक्षित है - परीक्षण यह है कि क्या वाद में उठाया गया बिंदु अधिकरण द्वारा अधिनियम के अधीन किसी प्रावधान द्वारा विनिश्चित किया जाना आवश्यक है अथवा नहीं - यदि उत्तर हां में है, तो सिविल न्यायालय को कोई क्षेत्राधिकार नहीं होगा।

(ii) क्या कोई गैर-मुस्लिम अथवा वक्फ़ से अपरिचित व्यक्ति अधिकरण के समक्ष वाद संस्थित कर सकता है अथवा संपत्ति की प्रास्थिति के संबंध में प्रतिवाद कर सकता है? अभिनिर्धारित, हाँ। (***हरियाणा वक्फ़ बोर्ड विरूद्ध महेश कुमार, (2014) 16 एससीसी 45*** अनुसरित)

Punjab Wakf Board v. Sham Singh Harike

Judgment dated 07.02.2019 passed by the Supreme Court in Civil Appeal No. 92 of 2019, reported in (2019) 4 SCC 698

Relevant extracts from the judgment:

Chapter VIII of the Wakf Act, 1995 deals with judicial proceedings. Sections 83 and 85 which are relevant for this case are as follows:

"**83. Constitution of Tribunals, etc.—** (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property under this Act and define the local limits and jurisdiction of such Tribunals.(2) Any mutawalli person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.

x x x

85. Bar of jurisdiction of civil Courts.— No suit or other legal proceeding shall lie in any civil Court in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

Coming to Section 83 which relates to bar of jurisdiction of civil Court, the relevant words are "any dispute, question or other matter relating to a wakf or wakf property" which is required by or under this Act to be determined by the Tribunal. Thus, bar of jurisdiction of civil Court is confined only to those matters which are required to be determined by the Tribunal under this Act. Thus, the civil Court shall have jurisdiction to entertain the suit and proceedings which are not required by or under the 1995 Act to be determined. Thus, answering the question of jurisdiction, question has to be asked whether the issue raised in the suit or proceeding is required to be decided under the 1995 Act by the Tribunal, under any provision or not. In the event, the answer is affirmative, the bar of jurisdiction of civil Court shall operate.

x x x

As per Section 6 sub-Section (1) if any question arises as to whether a wakf property in the list of wakfs is wakf property or not, a suit can be instituted in a Tribunal for the decision of the question which decision shall be treated as final. Limitation for such suit was also provided in the proviso as one year from the date of the publication of the list of wakfs. Sub-section (5) of Section 6 contained the provision barring a suit in any Court after the commencement of the Act in relation to any question referred to in sub-Section (1). In Suit No. 250 dated 10.9.2001 (RBT no. 84 dated 9-10-2006, Punjab Wakf Board v. Sham Singh), the question has arisen as to whether the suit property is a wakf property or not. We have noticed pleadings in the written statement filed by the defendant in the above suit where it was specifically denied that the suit property is a wakf property. Thus, within the meaning of sub-Section (1) of Section 6 question that

whether a suit property is a wakf property or not has arisen. Thus, the suit wherein the above question has arisen ought to be considered by the Tribunal and the High Court clearly erred in allowing the revision filed by the defendant by its order dated 20.9.2010.

Thus, the view of the High Court that right, title and interest of a non-Muslim to the wakf in a property cannot be put in jeopardy is contrary to the statutory scheme as contained in Section 6 of the 1995 Act. Thus, the reason of the High Court to allow the revision petition is wholly unfounded. The defendant in the written statement has pleaded that the suit property is not wakf property. When issue in the suit is as to whether suit property is wakf property or not it is covered by specific provision of Sections 6 and 7 of the Wakf Act, 1995, hence, it is required to be decided by the Tribunal under Section 83 and bar under Section 85 shall come into existence with regard to jurisdiction of the civil Court.

In this context, in the judgment in ***Haryana Wakf Board v. Mahesh Kumar, (2014) 16 SCC 45,*** this Court has laid down that the question as to whether the suit property is a wakf property is a question which has to be decided by the Tribunal. In the above case the plaint was returned by the appellate Court under Order 7 Rule 10 for presentation before the Tribunal which view was upheld by this Court. In para 6 of the judgment the following was laid down:

> "6. ... Deciding the question of maintainability and locus standi, in respect of which Issues 2 and 4 were framed, the first appellate Court held that since the claim in the suit by the petitioner which is a Wakf Board, was on the basis that suit property was wakf property and since the respondent had denied it to be the wakf property, the question had arisen as to whether suit property is wakf property or not. Such a question, in the opinion of the learned Additional District Judge, could be decided only by the Tribunal constituted under the Wakf Act. The appeal Court, therefore, returned the plaint to the petitioner under Order 7 Rule 10 CPC for presentation to the court of competent jurisdiction, namely, the Tribunal. The result was that the decree passed by the trial Court was set aside and the plaint returned."

Civil Appeal No. 92 of 2019 is, thus, fully covered by the judgment of this Court in ***Haryana Wakf Board v. Mahesh Kuma***r (supra). The defendant having pleaded that the suit property is not a wakf property, the question has to be decided by the Tribunal.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS, RULES & AMENDMENTS

THE MADHYA PRADESH DISTRICT COURT TECHNICAL MANPOWER (APPOINTMENT & CONDITIONS OF SERVICE) RULES, 2019

(Notification No. 3202-2019 - 21-B - (one), Bhopal, dated 19th June, 2019)

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, in consultation with the High Court of Madhya Pradesh, hereby, makes following Rules to regulate the appointment and other conditions of service of posts of Technical Manpower created under the National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary, prepared by the e-Committee of the Supreme Court of India, dated 01.08.2005, for the service of employees of the establishment of District Courts under the superintendence of High Court of Madhya Pradesh.

1. Short title, commencement and extent of application.-

(1) These Rules shall be called "The **Madhya Pradesh District Court Technical Manpower (Appointment & Conditions of Service) Rules, 2019**".

(2) They shall come into force from the date of publication in the Madhya Pradesh Gazette.

(3) These Rules shall apply as one time measure of appointment.

(4) These Rules shall apply to.-

(a) all persons appointed in Technical Manpower Posts in the Establishment of District Courts in the State of Madhya Pradesh.

(b) person appointed in Technical Manpower posts includes System Officer and System Assistant.

2. The appointment shall be made on the following posts.-

(1) System Administrator (now re-designated as Junior System Analyst).

(2) Console Operator/System Manager (now re-designated as Senior Computer Programmer Assistant).

3. Appointing Authority.-

S.No.	Categories	Appointing Authority
(1)	System Administrator (now re-designated as Junior System Analyst)	The District Judge of the district concerned
(2)	Console Operator/System Manager (now re-designated as Senior Computer Programmer Assistant)	

4. Age. – Candidate should be above 18 years but should not have crossed the maximum age prescribed by the State Government:

Provided that the Candidate appointed under the scheme of e-Court Project of the Supreme Court of India and has worked for 2 years or more, shall be entitled for age relaxation of the period of such appointment/services, subject to maximum age limit up to 55 years, for the posts mentioned in Schedule-I.

5. Qualification and Mode of Appointment to the posts.-

The qualification and mode of appointment to the posts shall be as prescribed in Schedule-I and Schedule-II of these rules.

6. Provision for reservation of Appointment.-

(I) Posts shall be reserved for the members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes to such extent and in such manner as may be specified by the State Government from time to time. The reservation for these categories shall be applicable only vertically:

Provided that reservation on the district level posts shall be as per the district wise reservation roster, issued by the General Administration Department from time to time.

(2) Total 6 percent Horizontal reservation shall be given to persons with physical impairment in the following manner:-

1.	Blindness and low vision	1.5%
2.	Deaf and hard of hearing	1.5%
3.	Locomotive disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy	1.5%
4.	Autism, intellectual disability, specific learning disability and mental illness	1.5%

Provided that if such reserved posts or any of them are not filled in a given recruitment year due to non-availability of suitable candidate, they shall be re-advertised for respective categories once more and if any such posts remain vacant due to the same reason, they shall first be filled by interchange among the five categories of disabled persons and if it remains vacant, they shall be treated as un-reserved posts.

Provided that the reservation shall be made as per the posts identified and earmarked by the High Court for specially abled persons.

(3) As per the provision of the Madhya Pradesh Civil Services (Special Provisions for Appointment of Women) Rules, 1997, 33 percent horizontal reservation shall be applicable for women candidates.

(4) Appointments shall be made strictly in accordance with the roster prescribed separately for direct recruitment.

(5) Verification of percentage of physical impairment case of "Specially abled" candidates shall be done by the District Medical Board.

(6) As per provision of The Madhya Pradesh Lok Seva (Anushuchit Jatiyon Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994, in the event of non-availability of the eligible and suitable candidates amongst the Other Backward Classes, Scheduled Castes and Scheduled Tribes, as the case may be, in a particular year, the vacancies so reserved for them shall not be filled by the members who do not belong to such castes or tribes or classes as the case may be.

If in respect of any recruitment year any vacancy reserved or any category of persons belongs to Other Backward Castes, Scheduled Castes and Scheduled Tribes remains unfilled, such vacancy shall be carried forward to be filled up in the next or three consecutive recruitment years.

When a vacancy carried forward in the manner aforesaid it shall not be counted against the quota of the vacancies reserved for the concerned category of persons for the recruitment year to which it is carried forward:

Provided that the appointing authority may at any time undertake a special recruitment to fill up such unfilled vacancy and if such vacancies remain unfilled it shall be carried forward to the next or three consecutive recruitment years in total and thereafter such reservation would lapse.

7. Interpretation of these Rules.-

Whenever any difficulty or doubt arises in applying and/or interpreting these Rules, the decision of the High Court, thereon, shall be final.

8. Relaxation.-

Nothing in these Rules shall be construed to limit or abridge the power of the High Court to deal with the case of any person(s) to whom these rules apply. The High Court may dispense with or relax any particular rule in such manner as may appear to it as just and equitable.

9. Residuary provision.-

(1) All members of the service shall be subject to the superintendence of the High Court

(2) In respect of all matters (not provided in these rules) regarding the conditions of service of the members including matters relating to the

conduct, control and discipline, provisions of M.P. Civil Services (General Conditions of Services) Rules, 1961, M.P. Civil Services (Conduct) Rules 1965, M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 and all others Rules applicable to M.P. State Government Employees shall apply subject to such modification, variation and exceptions, as the High Court may, from time to time, specify.

SCHEDULE·I
(SEE RULE 5)

SR.	NAME OF SERVICE		EDUCATION & TECHINACAL QUALIFICATION PRESCRIBED
1.	Junior System Analyst	1.	B.E./B.Tech (C.S/IT.) / MCA / M.Sc. (C.S/IT.) from recognized university with at least 2 years experience of working on Linux /Open Source Software/Windows / DBMS /Software development/ Desktop & Network support. OR ME/M.Tech (C.S/IT.) with at least 1 year experience of working on Linux/ Open source software/Windows/DBMS/Software development / Desktop & Network support.
		2.	Work experience of not less than 2 years in District Court Establishment of High Court.
2.	Senior Computer Programmer Assistant	1	B.E./B.Tech/B.Sc. in C.S/IT. Electronics & Telecommunications/ B.C.A./ M.C.A./ M.Sc. Electronics/C.S./I.T) with at least 1 year experience in working on Linux /Open Source Software/ Windows/ DBMS/Software development.
		2.	Work experience of not less than 2 years in District Court Establishment or High Court.

SCHEDULE-II
(SEE RULE 5)

S. No.	Name of the post	Classif-ication	Scale of pay	Appointing Authority	Method of Recruitment
1.	JuniorSystem Analyst	Class-III	9300+ 34800 + G.P. 4200 (As Per 6th Pay Commission)	District Judge	By direct recruitment through suitability test conducted by High Court from amongst the persons appointed as District Judge

S. No.	Name of the post	Classif-ication	Scale of pay	Appointing Authority	Method of Recruitment
					System Officer under e-court project of the Supreme Court of India with essential qualification prescribed in these Rules.
2.	Senior Computer Programmer Assistant	Class-III	9300+ 34800+G.P. 3600 (As Per 6th Pay Commission)	District Judge	direct recruitment through suitability test conducted by High Court from amongst the persons appointed as District Judge Assistant under e-court project of the Supreme court of India with essential qualification prescribed in these Rules.

SCHEDULE-II
(SEE RULE 5)

S. No.	Name of the post	Classif-ication	Scale of pay	Appointing Authority	Method of Recruitment
1.	Junior System Analyst	Class-III	9300+ 34800 + G.P. 4200 (As Per 6th Pay Commission)	District Judge	By direct recruitment through suitability test conducted by High Court from amongst the persons appointed as District Judge System Officer under e-court project of the Supreme Court of India with essential qualification prescribed in these Rules.
2.	Senior Computer Programmer Assistant	Class-III	9300+34800+G.P. 3600 (As Per 6th Pay Commission)	District Judge	By direct recruitment through suitability test conducted by High Court from amongst the persons appointed as District Judge Assistant under e-court project of the Supreme court of India with essential qualification prescribed in these Rules.

क्र. 3249-2019-**इक्कीस-ब-(एक).-** **भोपाल, दिनांक 21/22 जून, 2019**

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, in consultation with the High Court of Madhya Pradesh, hereby makes the following Rules for regulating the recruitment and conditions of service of .employees of the establishment of District Courts under the superintendence of High Court of Madhya Pradesh, in supersession of all previous rules, instructions and orders in force:

PART-I
GENERAL

1. Short title, extent and commencement.-

(i) These Rules may be called "The Madhya Pradesh District Court Establishment (Recruitment and Conditions of Service) Rules, 2016".

(ii) These Rules shall come into force from the date of their publication in Madhya Pradesh Gazette.

(iii) These Rules shall apply to every member of the service without prejudice to the generality of the provisions contained in the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961.

2. Definitions.-

In these Rules, unless there is anything repugnant in the subject or context-

(a) "Appointing Authority'" means the High Court or the District and Sessions Judge of respective Districts, as specified in Schedule II;

(b) "Chief Justice" means the Chief Justice of the High Court ofMadhya Pradesh;

(c) "Counselling" means process of allocation of District on the choice of candidate on the basis of merit for appointment in a particular district;

(d) "Departmental Promotion Committee" means Committee as specified in clause (a) and (b) of sub-rule (1) of rule 19 of these rules;

(e) "Establishment" means District Court establishment;

(f) "Examination" means examination conducted by the "Examination Cell" of the High Court for selection of employees of the District Court;

(g) "Examination Committee" means Committee constituted by the Chief Justice to monitor and overseeing the selection process for the recruitment of various staff of District Courts;

(h) "Governor" means the Governor of Madhya Pradesh;

(i) "Government" means the Government of Madhya Pradesh; .

(j) "Other Backward Class" means the other Backward Classes of citizens as specified by the State Government vide notification No. F.85-XXV-4-84, dated the 26th December, 1984 as amended from time to time;

(k) "Post" means posts as mentioned in Schedule II;

(l) "Schedule" means each schedule appended to these rules;

(m) "Scheduled Castes" means any caste, race or tribe or part of or a group within a caste, race or tribe specified as scheduled castes with respect to the State of Madhya Pradesh under Article 341 of the Constitution of India;

(n) "Scheduled Tribe" means any tribe, tribal community or part of or group within a tribe or tribal community specified as scheduled tribes with respect to the State of Madhya Pradesh under Article 342 of the Constitution of India; .

(o) "Selection Authority" means "Examination Cell" of the High Court established for the purpose;

(p) "Service" means Madhya Pradesh District Court services;

(q) "Specially abled" means persons coming under the provision of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996).

(r) "Year of Recruitment" means year commencing from 1st January to 31st December;

PART-II

3. Constitution of Service:

(1) On and from the date of commencement of these Rules, "The Madhya Pradesh District Court Services" shall be constituted.

(2) The Madhya· Pradesh District Court Services shall consist of the following persons, namely:

(i) Persons, who at the time of commencement of these Rules are holding substantive or in an officiating capacity, the posts specified in the Schedule II;

(ii) Persons recruited to the service before the commencement of these Rules; and

(iii) Persons recruited to the service in accordance with the provisions of these Rules.

4. Classification, Scale of Pay etc.-

(1) The classification of the service, the number of posts included in the service and the scale of pay attached thereto shall be as specified in Schedule II:
Provided that the Government may, from time to time, add or reduce the number of posts included in the service either on permanent or temporary basis.

(2) The member of service shall have eligibility of time pay scale under the provisions of the circular dated 24th July, 2008 of the Finance Department.

PART-III
RECRUITMENT

5. Method of Recruitment.-

Recruitment to the service after the commencement of these Rules shall be made by the following method, namely;

(a) By direct recruitment through Competitive Examination or Interview or by both for the posts indicated in the Schedule II;

(b) By promotion of members of service as specified In Schedule II;

(c) By transfer or deputation of persons who hold in substantive or officiating capacity such posts in such service as may be specified in this behalf by the High Court;

6. Appointment to the service.-

All appointments to the service after the commencement of these Rules shall be made by the appointing authority and no appointment shall be made except after selection by one of the methods of recruitment as specified in these Rules;

7. Eligibility for direct recruitment.-

In order to be eligible for selection, a candidate must satisfy the following conditions, namely:

(a) He must be a citizen of India;

(b) He should have attained the age of 18 years but should not have attained the maximum age as specified by the Government by general or special order;

(c) The upper age limit for candidates belonging to Schedule Caste, Schedule Tribe or Other Backward Classes and females shall be relaxable which is subject to change as per the Government policy;

(d) The upper age limit shall also be relaxable in respect of widow, destitute or divorced women candidates;

(e) The upper age limit shall also be relaxable in respect of the candidates who are or have been the Permanent or Temporary Employee of the Madhya Pradesh Government or Board and Corporation owned by the Government of Madhya Pradesh subject to change as per Government policy. This concession shall also be admissible to the contingency paid, work-charged or contract employee.

(e-l) A candidate appointed on contractual basis and has worked for 5 years or more, shall be entitled for age relaxation of the period of contractual appointment, subject to maximum age limit up to 55 years, for the post mentioned in Schedule-I, which are reserved for contractual employees.

(f) The relaxation in the upper age limit in respect of "Specially abled" candidates shall be as per the Orders/Guidelines issued by the Government from time to time.

(g) In the Clerical Cadre 25% posts shall be reserved for the persons having Post Graduate degree in Management in Finance/Human Resource Management/Graduate or Post Graduate degree in Information Technology (I.T)/Computer Science (C.S.):

Provided that in case the aforesaid posts remain unfilled due tonon-availability of suitable candidate, the vacant posts shall be filled from the general pool in the same year.

Date of reckoning of age.– The age limit shall be reckoned as on 1st January of the current year of recruitment.

Explanation. – A woman candidate will be deemed to be destitute if she has no source of income and her parents and her husband do not support her financially or who has some source of income but that does not exceed a sum of money specified by the High Court as determined by theState Government.

Note. – In no other case will these age limits be relaxed. Departmental candidates must obtain previous permission of their appointing authority to appear for the selection.

8. Educational Qualification. – The candidate must possess, the educational qualifications prescribed for the service as, shown in Schedule I.

9. Disqualification for Appointment. –

(1) No person shall be eligible for appointment unless he is citizen of India.

(2) No candidate who has more than one spouse living will be eligible for appointment to the service.

(3) No candidate shall be eligible for appointment unless he has been certified to be medically fit for appointment to the post by theDistrict Medical Board.

Provided that a candidate may be appointed provisionally subject to production of Medical fitness certificate as aforesaid within a period of 30 days from the date of appointment. If the candidate is found unfit by the Medical Board, his services shall be liable to be terminated forthwith.

(4) Any attempt on the part of the candidate to obtain support for his candidature by any means shall be held disqualified by the Committee for selection.

(5) No person shall be eligible for appointment if he or she-

(a) Is or has been a member of, or has associated himself or herself with, anybody or association after such body or association is declared, as an unlawful body or association;

or

(b) Has participated in or is associated with, any activity or programme-

(i) Aimed at subversion of the Constitution of India.

(ii) Aimed at organized breach or defiance of law involving violence;

(iii) Which is prejudicial to the interests of the sovereignty and integrity of India or the security of the State; or

(iv) Which promotes on grounds of religion, race, language, caste or community, feelings of enmity or hatred between different sections of the people;

or

(c) Is dismissed from service under the Government of India or any State Government or any High Court;

or

(d) Is or has been debarred or disqualified by the Union or any State Public Service Commission or any High Court from appearing for any examination or selection conducted by it;

or

(e) Is or has been convicted of an offense involving moral turpitude.

(6) In respect of all such matters regarding conditions of service of the officers and employees of the Subordinate Courts of the State of Madhya Pradesh for which no provision or insufficient provision has been made in these Rules, the provisions of Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 shall be applicable with amendments made therein from time to time.

10. The selected candidate shall be eligible for appointment subject to the satisfaction of the Appointing Authority after verification of his testimonials and antecedents.

11. Requisition from District Establishments.-

All the District Establishments shall send their requisition forms to the Registrar (D.E.) of the High Court by 30th September of every recruitment year for all such posts which are to be filled and likely to fall vacant in the ensuing recruitment year. District Establishments in their requisition shall show the details of the posts of the reserved categories. Registrar (D.E.) of High Court after receiving all requisitions from District Establishments shall compile in tabular form details of all posts including reservations by the 30th October to the Examination Cell for starting recruitment process.

12. Mode of Selection.-

(a) Selection will be made in a centralized manner by theExamination Cell of the High Court as per directions of the Examination Committee.

(b) Examination Cell shall advertise the total number of vacancies across the State in daily newspapers, both, English and Hindi language.

(c) Examination Cell shall conduct a centralized written examination followed by interview as per the directions of the Examination Committee of the High Court. The examination may be conducted offline or online system in the months of January to April every year.

(d) The Examination Cell may change the mode of testing the suitability of candidates as per the recommendation of the Examination Committee as and when such change is considered to be appropriate.

(e) In conducting "Online examination", precautions mentioned in Schedule IV, to the extent considered applicable by the Examination Committee, shall be adhered to.

(f) The Examination Cell, on the directions of Examination Committee, may hold screening test, which may also be held online, prior to main written examination if the ratio of number of eligible candidates and the number of posts is inordinately high in view of Examination Committee.

(g) The names of candidates recommended for appointment shall be sent by the Examination Cell to Appointing Authority.

13. Appointment of Candidates.-

Appointing Authority, after scrutinizing documents of the recommended candidates and satisfying itself as to his eligibility regarding suitability in all respects of an appointment to the post in the cadre, shall issue an order of appointment which shall be final.

14. Requirement of Character Certificate.-

No person shall be appointed unless the Appointing Authority is satisfied that he is of good character and is in all respect suitable for appointment to the service. Every candidate selected for direct recruitment shall furnish to the Appointing Authority certificates, given not more than six months prior to the date of selection, by two respectable persons.

15. Conditions relating to Physical fitness.-

No candidate selected for appointment shall be appointed to any post unless he satisfies the Appointing Authority that he is physically fit to discharge the duties that he may be called upon to perform. Appointing Authority, may by order, prescribe the physical standards required to be satisfied by a person for appointment and specify the Medical Authority which may grant the certificate of physical fitness and provide such other incidental matters as may be necessary. The opinion of the Medical Authority regarding the

physical fitness or otherwise of the candidate shall be binding on the candidates.

However, a candidate selected for appointment who fails to appear before the Medical Authority specified by the Appointing Authority shall be given one more opportunity to appear before such authority. If the candidate fails to appear before Medical Authority given on second occasion his name shall be deleted from the list of selected candidates and he shall cease to be eligible for appointment.

16. Examination Fees etc.-

Every candidate for direct recruitment to any category of post shall be required to pay such fees and portal charges, if any, as may be specified by the Examination Committee in respect of his applications.

The relaxation of fee which is applicable to the candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes shall be applicable to the domiciles of Madhya Pradesh who have been declared by the Government as Scheduled Castes, Scheduled Tribes and Other Backward Classes only:

Provided further that the candidates belonging to Other Backward Classes and are coming in creamy layer shall not be eligible for the benefit of reservation, relaxation in age limit or any other benefit of the category.

Provision for fee relaxation shall also be applicable for Specially abled candidates.

17. Joining time for appointment.-

(1) A candidate appointed by direct recruitment shall assume charge of the post specified by the Appointing Authority on the date or within the period specified in the order.

However, the Appointing Authority may, on the application of the candidate and if satisfied that there are good and sufficient reasons for doing so, by order in writing, grant such further time but not exceeding thirty days as it may deem necessary.

Explanation.- For the purpose of the sub-rule "the date of the order of appointment" means the date of dispatch of order of appointment by registered post to the address given by the candidate.

(2) The name of the candidate who fails to assume charge of the post within the time specified in sub-rule (1) shall stand deleted from the list of selected candidates and the candidate concerned shall cease to be eligible for appointment and in that event, Appointing Authority may appoint candidates from the wait list as per the Rules framed in that respect.

(3) **Validity period of the select list.-** The select list of the successful candidates, in the examination in any recruitment year shall be valid upto 12 months from the date of declaration of the select list.

18. Provision for reservation of Appointment.-

(1) Posts shall be reserved for the members of the Schedule Castes, Schedule Tribes and for Other Backward Classes to such extent and in such manner as may be specified by the Government. The reservations for these categories shall be applicable only vertically:

Provided that reservation on the district level posts shall be given as per the district wise reservation roaster, issued by the General Administration Department.

(2) A total 6 percent Horizontal reservation shall be given to persons with physical impairment, with 2 percent each for hearing, visually andorthopedically impaired:

Provided that the reservation shall be made as per the posts identified and marked by the High Court for specially abled persons.

(3) As per the provision of The Madhya Pradesh Civil Services (Special Provisions for Appointment of Women) Rules, 1997, 30 percent horizontal reservation shall be applicable for women candidates.

(4) Appointments shall be made strictly in accordance with the roster prescribed separately for direct recruitment and promotion.

(4-a)20% of posts mentioned in Schedule-I shall be reserved and filled-up from the candidate who is/was working for not less than 5 years on contractual basis, in the same category or higher category of post, in the service of High Court or District Courts Establishment. The said appointment shall be through selection/ suitability test with minimum qualifying marks for candidates belonging to Unreserved Categories as 55% and for candidates 'belonging to OBC, SC/ST Categories as 50%.

(5) Verification of percentage of physical impairment in case of "Specially abled" candidates shall be verified by the Medical Board.

(6) In the event of non-availability of the eligible and suitable candidates amongst the Other Backward Casts, Scheduled Castes and Scheduled Tribes, as the case may be, in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure, and an equivalent number of additional vacancies shall be reserved in the subsequent year. Such of the vacancies which remain so unfilled shall be carried forward to the subsequent three recruitment years in total and thereafter such reservation would lapse.

Appointment By Promotion

19. Constitution or Departmental Promotion Committee:

(I) (a) There shall be constituted a three members Committee consisting of District Judge as Chairman, Senior-most Additional District Judge (for the time being working), Senior-most Civil Judge Senior Division (for the time being working).

(b) The constitution of Departmental Promotion Committee for the post of Administrative Officer and Deputy Administrative Officer shall be as per direction of the Chief Justice.

(2) The selection list shall be prepared by the Committee and the District Judge shall issue appointment orders based on the recommendation of the Committee.

(3) The exercise of departmental promotion shall be carried out every year regularly as per Calendar containing date wise Schedule for appointments to various posts.

(4) The selection shall be made on the basis of seniority-cum-merit up to Accountant and thereafter on the basis of merit-cum-seniority subject to Rule 20.

(5) An employee who has not been found fit for being promoted or whose seniority has been affected may submit his representation before the High Court within thirty days from the date of publication of the list.

(6) The Committee of the High Court considering such representation may cancel or modify such selection list.

20. Provision For Departmental Competitive Examination To Promote Merit.-

In order to promote merit, 15% of vacancies in any cadre shall be kept open for appointment from Lower Cadre by selection through competitive examination and only in case of non availability of suitable candidates through competitive examination, the same will not be carried forward and such vacancies may bc filled by promotion “as per sub-rule (4) of Rule 19 above”.

21. Seniority.-

Seniority of the person included in the select list shall follow the order in which the names of such persons appear in the select list.

In case list of candidates promoted on the basis of seniority-cum-merit and the list of candidates selected through competitive examination is brought out during the same recruitment year, the seniority of candidates promoted on the basis of seniority-cum-merit shall be over and above the seniority of candidates selected through competitive examination.

22. Preparation of List of Suitable Officers.-

(1) The Departmental Promotion Committee shall prepare a list of such persons who satisfy the conditions prescribed and as are held by the Committee to be suitable for promotion to the service. The list shall be sufficient to cover the anticipated vacancies on account of retirement and promotion during the course of one year from the date of preparation of the select list. A reserved list containing 25% of the number of persons included in select list shall also be prepared to meet the unforeseen vacancies occurring during the course of the aforesaid period.

(2) The names of selected officials included in the list shall be arranged in order of seniority in service.

Explanation :- A person whose name is included in the select list but who is not promoted during the validity of the list, shall have no claim to seniority over those considered in a subsequent selection merely by the fact of his earlier selection.

(3) The list so prepared shall be reviewed and revised every year.

(4) If in the process of selection, review or revision, it is proposed to supersede any member of the service, the committee shall record its reasons for the proposed supersession.

23. Reservation. –

Reservation for the promotion to any service in favour of the Scheduled Castes, Scheduled Tribes and Other Backward Classes shall be in accordance with the orders issued by the High Court from time to time.

24. Select List.-

The select list shall ordinarily be in force until it is reviewed or revised in accordance with sub-rule (3) of Rule 22 mentioned above, but its validity shall not be extended beyond the total period of 12 months from the date of its publication:
Provided that in the event of a grave lapse in the conduct of performance of duties on the part of any person included in select list a special review of the select list may be made at the instance of the Appointment Authority and it may, if it thinks fit, remove the name of such person from the select list.

PART-IV

PROBATION

25. (1) All appointments to the Service by direct recruitment or by promotion shall be on probation for the period of two years.

(2) The period of probation for reasons to be recorded in writing, may be extended by the Appointing Authority by such period not exceeding the period of probation specified in sub rule(I) or (II) of Rule 3.

(3) At the end of period of probation or the extended period of probation the Appointing Authority shall consider the suitability of the person so appointed or promoted to hold the post to which he was appointed or promoted, and

(I) If it is decided that he is suitable to hold the post to which he was appointed or promoted, it shall, as soon as possible, issue an order declaring him to have satisfactorily completed the period of probation and such an order shall have effect from the date of expiry of the period of probation, including extended period, if any, as the case may be.

(II) If it is considered that the person is not suitable to hold the post to which he was appointed or promoted, as the case may be, he shall by order:

(a) If he is a promotee, revert him to the post which he held prior to his promotion;

(b) If he is probationer, discharge him from service.

(III) A person shall not be considered to have satisfactorily completed the period of probation unless a specific order to the effect is passed, any delay in passing such an order shall not entitle the person to be deemed to have satisfactorily completed the period of probation.

26. Discharge of a probationer during the period of probation.-

Notwithstanding anything contained in the Rule mentioned above, the Appointing Authority may, at any time during the period of probation, discharge from the service, a probationer on account of reason thathis/her services are no more required.

27. Increment during the period of probation.-

A probationer or promotee may draw the increments that accrued during the period of probation. He shall not, however, draw any increment after the expiry of the period of probation unless and until he is declared to have satisfactorily completed his probation.

When a probationer or promotee is declared to have satisfactorily completed his probation, he shall draw, from the date as such order takes effect, the pay he would have drawn had he been allowed the increments for the whole of his service from the date of his appointment or probation.

28. Appointment to the service from the select list.-

(1) Appointments of the persons included in the select list shall follow the order in which the names of such persons appear in the select list.

(2) In case of promotion, it shall not ordinarily be necessary to consult the Committee for exclusion of a person whose name is included in the select list, if during the period intervening between the inclusion of his name in the select list and the date of the proposed appointment, there occurs any deterioration in his work, which, in the opinion of the Appointing Authority, is such as to render him unsuitable for appointment to the service.

29. Applicability of other Rules.-

The Pay, Allowance, Pensions, Gratuity, Leave, Retirement, T.A., Medical Allowance, G.P.F, Discipline, Control, Punishment and other conditions of service of persons appointed to the District Courts Establishment shall be governed by the rules applicable to the employees of the Government.

30. Transfer.-

1. The ***Chief Justice,*** may, in ***administrative exigency***, transfer any member of the service from one District Court establishment, to another District Court establishment within the State and the member of the service so transferred, shall carry his seniority with him.
2. However, in case the employee requests his transfer, he shall not be entitled to seniority which he held prior to such transfer and his seniority in his new place of posting, his position, will be at the bottom of other employees of the same cadre posted in the District to which he is transferred.

31. Deputation.-

Any member of the service may be deputed by the High Court for a continuous period not exceeding four years to perform the duties of any post in the Central Government or the State Government or took service in any Organization, which is wholly or partly owned or controlled by the Government.

PART-V

MISCELLANEOUS

32. Age of superannuation.-

Subject to the provision contained in Rule 56(2) of the Fundamental Rules and Rule 42(l)(b) of Madhya Pradesh Civil Services (Pension) Rules, 1976, the age of superannuation of a member of the service shall be the age specified by the Government from time to time for the employees of the Government of the same cadre.

33. Retirement in public interest.-

Notwithstanding anything contained in these rules or any other law the appointing authority may, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any member of the Service who has put in not less than twenty years of service or has attained the age of 50 years whichever is earlier, by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

34. Training etc.-

(1) Every person appointed by direct recruitment to the Service shall, undergo such training as the High Court may, from time to time, specify.

(2) Every member of the Service shall be given such periodical training as the High Court may, from time to time, specify.

(3) Every member of the Service shall pass such tests or examinations within such time as the High Court may, from time to time, specify.

35. Interpretation.-

If any question arises regarding the interpretation of the rules, it shall be referred to the Chief .Justice whose decision, thereon, shall be final.

36. Relaxation.-

Nothing in these Rules shall be construed to limit or abridge the power of the High Court to deal with the case of any person(s) to whom these rules apply may dispense with or relax the particular rule in such a manner as may appear to him to be just and equitable.

37. Repeal and Savings.-

All Rules, Orders, Instructions and Circulars corresponding to these Rules, in force immediately before the commencement of these Rules are hereby repealed in respect of matters covered by these Rules:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

38. Residuary provision.-

(1) All members of the service shall be subject to the superintendence of the High Court.

(2) In respect of all matters (not provided in these rules) regarding the conditions of service of the members of the service, including matters relating to the Conduct, Control and Discipline, provisions of M.P. Civil Services (Conduct) Rules, 1965, M.P. Civil Services (CCA) Rules, 1966 and all other applicable to M.P. State Government employees shall apply subject to such modification, variation and exceptions, if any, as the High Court may, from time to time specify.

SCHEDULE-I
(SEE RULE 8)

S. No.	Name of Service	Educational and Technical Qualification Prescribed
	Court Manager	1. B.Tech. in Computer Scienee/B.Teeh. in I.T. with degree in MBA (in Finance/ Human Resource) from a recognized university and preferably having two years of experience in managerial capacity. OR Bachelor Degree with Masters in Business Administration or advanced diploma in General Management from U.G.C. recognized University or Institution along with 3 (Three) years experience/ training in system and process management or 3 years experience / training in I. T. System Management/ Human Resource Management/ Financial System Management/ Court Management in Government Organization or reputed Institution/ Industry having turnover of not less than 100 crores. And 2. Excellent communication skill in Hindi andEnglish;

S. No.	Name of Service	Educational and Technical Qualification Prescribed
		3. Excellent social skill; 4. Excellent computer application skill; 5. Preference will be given to candidates having qualification and experience in the field of Law/specialization 10 Human Resource/Finance and also to such candidates who have worked efficiently as Court Manager in the High Court /Subordinate Courts of M.P.
2.	Junior System Analyst	1. M.E./M.Tech (C.S/I.T.) with at least 2 years experience of working on Linux/ Open source software/Windows/ DBMS/Software development/Desktop and Network support. **OR** M.E./M.Tech (C.S/I.T.) with at least 2 years experience of working on Linux/ Open source software/Windows/DBMS/Software development/Desktop and Network support. 2. Work experience with Company or domain having turnover of not less than 100 crores. 3. Additional desirable qualification MBA (IT Management)
3.	Senior Computer Programmer Asstt.	1. B.E./B.Tech. In Computers / I.T. / Electronics and Telecommunications/ M.C.A. /M.Sc. (Electronics) with at least 2 years experience in working on Linux/ Open Source Software/ Windows/ DBMS/ Software development. 2. Work experience with Company or domain having turnover of not less than 100 crores. 3. Additional desirable qualification MBA (IT Management)
4.	Stenographer Grade-II	1. Graduation in any discipline from a recognized University. 2. C.P.C.T. score card exam passed from M.P. Agency for Promotion of information Technology (MAP-I.T.) or any other Agency/Institution recognized by the M.P. Government. 3. Hindi Shorthand exam passed with speed of 100 W.P.M. from Board/Institution recognized by M.P. Government. 4. One year Diploma Course passed in Computer Application from Institution recognized by M.P. Government.
5.	Stenographer Grade -III	1. Graduation in any discipline from recognized University. 2. C.P.C.T. score card exam passed from M.P. Agency for Promotion of Information Technology (MAP-I.T) or any

S. No.	Name of Service	Educational and Technical Qualification Prescribed
		other Agency/Institution recognized by the M.P. Government. 3. Hindi Shorthand exam passed with speed of 80 W.P.M. from Board/Institution recognized by M.P. Government. 4. One year· Diploma Course passed in Computer Application from Institution recognized by M.P. Government.
6.	Assistant Grade -III	1. Graduation in any discipline from a recognized University. 2. C.P.C.T. score card exam passed from M.P. Agency for Promotion of Information Technology (MAP-I.T.) or any other Agency/Institution recognized by the M.P. Government. 3. One year Diploma Course passed in Computer Application from Institution recognized by M.P. Government.
7.	Assistant Grade III (English Knowing)	1. Graduation in any discipline from recognized University. 2. C.P.C.T. score card exam passed from M.P. Agency for Promotion of Information Technology (MAP-I.T) or any other Agency/Institution recognized by the M.P. Government. 3. English Shorthand exam passed with speed of 80 W.P.M. from Board/Institution recognized by M.P. Government. 4. One year Diploma Course passed in Computer Application from Institution recognized by M.P. Government.
8.	Driver (Contingency)	1. 10^{th} Standard passed from any Board/Institution recognized by Government. 2. Driving Licence holder of Light Motor Vehicle.
9.	Peon/ Chowkidar/ Waterman/ Mali/ Sweeper (Contingency	1. 8^{th} Standard passed.

SCHEDULE-II
(SEE RULE 5)

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	Court Manager	**50**	**III**	15600-39100-G.P.5400	District Judge	By Direct Recruitment
2.	Administrative officer	50	III	15600-39100-G.P. 5400	Registrar General	By promotion from Deputy Administrative officer/Senior Personal Assistant in ratio of 90% and 10% respectively subject to the condition that if "Senior Personal Assistant" is not available that will not be carried forward and will be filled from "Deputy Administrative Officer" and the option by the "Deputy Administrative Officer", once exercised shall not be revoked.
3.	Junior System Analyst	50	III	9300-34800+ G.P. 4200 (As per 6th pay Commission)	District Judge	50% by direct recruitment and 50% by promotion from amongst the Senior Computer Programmer Asstt. having experience of 5 years on the basis of merit-cum-seniority.
4.	Senior Computer Programmer Asstt.	150	III	9300-34800+ G.P. 4200 (As per 6th pay Commission)	District Judge	50% by direct recruitment and 50% by promotion from through departmental examination conducted by the High Court from amongst Stenographer/

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
						Stenographer Grade-II/ Stenographer Grade-III/ Assistant Grade-III having experience of 3 years with essential qualification prescribed for direct recruitment.
5.	Deputy Administrative Officer	168	III	9300-34800-G.P. 3200	Registrar General	By promotion from Accountant who have completed five years of service.
6.	Accountant	100	III	5200-20200-G.P. 2800	District and Sessions Judge	By promotion from Asstt. Accountant/Asstt. Gr.II or Asstt. Gr.III who have completed five years service and also have passed accounts training or Asstt. Gr-II who has crossed the age of 45.
7.	Assistant Accountant	117	III	5200-20200-G.P. 2400	District and Sessions Judge	By promotion from Asstt. Gr.II or Asstt. Gr.III who havecompleted five years service and also have passed accounts training or Asstt. Gr-II who has crossedtheageof 45.
8.	Statistical Writer	50	III	5200-20200-G.P. 2400	District and Sessions Judge	By Promotion from Asstt. Gr.III.
9.	Reader to District Judge	48	III	9300-34800-G.P. 3600	District and Sessions Judge	By Promotion from Reader Grade II.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
10.	Reader to ADJ	701	III	9300-34800-G.P. 3600	District and Sessions Judge	By Promotion from Reader Grade II.
11.	Reader to Civil Judge (Senior Division)	346	III	5200-20200-G.P. 2800	District and Sessions Judge	By Promotion from Reader Grade III.
12.	Reader to Civil Judge (Junior Division)	932	III	5200-20200-G.P. 2400	District and Sessions Judge	By Promotion from Asstt. Gr.III.
13.	Record Keeper	62	III	5200-20200-G.P. 2400	District and Sessions Judge	By Promotion from Asstt. Gr.III.
14.	Librarian Cum-Farms Clerk	78	III	5200-20200-G.P. 2400	District and Sessions Judge	By Promotion from Asstt. Gr.III.
15.	Execution Clerk (Asstt. Gr.III)	741	III	5200-20200-G.P. 2400	District and Sessions Judge	By Promotion from Asstt. Gr.III.
16.	Execution Clerk (Asstt. Gr.III)	1245	III	5200-20200-G.P. 1900	District and Sessions Judge	By Promotion from Asstt. Gr.III.
17.	Asstt. Gr.III (For Court Manager)	50	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
18.	Assistant Record keeper	361	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
19.	Deposition Writer	202	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
20.	Despatcher	58	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
21.	Assistant Statistical Writer	45	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
22.	Officer Mohrir	54	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
23.	Senior Personal Assistant	41	III	9300-34800-G.P. 4200	District and Sessions Judge	By promotion from Personal Assistant.
24.	Personal Assistant	357	III	9300-34800-G.P. 3600	District and Sessions Judge	By promotion from Stenographer.
25.	Stenographer	364	III	5200-20200-G.P. 2800	District and Sessions Judge	By promotion from Stenographer Gr. II.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
26.	Stenographer Grade II	328	III	5200-20200-G.P. 2800	District and Sessions Judge	By promotion from Stenographer Gr. III and Direct Recruitment.
27.	Stenographer Grade III	757	III	5200-20200-G.P. 2400	District and Sessions Judge	By direct recruitment.
28.	Stenographer Grade III (For Court Manager)	50	III	5200-20200-G.P. 1900	District and Sessions Judge	By direct recruitment.
29.	Head Copyist	61	III	5200-20200-G.P. 2400	District and Sessions Judge	By promotion from Asstt. Gr. III.
30.	Copyist	362	III	5200-20200-G.P. 1900	District and Sessions Judge	75% By direct recruitment and 25% by promotion from Class IV.
31.	Office Typist	108	III	5200-20200-G.P. 1900	District and Sessions Judge	75% By direct recruitment and 25% by promotion from Class IV.
32.	District Nazir	50	III	5200-20200-G.P. 2400	District and Sessions Judge	By promotion from Asstt. Gr. III.
33.	Senior Naib Nazir	92	III	5200-20200-G.P. 2400	District and Sessions Judge	By promotion from Asstt. Gr. III.
34.	Junior Naib Nazir	228	III	5200-20200-G.P. 2100	District and Sessions Judge	By promotion from Asstt. Gr. III.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
35.	Sale Amin	236	III	5200-20200 G.P. 1900	District and Sessions Judge	75% By direct recruitment and 25% by promotion from Class IV.
36.	Process Writer	1826	III	5200-20200 G.P. 1900	District and Sessions Judge	By direct recruitment and 25% by promotion from Class IV.
37.	Process Server	1113	IV	5200-20200 G.P. 1800	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
38.	Driver to DJ/ADJ	218	IV	5200-20200 G.P. 1900	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
39.	Driver to CJM	50	IV	5200-20200 G.P. 1900	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
40.	Daftari	54	IV	4440-7440- G.P. 1400	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
41.	Farrash	130	IV	4440-7440- G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.
42.	Daftari-cum-Farrash	150	IV	4440-7440- G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
43.	Record Supplier	56	IV	4440-7440-G.P. 1400	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
44.	Jamadar	56	IV	4440-7440-G.P. 1400	District and Sessions Judge	By promotion from other Class IV employees of the Establishment possessing requisite qualification.
45.	Peon (for Court Manager)	50	IV	4440-7440-G.P. 1400	District and Sessions Judge	Promotion by seniority from other Class IV employees in the Grade Pay of Rs 1300/- of the Establishment.
46.	Record Supplier	56	IV	4440-7440-G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.
47.	Record Room Peon	38	IV	4440-7440-G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.
48.	Copying Peon	30	IV	4440-7440-G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.
49.	Court Peon	2254	IV	4440-7440-G.P. 1300	District and Sessions Judge	By promotion from contingency Class IV employees.

S. No.	Name of the post	No. of Post	Classif-ication		Appointing authority	Method of Recruitment
50.	Chowkidar	279	Contingency	Collector Rate	District and Sessions Judge	By promotion from contingency Class IV employees.
51.	Waterman	257	Contingency	Collector Rate	District and Sessions Judge	By Direct Recruitment
52.	Sweeper	248	Contingency	Collector Rate	District and Sessions Judge	By Direct Recruitment
53.	Mali	68	Contingency	Collector Rate	District and Sessions Judge	By Direct Recruitment
54.	Driver	136	Contingency	Collector Rate	District and Sessions Judge	By Direct Recruitment
55.	Peon	139	Contingency	Collector Rate	District and Sessions Judge	By Direct Recruitment

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मध्यप्रदेश उच्च न्यायालय, खण्डपीठ इन्दौर

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