JOTI JOURNAL

OCTOBER 2013(BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM EDITOR'S DESK

C.V. Sirpurkar,
Director, JOTRI

Esteemed Readers

Judicial training imparted by Judicial Academies to Judges play a key role in shaping the quality of justice delivery; therefore, the Judicial Officers' Training & Research Institute is directing all its energies towards conceiving programmes on the subjects that are relevant to the day-to-day working of Judges. The Officers of the Institute are striving hard to chalk out different strategies of learning in order to maximize the retention of knowledge transmitted during the various work shops, seminars, symposia, colloquia and courses etc. Every possible effort is made in these programmes to provide quality reference material to the participants, in advance. The idea is to keep the Judges abreast of law on relevant topics. The reference material is now being made available in electronic form to facilitate its availability to the Judges both in the Court and at the residence.

As you would appreciate, the Judges are adult learners. In a programme, they see their role as contributors and not mere recipients of knowledge. As such, we cannot afford to be too prescriptive. Further, the lecture based methods of educating Judges can but have only limited impact and that too, if the lectures are made truly interactive and participative. However, the problem with such a methodology is that if too many interventions are made and a debate on a particular point starts with everybody participating, disproportionately long time is consumed. In such a case, the lecturer is unable to complete his lecture within the prescribed time limit. Keeping this aspect of the matter in mind, the JOTRI is experimenting with various innovations. More time could be made available for interaction by ensuring that the reference material is supplied to the participants well in advance and they are expected to come to the programme well prepared. The lecturer shall proceed on the assumption the participants are thoroughly acquainted with the provisions of law and the precedents contained in the reference material. The session may begin by lecturer setting the context and thereafter inviting the questions straightaway, without reciting the contents of the reference material.

The Faculty Members of JOTRI are already extensively using Power Point presentations on various topics.

There are some other adult learning strategies that may be deployed. The need of the hour is to minimize the role of lecture based methodologies.

The JOTRI is conscious that the lectures cannot be entirely eliminated from the repertoire of the Institute. They will continue to be one of the major learning tools for a long time to come. However, it has to be realized that the lectures simply facilitate transmission of knowledge. They do little to promote judging skills. The judging skills can only be enhanced through experiential learning; therefore, the Institute proposes to gradually move towards those methods. Such methods mainly consist of group discussions followed by presentations, exercises and simulations.

Group discussions followed by presentations by participants offer threefold benefits. Firstly, they promote lateral dissemination of knowledge amongst the participants. Secondly, they induce retention of knowledge acquired during the discussion because the participant expects to be called upon to make presentation. Thirdly, they hone communication skills.

Exercises give a participant an opportunity to apply the knowledge acquired during a programme. These improve the craft of judging. John Dewey has famously said that “I hear and I forget - I see and I remember - I do and I understand.” So even a short opportunity of applying the procedural knowledge acquired during a programme, goes a long way in nurturing the judging skills.

Another strategy that might be adopted, particularly for newly inducted Judges, is observation of Court proceedings under the supervision of a faculty member of the Institute. It is true that after each month long phase of a Induction Course, the Trainee Judges go back to the field, for a period of two months to acquire practical experience. However, it would still be beneficial to send such Judges to Courts at Jabalpur during their stay with JOTRI in small batches of say, six or seven, with a faculty member. After observing proceedings in a functioning Court for about 2 hours, they may be asked to jot down their observations regarding the manner in which the concerned Judge was conducting the proceedings and regularity and legality of the procedure adopted by him. After that the faculty member may give his feed back upon the observations and make general comments. This way, the trainees shall learn the Court craft under a trained eye.

We feel that the success of a programme lies in indentifying the favourite learning styles of different participants and adopting right combination of more than one of above methodologies. The JOTRI is trying to mould its programmes on the aforesaid lines. Any feedback in this regard from our esteemed readers will be highly appreciated.

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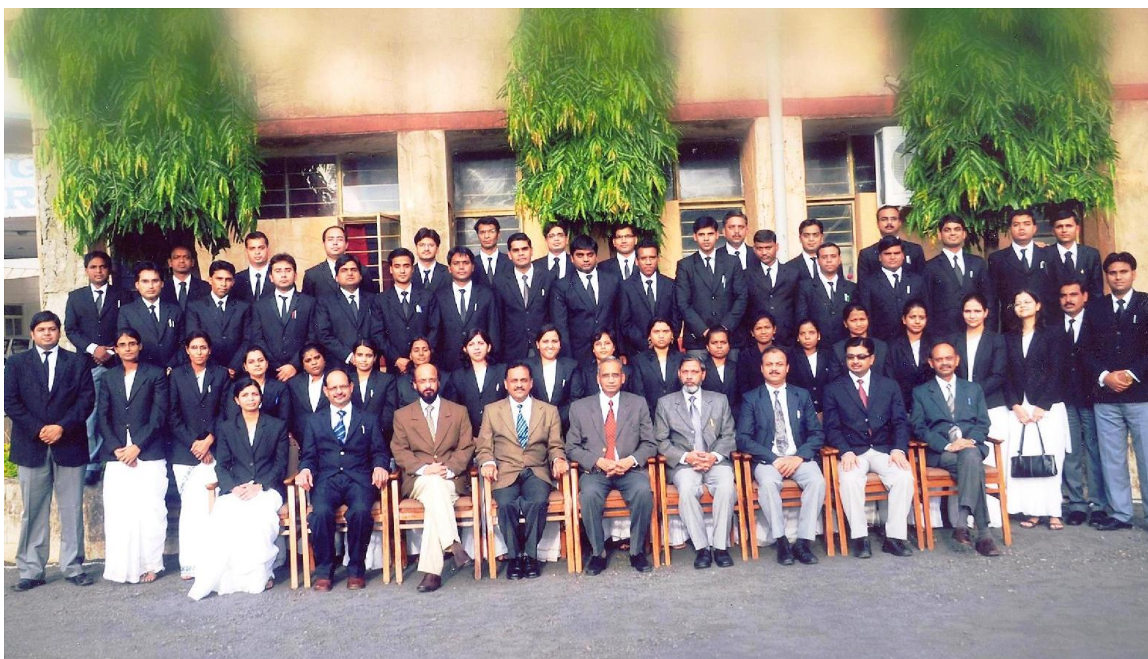
FIRST PHASE INDUCTION COURSE FOR NEWLY APPOINTED CIVIL JUDGES CLASS II FROM 2013 BATCH

First Batch – 01.07.2013 to 27.07.2013



Second Batch – 13.08.2013 to 07.09.2013

HON'BLE SHRI JUSTICE RAKESH SAKSENA DEMITS OFFICE

Hon'ble Shri Justice Rakesh Saksena demitted office on 07.09.2013 on His Lordship's attaining superannuation. Born in the family of Shri B.N. Saksena (Retired District & Sessions Judge) on 08.09.1951. Obtained LL.B degree from Vikram University, Ujjain. Joined Bar at Gwalior in the year 1973 and started practice under the able guidance of Hon'ble Shri Justice S.K. Dubey (Former Judge of the High Court of M.P.) and later on under Shri J.P. Gupta, a renowned Criminal Lawyer. Was Vice President, Bar Association, Gwalior during the years 1977 to 1979 and Secretary, High Court Bar Association, Gwalior in the year 1994. Took oath as Permanent Judge of High Court of M.P. on 11.10.2004. Was accorded farewell ovation on 07.09.2013.

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

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LITTLE KNOWN FACTS

Justice Bijan Kumar Mukherjea established a glorious tradition of judicial independence by refusing Pandit Nehru's offer that he become Chief Justice before his time superseding his brother judges. On the demise of the first Chief Justice of India, Justice Kania in November, 1951, there was a proposal from the Government to appoint Justice B.K. Mukherjea as the next Chief Justice overlooking the claims of Justice Patanjali Sastri and Justice Mehr Chand Mahajan on the ground also that he would have longer tenure. While both Sastri and Mahajan were not averse to it and indeed considered it appropriate that a person of his caliber should be the Chief Justice, Shri Mukherjea was not agreeable and threatened to resign if he were appointed Chief Justice of India superseding Justice Sastri and Justice Mahajan.

Courtesy: "Legends in Law"(page 276)
By V. Sudhish Pai

PROOF OF WILL PARTICULARLY BY SECONDARY EVIDENCE

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The Indian Evidence Act, 1872 (in short - “Evidence Act”) lays down that documents must be proved by primary evidence except in cases where secondary evidence is permissible. Section 65 of the Evidence Act enumerates seven exceptions to the “best evidence rule” wherein secondary evidence is admissible. The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation of a Will as ordained by section 63 of the Indian Succession Act, 1925 (in short - “the Act”). From the point of this particular constraint as well as the degree of proof that is required for proving execution of an unprivileged Will, the question of admission of secondary evidence in case of Wills, needs to be addressed.

Proof of execution of a Will

The execution of a Will can only be proved in terms of section 63 of the Act and section 68 of the Evidence Act. Section 63 of the Act lays down three conditions mentioned in sub-clauses (a), (b) and (c) thereof for execution of a valid will.

(1) The first condition is that –

(a) the testator has to sign or affix his mark to the Will or

(b) it has got to be signed by some other person in his presence and by his direction.

(2) The second condition is that –

(a) the signature or mark of the testator, or

(b) the signature of the person signing for him,

– has to appear at a place from which it would appear that by that mark or signature the document was intended to have effect as a Will and

(3) The third condition, which is the most important is that –

(a) Will has to be attested by two or more witnesses and

(b) each of these witnesses must have seen -

(i) the testator sign or affix his marks to the Will, or

(ii) must have seen some other person signing the Will in the presence and by the direction of the testator, or

(iii) must have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and

– each of the witnesses must have signed the Will in the presence of the testator.(see- ***Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85, Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91, Bhagatram v. Suresh and others, (2003) 12 SCC 35, Benga Behera v. Braja Kishore Nanda, AIR 2007 SC 1975*** and ***Savithri v. Karthyayani Amma, AIR 2008 SC 300***).

In ***Harish Chandra Sahu v. Basant Kumar, AIR 1974 Ori 170,*** it has been categorically held that execution of Will does not merely mean the signing of it by the testatrix or putting her thumb impression on the document, it means that all the formalities required and laid down by section 63 of the Act, have been observed.

The law is well settled that *onus probandi* lies on the person who propounds the Will and this onus is in general, discharged by proof of capacity and the fact of execution from which the knowledge and the assent to its contents by the testator would be assumed. However, as the Privy Council opined in ***Gomtibai v. Kanchhedilal, AIR 1949 PC 272,*** where a Will is executed under circumstances which excite the suspicion of the Court, it is for those who propound the Will, to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the document. In ***Babu Singh v. Ram Sahai, AIR 2008 SC 2485*** it has been held that when genuineness of a Will is in question, apart from execution and attestation, it is also the duty of a person seeking declaration about the validity of the Will to dispel the surrounding suspicious circumstances, if any. Thus, in addition to proving the execution of the Will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the Will would, *inter alia* depend thereupon.

Attestation of Will and mode of prove

The law relating to attestation of Will is contained in section 63 (c) of the Act and mode of proving the documents required by law to be attested is laid down in sections 68 to 72 of the Evidence Act. 'Attestation' generally means signing a document for the purpose of testifying to the signature of the executant. The Apex Court in ***Benichand v. Kamlakunwar, AIR 1977 SC 63,*** has laid down that attestation means the signing of a document to signify that the attestor is a witness to the execution of the document. In ***M. L. Abdul Jabbar Sahib v. H. Venkata Sastri, AIR 1969 SC 1147,*** it has been held thus: "It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e. g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

However, a scribe may become an attesting witness if he signs the document with the intention of attesting the signature of the executant. In ***Mathew v. Suseela, AIR 2006 SC 786,*** the Supreme Court has observed that there is no requirement in law that a scribe cannot be an attesting witness. What is required for attestation, is an intention to attest.

It is not essential in order to prove documents required by law to be attested that signature of all the attesting witness ought to be identified; or the attesting witness should identify each other or even know each other; or the attesting witness should be able to identify signature of each other. All that has to be proved is that: (i) each of the attesting witness saw the executant signing the documents or receiving from him a personal acknowledgment of his signature; and (ii) that each of the witness signed the documents in presence of the executant [see- Law of Evidence by Woodroff and Amir Ali, 19th Edition, Page 2681]

Section 68 of the Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. High Court of Orissa in ***Harish Chandra Sahu*** (supra) observed that section 68 makes an important concession to those who wish to prove and establish a Will in a Court of law. Although the Act requires that a Will has to be attested by two witnesses, section 68 of the Evidence Act permits the execution of the Will to be proved by only one attesting witness being called. But that attesting witness must be in a position to prove the execution of the Will.

That apart, where it is not possible to prove execution of the Will by calling the attesting witnesses though alive, section 71 of the Evidence Act is a kind of safeguard introduced by the Legislature to the mandatory provisions of section 68. It provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. It has been held in ***Harish Chandra Sahu*** (supra) that section 71 can be availed of only when the attesting witnesses who have been called, failed to prove execution of the Will by either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. It has no application where an attesting witness fails to prove the execution of the Will in exact terms of S. 63 (c) of the Act. In other words, where the attesting witness who has been called fails to testify to all the ingredients which go to make the due execution of the Will, his evidence cannot be supplemented, by the evidence of other witnesses who are not attesting witnesses. [see also- ***M.B. Ramesh v. K.M. Veeraje Urs, (2013) 7 SCC 490***].

The position would have been different if none of the attesting witnesses was available. Provision for such a contingency is made in section 69 of the Evidence Act, which states that if no such attesting witness can be found, execution of the document can be proved by leading evidence to show that attestation by one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. [see- ***Harish Chandra Sahu*** (supra)].

The Apex Court in ***Babu Singh*** (supra) has held that section 69 of the Act would apply, *inter alia*, in a case where the attesting witness is either dead or out of jurisdiction of the court or kept out of the way by adverse party or cannot be

traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. Ingredients of the Will are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in section 69, must be proved.

Proof of Will by Secondary Evidence

The definition of secondary evidence given in section 63 of the Evidence Act is exhaustive as it declares that the secondary evidence "means and includes" and then enumerates five kinds of secondary evidence. The exceptions to the rule of primary evidence are designed to provide relief in a case where party is unable to produce the original. The Supreme Court in ***M. Chandra v. M. Thangmuthu, AIR 2011 SC 146,*** has observed thus it is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available.

Section 64 of the Evidence Act rules that documents must be proved by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned therein. In order to enable a party to produce secondary evidence, it is necessary to prove existence and execution of the original document. In ***J. Yashoda v. K. Shobha Rani, AIR 2007 SC 1721,*** it has been held that the conditions laid down in section 65 must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being accounted for in such a manner as to bring it within one or other of the cases provided for in the section.

The mode of proving a Will by secondary evidence does not ordinarily differ from that of proving any other document by secondary evidence; therefore, secondary evidence of a will is admissible in the same manner as any other document.

Lost or suppressed Will

There is no possible distinction between proof of a deed and proof of a Will by secondary evidence and therefore, parole evidence of a Will that is lost or suppressed is admissible. There is no reason why the Will should not be allowed to be proved by secondary evidence if the witnesses are unable to recollect its contents.

In ***Kumar Chandan v. Longa Bai, AIR 1998 MP 1,*** the High Court of Madhya Pradesh held that where there is evidence on record to show that the original Will had been eaten away by rats, secondary evidence is admissible under the law.

In ***Prem Lata (Smt.) v. Smt. Kamla Devi, AIR 2007 NOC 19 (P&H),*** it is held that where name of the applicant was mutated over the property on the basis of Will, the existence of Will stood prove, therefore, the applicant was allowed to produce secondary evidence thereof.

Certified copy of a registered Will

An unprivileged will is not a document that is compulsorily registrable under the law of registration of documents. Its registration is optional. However, certified copy of a registered Will may be used as secondary evidence for proving contents of the original. In ***Chhatra Pratap v. Tulsi Pd., 2000 (3) MPLJ 293*** it has been held that where applicant, relying on registered Will, which was not in his possession, prayed for production of certified copy of the same, the application had to be allowed.

Certified copy of the Will would be admissible in evidence for the purpose of proving contents of original Will, as held in ***Hameed v. Kanhaiya, AIR 2004 All. 405.*** The Court, while placing reliance on ***Parsa Singh v. Smt. Parkash Kaur, AIR 1976 P & H 235,*** observed that from a conjoint reading of sections 63(1), 65 (f), and 79 of the Evidence Act and section 57 of the Registration Act, it is clear that a certified copy of the Will is admissible in evidence for the purpose of proving the contents of the original document. It has further been held that where the plaintiff produced certified copy of the Will stating that he never received the original, section 65(a) would not be applicable.

In ***B. Poornima v. Thoomu Ramdasu, 2006 AIHC 1772 (AP),*** it is held that the certified copy of the registered Will executed by the deceased can be produced as secondary evidence.

Presumption as to a Will thirty years old

Section 90 of the Evidence Act does away with strict rules of proof by giving rise to a presumption of genuineness with regard to documents reaching a certain age. But it cannot be taken as a shelter by the propounder of a Will, he has to prove the will strictly in accordance with section 63 (c) of the Act and Section 68 of the Evidence Act coupled with sections 69 and 70 as laid down in ***Bharpur Singh v. Shamsher Singh, (2009) 3 SCC 687.*** The principle applied in the case of ***Bharpur Singh*** (supra) was also followed by another bench of Supreme Court in the case of ***M.B. Ramesh v. K.M. Veerje Urs, (2013) 7 SCC 490.*** Thus, the law relating to presumption in respect of ancient documents is not applicable to Wills.

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लिखतों की ग्राह्यता के संबंध में अपर्याप्त स्टाम्प शुल्क संबंधी प्रश्न के निराकरण की विधि एवं प्रक्रिया

अवधेश कुमार गुप्ता
उपसंचालक,
न्यायिक अधिकारी प्रशिक्षण एवं
अनुसंधान संस्थान

भारतीय स्टाम्प अधिनियम, 1899 की धारा 33 (1) के अधीन प्रत्येक न्यायाधीश का यह कर्त्तव्य है कि वह साक्ष्य के रूप में प्रस्तुत प्रत्येक ऐसी लिखत को परिबद्ध कर ले, जिसके संबंध में उसे यह प्रतीत होता है कि वह सम्यक् रूप से स्टाम्पित नहीं है।

पी. रामनाथ अय्यर की द लॉ लेक्सिकान (तृतीय संस्करण–2012) के अनुसार परिबद्ध किये जाने से अभिप्रेत है, विधि की अभिरक्षा में ले लेना। तदनुसार किसी दस्तावेज को परिबद्ध किये जाने से अभिप्राय यह है कि उसे न्यायालय की सुरक्षित अभिरक्षा में रख लेना। धारा 33 (1) के अधीन प्रत्येक न्यायाधीश के लिए यह आबद्धकर है कि वह निम्नलिखित परिस्थितियों में किसी दस्तावेज को परिबद्ध कर ले –

1. न्यायाधीश के समक्ष साक्ष्य के प्रयोजन से लिखत प्रस्तुत होना चाहिए। लिखत को अधिनियम की धारा 2 (14) में परिभाषित किया गया है, जिसके अनुसार लिखत के अन्तर्गत ऐसा प्रत्येक दस्तावेज है, जिसके द्वारा कोई अधिकार या दायित्व, सृष्ट, अंतरित, सीमित, विस्तारित या अभिलेखबद्ध किया जाता है या किया जाना तात्पर्यित है। स्पष्ट है कि धारा 33 (1) के प्रावधान केवल ऐसे दस्तावेजों को आवृत्त करते हैं, जिनके अधीन किसी अधिकार या दायित्व का प्रादुर्भाव, अंतरण, परिमिती, विस्तारण या अभिलेखन किया जाता है एवं यह उपबन्ध किसी मौखिक संव्यवहार को आवृत्त नहीं करते हैं। इसी प्रकार ये उपबन्ध उसी मूल दस्तावेज के संबंध में लागू होते हैं, जिसके द्वारा ऐसे अधिकार या दायित्व को सृष्ट, अंतरित, सीमित, विस्तारित या अभिलिखित किया गया है, न कि ऐसे किसी दस्तावेज की प्रतिलिपि या उस दस्तावेज के अनुवाद आदि के संबंध में (कृपया देखें – जुपुदी केशव राव विरूद्ध पुलवरथी बेंकट सुब्बाराव, ए.आई.आर. 1971 एस.सी.1070, हरिओम अग्रवाल विरूद्ध प्रकाशचंद्र मालवीय (2007) 8 एस.सी.सी. 514, सुग्रीव प्रसाद दुबे विरूद्ध सीताराम दुबे 2004 (1) एम.पी.एच.टी. 488 एवं विजय चौधरी विरूद्ध यूनियन ऑफ इंडिया, 2010 (1) एम.पी.एच.टी. 435)

   इसी प्रकार आपराधिक मामलों में दस्तावेज किसी अधिकार या दायित्व को उद्भूत, अंतरित, परिमित या विस्तारित करने के प्रयोजन से प्रयुक्त नहीं होते हैं, अतः आपराधिक मामलों में दस्तावेजों का परिबद्ध किया जाना अपेक्षित नहीं है।

   (कृपया देखें :– विश्वनाथ विरूद्ध काशीराम जे.एल.जे. 1971 एस.एन.12)

पुनः यह भी उल्लेखनीय है कि इस धारा के अधीन प्रस्तुत किये जाने से अभिप्रेत है कि प्रश्नगत दस्तावेज या तो समंस के प्रत्युत्तर में प्रस्तुत किया गया हो या स्वेच्छया न्यायिक प्रयोजन से प्रस्तुत किया गया हो। दस्तावेजों की अनैच्छिक, त्रुटिवश या दुर्घटनावश प्रस्तुति, इस प्रावधान से आवृत्त नहीं है (देखें– इन रि नारायण दास नाथूराम ए.आई.आर., 1943 नागपुर 97) अतएव लिखत को परिबद्ध किए जाने की शक्ति का तब तक प्रयोग नहीं किया जा सकता है, जब तक कि उसे स्वेच्छया साक्ष्य में प्रस्तुत नहीं किया गया हो। (देखें– डिस्ट्रिक्ट रजिस्ट्रार एंड कलेक्टर हैदराबाद विरूद्ध केनरा बैंक (2005) 1 एस.सी.सी. 496)

2. ऐसी लिखत न्यायाधीश की राय में शुल्क से प्रभार्य होना चाहिए। अधिनियम की धारा 3 में शुल्क से प्रभार्य लिखत को परिभाषित किया गया है, जिसके अनुसार अधिनियम की अनुसूची में वर्णित विभिन्न लिखतें उस शुल्क से प्रभार्य होंगी, जो शुल्क ऐसी लिखत के सम्मुख उस अनुसूची में विहित किया गया है। यदि कोई दस्तावेज अनुसूची में वर्णित नहीं है, तो वह शुल्क से प्रभार्य नहीं होगा एवं उसे धारा 33 के अधीन परिबद्ध नहीं किया जाना चाहिए।

3. न्यायाधीश को यह प्रतीत होना चाहिए कि वह लिखत सम्यक् रूप से स्टाम्पित नहीं है। ''सम्यक् रूप से स्टाम्पित'' पद अधिनियम की धारा 2 (11) में परिभाषित किया गया है जिसके अनुसार सम्यक् रूप से स्टाम्पित से, जबकि वह किसी लिखत के बारे में प्रयुक्त है, यह अभिप्रेत है कि समुचित रकम से अन्यून रकम का असंजक या छापित स्टाम्प उस लिखत पर लगा हुआ है, ऐसा स्टाम्प भारत में तत्समय प्रवृत्त विधि के अनुसार लगाया गया है या उपयोग में लाया गया है। अर्थात् किसी लिखत के सम्यक् रूप से स्टाम्पित होने के लिए तीन अपेक्षाएं हैं :–

(I) उस पर प्रयुक्त स्टाम्प उचित धनराशि का हो,

(II) ऐसा स्टाम्प उचित वर्णन का हो, एवं

(III) ऐसा स्टाम्प तत्समय प्रवृत्त विधि के अनुसार लगाया या उपयोग में लाया गया हो।

यह उल्लेखनीय है कि धारा 33 के प्रयोज्य होने के लिए न्यायालय को मात्र यह प्रतीत होना पर्याप्त है कि प्रश्नगत लिखत सम्यक् रूप से स्टाम्पित नहीं है। इस हेतु न्यायाधीश की पूर्ण संतुष्टि अपेक्षित नहीं है। यदि न्यायाधीश लिखत को परिबद्ध किये जाने के पश्चात् पक्षकारों को सुनने के उपरान्त यह अभिनिश्चित करता है कि वह लिखत सम्यक् रूप से स्टाम्पित है, तो वह ऐसी लिखत को मुक्त कर देगा।

लिखत को परिबद्ध किये जाने का प्रक्रम एवं प्रविधि

दस्तावेजों को परिबद्ध किए जाने के संबंध में प्रक्रियात्मक उपबंध सिविल प्रक्रिया संहिता की धारा 30 एवं आदेश 13 नियम 8 में अभिकथित किए गए हैं। सिविल प्रक्रिया संहिता, 1908 की धारा 30 के अनुसार ''ऐसी शर्तों और परिसीमाओं के अधीन रहते हुए जो विहित की जाये न्यायालय किसी भी समय स्वप्रेरणा से या किसी भी पक्षकार के आवेदन पर, ऐसा आदेश कर सकेगा जो ...... दस्तावेजों ...... के जो साक्ष्य के रूप में पेश किये जाने योग्य हो ...... परिबद्ध किये जाने ...... से संबंधित सभी विषयों के बारे में आवश्यक या युक्तियुक्त है।'' इस प्रकार इस प्रावधान के अनुसार न्यायालय ''किसी भी प्रक्रम पर'' दस्तावेजों के परिबद्ध किये जाने का आदेश कर सकता है। इसी प्रकार सिविल प्रक्रिया

संहिता 1908 के आदेश 13 नियम 8 के अधीन न्यायालय पर्याप्त हेतुक दिखाई देने पर अपने समक्ष प्रस्तुत किसी भी दस्तावेज को ऐसी अवधि एवं ऐसी शर्तों के अधीन जो वह उचित समझें, परिबद्ध किये जाने का आदेश दे सकता है।

यह उल्लेखनीय है कि सिविल प्रक्रिया संहिता की धारा 30 एवं आदेश 13 नियम 8 का प्रावधान दस्तावेज परिबद्ध किए जाने के संबंध में सामान्य विधि अभिकथित करता है, जबकि स्टाम्प अधिनियम की धारा 33 सम्यक् रूप से स्टाम्पित न की गयी लिखतों के संबंध में विनिर्दिष्ट प्रावधान करती है। धारा 30 एवं आदेश 13 नियम 8 के प्रावधान वैवेकिक हैं, जबकि स्टाम्प अधिनियम की धारा 33 के प्रावधान आज्ञापक हैं। धारा 33 में भी यह उल्लेख है कि शुल्क से प्रभार्य कोई लिखत जब न्यायाधीश के समक्ष प्रस्तुत की जाती है एवं उसे यह प्रतीत होता है कि वह सम्यक् रूप से स्टाम्पित नहीं है, तो वह उसे परिबद्ध कर लेगा। स्पष्ट है कि धारा 33 के अधीन यह आज्ञापक निर्देश दिया गया है कि शुल्क से प्रभार्य कोई लिखत न्यायालय के समक्ष प्रस्तुत होने पर न्यायाधीश को उसके सम्यक् रूप से स्टाम्पित होने के संबंध में शंका होने पर, वह प्रस्तुत लिखित की परीक्षा कर यह सुनिश्चित करने हेतु कि क्या वह लिखत समुचित मूल्य एवं विवरण के स्टाम्प पर तैयार की गयी है, उसे परिबद्ध कर लेगा।

अतएव साक्ष्य के प्रयोजन से प्रस्तुत दस्तावेज चाहे वह वादपत्र के साथ प्रस्तुत किए गए हैं या तत्पश्चात्, न्यायालय में उसके प्रस्तुत किये जाते समय ही परीक्षा किए जाने की अपेक्षा करते हैं। यह परीक्षा यह जानने के लिए होना चाहिए कि क्या उस दस्तावेज पर उचित शुल्क संदाय किया गया है एवं स्टाम्प विहित वर्णन के हैं अथवा क्या वह अधिनियम की धारा 35 के अधीन स्टाम्प शुल्क एवं शास्ति के लिए उत्तरदायी है। (इस संबंध में देखें – न्यायालय फीस अधिनियम एवं स्टाम्प एक्ट के अधीन माननीय उच्च न्यायालय द्वारा दिए गए निर्देश)

यह परीक्षण दस्तावेजों के साक्ष्य में ग्रहण किये जाने तक के समय के लिए स्थगित नहीं किया जाना चाहिए। दस्तावेजों की आरंभिक जाँच न्यायाधीश द्वारा अपने अधीक्षण में निष्पादन लिपिक द्वारा भी करायी जा सकती है। फिर भी यह न्यायाधीश का ही प्राथमिक उत्तरदायित्व है कि वह दस्तावेज की विषय वस्तु, न कि दस्तावेज के वर्णन या शीर्षक के आधार पर दस्तावेज पर प्रभार्य शुल्क का आंकलन करे। यह भी उल्लेखनीय है कि ऐसी जाँच के लिए किसी पक्षकार की आपत्ति अपेक्षित नहीं है। ऐसी जाँच न्यायाधीश को स्वतः करनी चाहिए। यद्यपि पश्चात्वर्ती प्रक्रम पर कठिनाइयाँ उत्पन्न न हो, इसलिए आदेश पत्रिका में साक्ष्य हेतु प्रस्तावित दस्तावेजों की प्रस्तुति के समय ही प्रतिपक्ष का ध्यान दस्तावेज की ओर आकृष्ट करते हुए निर्देश दिया जा सकता है कि यदि उन्हें साक्ष्य में प्रस्तावित दस्तावेजों के सम्यक् रूप से स्टाम्पित होने के संबंध में कोई आपत्ति हो, तो वह उसे न्यायालय के समक्ष प्रस्तुत कर सकता है।

यह भी उल्लेखनीय है कि धारा–36 के अनुसार किसी भी लिखत को केवल साक्ष्य में गृहीत किए जाने के पूर्व ही परिबद्ध किया जा सकता है। यदि दस्तावेज को एक बार साक्ष्य में गृहीत कर लिया जाता है तो किसी भी पश्चात्वर्ती प्रक्रम पर उसे प्रश्नगत नहीं किया जा सकता है। किसी दस्तावेज के सम्यक् रूप से स्टाम्पित नहीं होने के आधार पर अग्राह्य होने संबंधी आपत्ति केवल उस दस्तावेज को प्रदर्श अंकित किए जाने के पूर्व ही उठाई जा सकती है। दस्तावेज पर न्यायालय द्वारा प्रदर्श अंकित

किए जाने के पश्चात् ऐसी आपत्ति विचारणीय नहीं है। (देखें– श्यामल कुमार राय विरूद्ध सुशील कुमार अग्रवाल ए.आई.आर. 2007 एस.सी. 637, जवेरचंद्र विरूद्ध पुखराज सुराना ए.आई.आर. 1961 एस.सी. 1655 एवं मनखां विरूद्ध मोहनलाल 2012 (3) एम.पी.एल.जे. 632)

जहाँ तक परिबद्ध किये जाने की प्राविधि का संबंध है, स्टाम्प अधिनियम में कुछ भी नहीं कहा गया है। सिविल प्रक्रिया संहिता, 1908 के आदेश 13 नियम 8 में मात्र यह विहित किया गया है कि किसी दस्तावेज को परिबद्ध किये जाने पर न्यायालय उसे अपने किसी अधिकारी की अभिरक्षा में रखे जाने के लिए निर्देश दे सकेगा। परिबद्ध किए जाने की प्रक्रिया के संबंध में एल. पूरनचंद विरूद्ध एम्परर, ए.आई.आर. 1942 लाहौर 257 के न्यायदृष्टांत में प्रेक्षित किया गया है कि दस्तावेज के परिबद्ध किये जाने का आदेश मौखिक नहीं होना चाहिए। ऐसा आदेश लिखित रूप से किया जाना चाहिए तथा प्रश्नगत दस्तावेज पर ''परिबद्ध'' शब्द पृष्ठांकित किया जाना चाहिए एवं संबंधित न्यायाधीश के द्वारा हस्ताक्षरित किया जाना चाहिए। इसके अतिरिक्त जिस दस्तावेज को परिबद्ध किया गया है, उसका वर्णन एवं उसके परिबद्ध किये जाने का विवरण आदेश पत्रिका में लेखबद्ध किया जाना चाहिए। साथ ही मध्यप्रदेश व्यवहार न्यायालय नियम, 1961 के नियम 323 के अधीन विहित प्रलेखों की सूची के स्तंभ क्रमांक 5 (रिमार्क कॉलम) में तत्संबंधी प्रविष्टि की जानी चाहिए। इस संबंध में नियम 324 का ध्यान रखा जाना चाहिए।

सम्यक् रूप से स्टाम्पित होने/न होने का निर्धारण

किसी लिखत को उपरोक्त रीति से परिबद्ध किये जाने के पश्चात् न्यायालय को धारा 33 (2) के अधीन यह अभिनिर्धारित करना आवश्यक है कि क्या प्रश्नगत लिखत सम्यक् रूप से स्टाम्पित है अथवा नहीं। इस हेतु एक न्यायालय द्वारा मामले में उभयपक्ष को निर्देशित किया जाना चाहिए कि वह नियत तिथि पर प्रश्नगत लिखत के सम्यक् रूप से स्टाम्पित होने अथवा नहीं होने के संबंध में अपने तर्क प्रस्तुत करें। नियत तिथि पर उभयपक्ष को सुनने के पश्चात् न्यायाधीश के द्वारा उभयपक्षीय तर्क के परिप्रेक्ष्य में धारा 33 (2) के अधीन प्रश्नगत लिखत की जाँच यह अभिनिश्चित करने के प्रयोजन से की जानी चाहिए कि जिस समय ऐसी लिखत निष्पादित की गयी थी, तब क्या वह तत्समय प्रवृत्त विधि द्वारा अपेक्षित मूल्य और विवरण के स्टाम्प से स्टाम्पित थी।

यह उल्लेखनीय है कि प्रभार्य शुल्क की गणना हेतु प्रश्नगत लिखत के निष्पादन की तिथि पर प्रवृत्त स्टाम्प शुल्क विचारणीय होगा न कि ऐसे निर्धारण की तिथि पर प्रवृत्त स्टाम्प शुल्क। (कृपया देखें :– स्टेट ऑफ राजस्थान विरूद्ध मेसर्स खंदक जैन ज्वेलर्स, ए.आई.आर. 2008 एस.सी. 509)

किसी लिखत पर प्रभार्य स्टाम्प शुल्क के प्रश्न का निर्धारण करते निम्नलिखित तथ्यों को विचार में लिया जाना चाहिए –

1. स्टाम्प शुल्क लिखत पर प्रभार्य होता है न कि संव्यवहार पर।
2. लिखत में अंतर्विष्ट संव्यवहार का सार स्टाम्प शुल्क का निर्धारण करता है न कि लिखत का प्रारूप या शीर्षक।
3. लिखत की प्रकृति एवं उसके सम्यक् रूप से स्टाम्पित होने के निर्धारण हेतु न्यायालय द्वारा लिखत की अंतर्विशिष्टियों (contents) न कि संपार्श्विक परिस्थितियाँ, जो कि साक्ष्य के द्वारा

अभिलेख पर लायी जा सकती है, पर विचार करना चाहिए। दूसरे शब्दों में कहा जाये तो, पक्षकारों का वह आशय जिसकी पूर्ति के प्रयोजन से उस लिखत को लेखबद्ध किया गया है, विचार में लिया जाना चाहिए। ऐसे निर्धारण हेतु अन्य बाहरी सामग्री को विचार में नहीं लिया जा सकता है। (इस नियम का एक अपवाद यह है कि जहाँ स्टाम्प शुल्क बाजार मूल्य पर निर्भर हो, वहाँ बाहरी सामग्री स्टाम्प विधि में यथाविहित रीति से विचार में ली जा सकती है।)

4. लिखत की वास्तविक प्रकृति के निर्धारण हेतु दस्तावेज को सम्पूर्ण रूप से पढ़ा जाना चाहिए एवं लिखत के मूल प्रयोजन की पहचान की जानी चाहिए।

(कृपया देखें– शिवकुमार सक्सेना विरूद्ध मनीषचंद्र सिन्हा 2004 (4) एम.पी.एच.टी. 475)

इस प्रकार यह स्पष्ट है कि लिखत को परिबद्ध किये जाने के पश्चात् पक्षकारों को सुनवाई का अवसर दिया जाना चाहिए तथा तत्पश्चात् प्रश्नगत लिखत की वास्तविक प्रकृति निर्धारित की जानी चाहिए एवं तदनुसार निर्धारित वर्णन के लिखत पर ऐसे लिखत के निष्पादन की तिथि पर प्रभार्य स्टाम्प शुल्क की गणना की जानी चाहिए। तत्पश्चात् यह अभिनिर्धारित किया जाना चाहिए कि क्या प्रश्नगत लिखत वस्तुतः सम्यक् रूप से स्टाम्पित है, अथवा नहीं। यदि न्यायालय यह अभिनिर्धारित करता है कि लिखत सम्यक् रूप से स्टाम्पित है, तो ऐसी लिखत परिबद्धता से मुक्त हो जायेगी। यदि न्यायालय प्रश्नगत लिखत के संबंध में यह अभिनिर्धारित करता है कि वह सम्यक् रूप से स्टाम्पित नहीं है, तो उसके संबंध में अधिनियम की धारा 38 के अधीन कार्यवाही की जायेगी।

सम्यक् रूप से स्टाम्पित न किये गये लिखत साक्ष्य में किसी भी प्रयोजन हेतु ग्राह्य नहीं है

धारा–35 के अनुसार कोई भी लिखत, जिसके संबंध में न्यायालय ने यह अभिनिर्धारित किया है वह ''सम्यक् रूप से स्टाम्पित'' नहीं है, साक्ष्य में किसी भी प्रयोजन से ग्राह्य नहीं होगी। दूसरे शब्दों में ऐसी लिखत को किसी भी परिस्थिति में साक्ष्य के रूप में ग्रहण नहीं किया जा सकता है अर्थात् ऐसी लिखत को साक्ष्य में ग्रहण करने के संबंध में न्यायालय को कोई भी विवेकाधिकार प्राप्त नहीं है। लिखत का सम्यक् रूप से स्टाम्पित न होना, उसे साक्ष्य के रूप में ग्रहण किए जाने के क्षेत्र से बहिष्कृत कर देता है।

ऐसी लिखत कब साक्ष्य में ग्रहण की जा सकेगी ?

ऐसी लिखत धारा–35 के परन्तुक (क) के अधीन साक्ष्य में ग्राह्य होगी। इस परंतुक के अनुसार–

(i) जहाँ अवशेष स्टाम्प शुल्क की दस गुनी राशि पाँच रूपए से कम है, तो अवशेष प्रभार्य स्टाम्प शुल्क एवं पाँच रूपए शास्ति के रूप में संदाय करने पर, या

(ii) जहाँ अवशेष स्टाम्प शुल्क की दस गुनी राशि पाँच रूपए से अधिक है, वहाँ अवशेष प्रभार्य स्टाम्प शुल्क एवं ऐसे अवशेष शुल्क के दस गुने के बराबर शास्ति संदाय कर दिए जाने पर – ऐसी लिखत साक्ष्य में ग्राह्य होगी।

अतएव न्यायालय जैसे ही यह अभिनिर्धारित करता है कि लिखत सम्यक् रूप से स्टाम्पित नहीं है, उसे अपने आदेश में यह उल्लेख करना चाहिए कि प्रश्नगत लिखत किसी भी प्रयोजन के लिए साक्ष्य में ग्राह्य नहीं है, परंतु यदि संबंधित पक्ष धारा 35 के परंतुक (क) के अधीन अमुक अवशेष प्रभार्य स्टाम्प

शुल्क एवं अमुक शास्ति का भुगतान कर देता है, तो प्रश्नगत लिखत साक्ष्य में ग्राह्य होगी। यह ज्ञातव्य है कि अवशेष प्रभार्य शुल्क एवं शास्ति आदेश में विनिर्दिष्ट रूप से अभिव्यक्त की जानी चाहिए। तत्पश्चात ऐसे स्टाम्प शुल्क एवं शास्ति के संदाय हेतु कार्यवाही अग्रसर करने का अवसर संबंधित पक्ष को दिया जाना चाहिए।

पक्षकार का विकल्प (परिबद्ध लिखतों का निराकरण) –

संबंधित पक्षकार को स्टाम्प शुल्क एवं शास्ति के संदाय का उपर्युक्तानुसार अवसर प्रदान किए जाने पर उसके समक्ष दो विकल्प उपलब्ध होते हैं –

(A) वह न्यायालय के निर्देशाधीन अपेक्षित स्टाम्प शुल्क एवं शास्ति के संदाय हेतु कार्यवाही अग्रसर करे, या

(B) ऐसे संदाय हेतु कोई कार्यवाही नहीं करे अथवा न्याय–निर्णयन हेतु लिखत को कलेक्टर स्टाम्प्स को प्रेषित करने के लिए आग्रह करें।

प्रथम विकल्प का चयन करने पर न्यायालय धारा – 38 (1) के अधीन कार्यवाही अग्रसर करेगा जबकि द्वितीय विकल्प का चयन करने पर न्यायालय धारा – 38 (2) के अधीन कार्यवाही करेगा। न्यायालय किसी पक्षकार को स्टाम्प शुल्क एवं शास्ति के भुगतान के लिए बाध्य नहीं कर सकता है। संबंधित पक्ष उपर्युक्त में से किसी भी विकल्प का चयन करने के लिए स्वतंत्र है। (देखें– सत्यनारायण विरूद्ध रामसिंह 2007 (3) एम.पी.एल.जे. 384)

जहाँ संबंधित पक्षकार प्रथम विकल्प का चयन करता है अर्थात् न्यायालय के निर्देशाधीन अपेक्षित शुल्क एवं शास्ति के संदाय हेतु आवेदन प्रस्तुत करता है, वहाँ न्यायालय द्वारा ऐसा शुल्क एवं शास्ति सिविल कोर्ट डिपॉजिट में जमा करने हेतु नाजिर को निर्देशित करना चाहिए।

नाजिर ऐसी राशि स्टाम्प शुल्क एवं शास्ति के रूप में ग्रहण कर उसकी रसीद संबंधित पक्ष को प्रदान करेगा। तत्पश्चात् जब संबंधित पक्ष द्वारा न्यायालय के समक्ष यह रसीद प्रस्तुत की जाती है, तो न्यायालय को उसके आदेशानुसार भुगतान की गयी राशि का सत्यापन करना चाहिए एवं तत्संबंधी सत्यापन धारा–42 (1) के अधीन लिखत पर पृष्ठांकित किया जाना चाहिए। धारा–42 (1) के अधीन अनुप्रमाणन में प्रश्नगत दस्तावेज पर निम्नलिखित तथ्य पृष्ठांकित किये जाने चाहिए–

1. दस्तावेज का वर्णन
2. प्रभार्य स्टाम्प शुल्क
3. पक्षकार द्वारा संदत्त स्टाम्प शुल्क
4. अवशेष स्टाम्प शुल्क
5. शास्ति
6. स्टाम्प शुल्क एवं शास्ति के भुगतान की तिथि एवं रसीद का क्रमांक
7. स्टाम्प शुल्क एवं शास्ति का संदाय करने वाले व्यक्ति का नाम एवं पता।

इस विवरण के नीचे न्यायाधीश के द्वारा अपने हस्ताक्षर किये जाने चाहिए। इस कार्यवाही का पूर्ण उल्लेख आदेश पत्रिका में भी किया जाना चाहिए। तत्पश्चात् न्यायालय के द्वारा ऐसी लिखत की एक अधिप्रमाणित प्रति संबंधित पक्ष से उद्‌गृहीत शुल्क एवं शास्ति की धनराशि के प्रमाणपत्र के साथ धारा 38 (1) के अधीन कलेक्टर स्टाम्प्स को प्रेषित की जानी चाहिए। प्रमाणपत्र में उपर्युक्त तथ्यों का उल्लेख करना चाहिए। अधिप्रमाणित प्रति भेजने की कार्यवाही का उल्लेख आदेश पत्रिका में भी किया जाना चाहिए।

इस कार्यवाही के पश्चात् प्रश्नगत लिखत को न्यायालय के द्वारा साक्ष्य विधि के अन्य प्रावधानों के अधीन रहते हुए साक्ष्य मे ग्रहण किया जा सकेगा।

यदि संबंधित पक्ष दूसरे विकल्प का चयन करता है अर्थात् न्यायालय के निर्देशाधीन स्टाम्प के शुल्क एवं शास्ति का संदाय न्यायालय द्वारा विहित समय के भीतर नहीं करता है अथवा प्रश्नगत लिखत को न्याय–निर्णयन हेतु कलेक्टर स्टाम्प्स को प्रेषित करने का आग्रह करता है, तो प्रश्नगत मूल लिखत धारा 38 (2) के अधीन कलेक्टर स्टाम्प्स को धारा 40 (1) के अधीन कार्यवाही अग्रसर करने एवं तत्पश्चात् उसे धारा 40 (3) के अधीन संबंधित न्यायालय को वापिस करने के निर्देश के साथ प्रेषित की जाना चाहिए।

जब इस प्रकार मूल लिखत न्याय–निर्णयन हेतु कलेक्टर स्टाम्प्स को प्रेषित की जाती है, तब संबंधित पक्ष का ध्यान धारा 46 (2) की ओर आकर्षित करते हुए उससे यह अपेक्षा की जानी चाहिए कि वह विहित अवधि में प्रश्नगत लिखत के कलेक्टर स्टाम्प्स को प्रेषित किये जाने के पूर्व अपने खर्च पर उस लिखत की सत्यापित प्रति प्राप्त कर ले।

यहाँ यह उल्लेखनीय है कि यदि ऐसी लिखत कलेक्टर स्टाम्प्स को भेजे जाने और न्यायालय को वापस प्राप्त होने के अनुक्रम में कहीं खो जाती है या नष्ट हो जाती है या विक्षत हो जाती है तो धारा 46 (1) के अधीन न्यायालय किसी भी दायित्व के अधीन नहीं होता है।

जब ऐसी लिखत धारा–40 के अधीन कलेक्टर स्टाम्प्स के यहाँ से वापस न्यायालय को प्राप्त हो जाएगी, तब वह उसे साक्ष्य विधि के अन्य प्रावधानों के अधीन रहते हुए साक्ष्य में ग्रहण करेगा।

प्रश्न यह है कि जब ऐसी लिखत कलेक्टर स्टाम्प्स को न्याय निर्णयन हेतु भेज दी गयी है, तो क्या संबंधित न्यायालय को उसके कलेक्टर स्टाम्प्स से वापस प्राप्त होने तक विचारण स्थगित कर देना चाहिए। इस संबंध में वाई. पेडा वैंकय्या विरूद्ध आर. डी. ओ. गुण्टूर ए. आई. आर. 1981 आंध्रप्रदेश 274 के प्रकरण में यह प्रतिपादित किया गया है कि यह पक्षकार का विकल्प है कि वह न्यायालय द्वारा निर्धारित स्टाम्प शुल्क एवं शास्ति का संदाय कर लिखत को साक्ष्य में ग्राह्य कराए अथवा उसे धारा–38 के अधीन कलेक्टर को भेजे जाने का आग्रह करे। न्यायालय, लिखत प्रस्तुत करने वाले पक्षकार को ऐसे शुल्क एवं शास्ति का भुगतान कर लिखत को साक्ष्य में ग्रहीत करने हेतु बाध्य नहीं कर सकता है। एक बार जब लिखत धारा 38 (2) के अधीन कलेक्टर को भेज दी जाती है, तो वह धारा 40 के अनुसार न्यायनिर्णीत की जायगी। जहाँ पक्षकार लिखत को धारा 38 (2) के अधीन कलेक्टर को प्रेषित किए जाने का आग्रह करता है, वहाँ वह धारा–40 के अधीन कलेक्टर के विनिश्चय तक के लिए वाद का विचारण रोके जाने का आग्रह नहीं कर सकता है। निःसंदेह कलेक्टर

धारा 40 (3) के अधीन लिखत वापस भेजेगा, परंतु न्यायालय के लिए यह आवश्यक नहीं है कि वह धारा 40 (1) या (3) के अधीन कलेक्टर के आदेश/कार्यवाही की प्रतीक्षा में विचारण रोक दे।

ऐसे मामलों में यह उचित होगा कि न्यायालय संबंधित पक्ष को कलेक्टर से न्यायनिर्णयन कराने हेतु युक्तियुक्त समय प्रदान करे एवं प्रश्नगत लिखत के साथ कलेक्टर को भेजे जाने वाले पत्र में मामले में साक्ष्य हेतु नियत तिथि का उल्लेख करते हुए कलेक्टर से नियत तिथि के पूर्व न्याय निर्णयन कर न्यायालय को लिखत के वापस भेजे जाने का आग्रह करें। लिखत की वापिसी की प्रतीक्षा में विचारण अनिश्चित काल के लिए स्थगित नहीं रखा जाना चाहिए।

उपसंहार

पूर्वोक्त विवेचन से यह स्पष्ट है कि :–

1. यह न्यायाधीश का कर्त्तव्य है कि वह साक्ष्य के रूप में प्रस्तावित ऐसी प्रत्येक लिखत को परिबद्ध कर ले, जिसके संबंध में उसे यह प्रतीत होता है कि वह सम्यक् रूप से स्टाम्पित नहीं है।
2. लिखत के सम्यक् रूप से स्टाम्पित होने के लिए न केवल लिखत पर प्रयुक्त स्टाम्प विहित धनराशि के होना चाहिए बल्कि विहित वर्णन के भी होने चाहिए।
3. शंकास्पद लिखत को एक बार साक्ष्य में ग्रहण कर लेने के पश्चात् विचारण या अपील के किसी भी प्रक्रम पर स्टाम्प शुल्क संबंधी आपत्ति संधारणीय नहीं है।
4. लिखत परिबद्ध किए जाने के पश्चात् उस लिखत की प्रकृति के निर्धारण हेतु उसकी अंतर्विशिष्टियों एवं लिखत के पक्षकारों के आशय की जांच की जानी चाहिए। इस हेतु सामान्यतः बाह्य सामग्री असंगत होती है।
5. लिखत की प्रकृति का निर्धारण केवल उसके शीर्षक के आधार पर नहीं होना चाहिए।
6. लिखत की प्रकृति का निर्धारण हो जाने के पश्चात् यह देखा जाना चाहिए कि क्या उस पर अनुसूची में यथाविहित राशि एवं वर्णन का शुल्क संदत्त किया गया है।
7. सम्यक् रूप से स्टाम्पित न की गयी लिखत धारा 35 के परंतुक (क) के अधीन विहित शुल्क एवं शास्ति संदाय कर देने पर साक्ष्य में ग्राह्य होगी।
8. लिखत प्रस्तुत करने वाला पक्षकार इस हेतु स्वतंत्र है कि वह न्यायालय द्वारा निर्देशित शुल्क एवं शास्ति का संदाय कर लिखत को साक्ष्य में गृहीत करा ले या न्याय निर्णयन हेतु कलेक्टर को प्रेषित करने का आग्रह करे। न्यायालय संबंधित पक्षकार को शुल्क एवं शास्ति के संदाय हेतु बाध्य नहीं कर सकता है।
9. पक्षकार के विकल्प पर न्याय निर्णय हेतु लिखत कलेक्टर को भेजे जाने की स्थिति में पक्षकार न्यायालय से विचारण अनिश्चित काल तक के लिए स्थगित करने का आग्रह नहीं कर सकता है। यद्यपि न्यायालय अपने विवेक के अधीन पक्षकार को कलेक्टर से लिखत का न्याय निर्णयन कराने हेतु युक्तियुक्त समय प्रदान कर सकता है।

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भारतीय संविधान के अनुच्छेद 20 के अधीन उपबंधित किसी अपराध के अभियुक्त को उपलब्ध सुरक्षा

न्यायिक अधिकारीगण
जिला– शिवपुरी, भोपाल, मंडला

दांडिक विधि का सामना करने वाला व्यक्ति अंततः प्राण व दैहिक स्वतंत्रता के अधिकार से वंचित हो जाता है, अतः भारतीय संविधान का अनुच्छेद 20 स्वैच्छिक व अत्यधिक दंड के विरूद्ध अंतर्राष्ट्रीय मान्यता प्राप्त सुरक्षा प्रदान करने का आश्वासन देता है। अनुच्छेद 20 में प्रदत्त अधिकार एक महत्वपूर्ण मूलभूत अधिकार है एवं यह अधिकार उन व्यक्तियों को प्राप्त है, जिन पर किसी प्रकार का अपराध करने का अभियोग लगाया गया है। यह अनुच्छेद अपराध के अभियुक्त व्यक्तियों को अपनी रक्षा करने के लिए निम्न तीन प्रकार की संवैधानिक सुरक्षा प्रदान करता हैः–

1. कार्योत्तर विधि से संरक्षण [Protection from Expostfacto law; अनुच्छेद 20 (1)]
2. दोहरे जोखिम से संरक्षण [Protection from double jeopardy; अनुच्छेद 20 (2)] एवं
3. आत्मअभिशंसन के विरूद्ध संरक्षण [Protection from self-incrimination; अनुच्छेद 20(3)]

कार्योत्तर विधि से संरक्षण
(अनुच्छेद 20 (1))

अनुच्छेद 20 (1) में वर्णित ''कार्योत्तर विधियों से संरक्षण'' से तात्पर्य यह है कि कोई व्यक्ति, कार्य के समय प्रवृत्त विधि एवं उसमें वर्णित सीमा तक के ही दण्ड से ही दण्डित किया जायेगा। जब किसी व्यक्ति को किसी आपराधिक कृत्य के लिए दण्डित किया जाना है, तब उक्त व्यक्ति को अनुच्छेद 20 (1) दो प्रकार से संरक्षण प्रदान करता हैः–

(अ) कोई व्यक्ति किसी ऐसे कृत्य के लिए दंडित नहीं किया जाएगा, जो उसे करते समय किसी प्रवृत्त विधि के अंतर्गत दंडनीय न हो।

(ब) कोई व्यक्ति कार्य करते समय प्रवृत्त विधि में वर्णित दण्ड की सीमा से अधिक दण्ड से दंडित नहीं किया जाएगा (पश्चिम बंगाल राज्य विरूद्ध एस. के. घोष, ए. आई. आर. 1963 एस.सी. 255)।

इस संबंध में अवलोकनीय है कि विधान मंडल साधारणतः भूतलक्षी व भविष्यलक्षी विधियाँ निर्मित कर सकता है, परंतु अनुच्छेद 20 (1) विधान मंडल को भूतलक्षी आपराधिक विधियाँ निर्मित करने से वर्जित करता है। अनुच्छेद 20(1) का संरक्षण केवल आपराधिक कार्यवाहियों में प्रयोज्य है (मकबूल विरूद्ध स्टेट, ए. आई. आर. 1953 एस. सी. 325)। व्यवहार विधियों के संबंध में विधान मंडल भूतलक्षी प्रावधान/विधि निर्मित करने के लिए पूर्णतः स्वतंत्र है। व्यवहार विधियों से तात्पर्य यह है कि

(अ) कर अधिरोपण करने की शक्ति

(ब) धारा 2 (2) मध्यप्रदेश आबकारी अधिनियम 1915 के अधीन पट्टे के संबंध में ड्यूटी, भूतलक्षी प्रभाव से अधिरोपित करने के लिए राज्य सरकार सशक्त है, क्योंकि कर/ड्यूटी व्यवहार क्षेत्राधिकार में आते हैं, न कि शास्ति के रूप में। प्रवृत्त विधि से तात्पर्य ऐसी विधि से है, जो वास्तव में अस्तित्व में है और आपराधिक कृत्य करते समय प्रवर्तनीय है (राव शिवबहादुर सिंह विरूद्ध स्टेट ऑफ विंध्य प्रदेश ए. आई. आर., 1953 एस.सी. 394)।

कार्योत्तर विधि के संबंध में माननीय सर्वोच्च न्यायालय व माननीय उच्च न्यायालयों के द्वारा समय–समय पर निर्णयज विधि एवं मार्गदर्शक सिद्धांत प्रतिपादित किए गए है, जो मुख्यतः निम्नानुसार हैं :–

(अ) भूतलक्षी कृत्य का संरक्षण :– इस संबंध में सोनी देवराज बाबूभाई विरूद्ध गुजरात राज्य, ए. आई. आर. 1991 एस. सी. 2173 अवलोकनीय है। इसमें माननीय न्यायालय के द्वारा यह घोषित किया कि धारा 304–बी भा.द.वि., जो कि दिनांक 19/11/1986 को संशोधन के माध्यम से जोड़ी गयी थी तथा दहेज–मृत्यु का सुभिन्न अपराध सृजित करते हुए कम से कम सात वर्ष के कारावास का उपबंध करती है, इस प्रकार की मृत्यु पर लागू नहीं होगी, जो अंतः स्थापित दिनांक के पूर्व हुई हो।

(ब) वर्धित दण्ड :– इस संबंध में माननीय सर्वोच्च न्यायालय ने केदारनाथ बाजोरिया विरूद्ध पश्चिम बंगाल राज्य, ए.आई.आर. 1953 एस.सी. 404, में महत्वपूर्ण निर्णय दिया, जिसके तथ्य इस प्रकार से हैं कि अपीलार्थी अभियुक्त ने वर्ष 1947 में एक विधि के अंतर्गत दण्डनीय अपराध किया, जिसके तहत निर्धारित कारावास या जुर्माना या दोनों के दण्डादेश का प्रावधान था। उक्त अधिनियम में पश्चात्वर्ती संशोधन कर जुर्माना राशि में वृद्धि कर दी गयी, जो कि अभियुक्त के पास से प्राप्त राशि के बराबर थी। सर्वोच्च न्यायालय ने पश्चात्वर्ती संशोधन को अनुच्छेद 20 (1) का उल्लघंन मानते हुए अमान्य किया।

(स) अनुच्छेद 20 (1) की सुरक्षा कब लागू नहीं :– अनुच्छेद 20 (1) केवल दोषसिद्धि और दंड से संरक्षण प्रदान करता है न कि विचारण प्रक्रिया में संशोधन से। यदि किसी अपराध में विचारण प्रक्रिया संबंधी प्रावधान, किसी व्यक्ति के कृत्य के समय प्रवृत्त विधि के पश्चात् विधान मंडल द्वारा संशोधित किए जाते है, तो विचारण प्रक्रिया संबंधी प्रावधान के संशोधन से संरक्षण प्राप्त नहीं है (आर.एस.बी.सिंह विरूद्ध विंध्य प्रदेश राज्य, (उपरोक्त)) इस संबंध में बिहार राज्य विरूद्ध शैलबाला, ए.आई.आर. 1952 एस.सी. 329 में माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित किया गया कि निवारक निरोध के विरूद्ध या किसी व्यक्ति से सुरक्षा की मांग या अजमानतीय मामलों में अनुच्छेद 20 (1) का संरक्षण प्राप्त नहीं होगा। इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा व्यवहार प्रकृति के मामलों में अनुच्छेद 20 (1) के उपबंध लागू न होने के संबंध में महत्वपूर्ण निर्णय हाथी सिंह मेनुफेक्चरिंग कंपनी विरूद्ध भारत संघ, ए.आई.आर. 1960 एस.सी. 923 में प्रतिपादित किया गया कि व्यवहार दायित्व के संबंध में भूतलक्षी प्रभाव के प्रावधान अधिरोपित किये जा सकते है, परंतु इसका विस्तार अनुच्छेद 20 (1) में प्राप्त संरक्षण के उल्लंघन तक नहीं किया जा सकता है।

(द) लाभकारी उपबंध :– माननीय सर्वोच्च न्यायालय के द्वारा अनुच्छेद 20 (1) के प्रावधान का लचीला निर्वाचन करते हुए रतनलाल विरूद्ध पंजाब राज्य, ए.आई.आर. 1965 एस.सी. 444 में अभिनिर्णित किया गया कि यदि कोई भूतलक्षी विधि किसी कठोरता को कम करती है तब लाभकारी उपबंध का निर्वाचन अभियुक्त के पक्ष में किया जाना चाहिए। ऐसी विधि, जो किसी दंड में न्यूनतम अर्थदंड या न्यूनतम कारावास की सजा का प्रावधान करती है तो ऐसे न्यूनतम दंड से व्यक्ति को दंडित किया जा सकेगा, चाहे उसके कार्य करते समय उक्त अपराध में वह न्यूनतम दंड प्रावधानित था या नहीं तथा उसे ऐसा नहीं समझा जाएगा कि वह किसी वर्धित दंड का प्रावधान है, (के. सतबंत सिंह विरूद्ध स्टेट, ए.आई.आर. 1960 एस.सी. 266)।

दोहरे दंड से संरक्षण

भारतीय संविधान में अनुच्छेद 20 (2) में किसी अपराध के अभियुक्त/दोषी व्यक्ति को बचाव प्रदत्त किया गया है–'' किसी व्यक्ति को एक ही अपराध के लिए एक बार से अधिक अभियोजित और दंडित नहीं किया जाएगा।'' उक्त सिद्धांत का प्रेरणा स्त्रोत अंग्रेजी व अमेरिकन न्याय शास्त्र का सर्वविदित सिद्धांत nemo debet bis vexari (अर्थात् किसी व्यक्ति को एक ही अपराध के लिए दोहरे दण्ड से दंडित नहीं किया जाना चाहिए)। भारतीय संविधान द्वारा प्रदत्त संरक्षण उक्त दोनों देशों में प्रदत्त संरक्षण की अपेक्षा सीमित है, क्योंकि यदि दोनों देशों में किसी अभियुक्त व्यक्ति का एक बार विचारण किया जा चुका है एवं उसे परीक्षण में उन्मोचित कर दिया गया हो, तो भी पुनः उस कृत्य के अपराध के लिए विचारित नहीं किया जाएगा, किंतु भारतीय संविधान के अनुसार उक्त अनुच्छेद में संरक्षण तभी प्राप्त है, जब उसे अभियोजित तथा दंडित किया गया हो। यदि परीक्षण में उसे न्यायालय के द्वारा उन्मोचित कर दिया गया हो, तो पुनः उसी के अपराध के लिए परीक्षण वर्जित नहीं है। भारतीय संविधान के अनुच्छेद 20 (2) autrefois convict पर आधारित है, न कि autrefois acquit पर। अनुच्छेद 20 (2) के संरक्षण के लिए तीन आवश्यक तत्व हैं :–

1. व्यक्ति का अभियुक्त होना आवश्यक है।
2. कार्यवाही न्यायिक अभिकरण के समक्ष न्यायिक प्रकृति की हो, अर्थात् प्रथम अभियोजन सक्षम न्यायालय/न्यायाधिकरण के समक्ष होना चाहिए (असिस्टेंट कलेक्टर ऑफ कस्टम विरूद्ध एल. आर. मिलवानी, ए.आई.आर. 1970 एस.सी. 962 एवं मकबूल विरूद्ध स्टेट, (उपरोक्त))। न्यायिक कार्यवाही का आशय है प्रकरण का निर्णय शपथ पर साक्ष्य के अनुसार हो।
3. उस व्यक्ति का अभियोजन किसी विधि विहित अपराध के संबंध में हो और दण्ड का प्रावधान हो।

माननीय सर्वोच्च न्यायालय के द्वारा अनुच्छेद 20 (2) के भिन्न–भिन्न पहलुओं पर व्याख्या कर इस प्रावधान को स्पष्ट किया गया है :–

(अ) धारा 300 द.प्र.सं. व अनुच्छेद 20 (2) :– संविधान के अनुच्छेद 20 (2) का संरक्षण अन्य अर्थों में आपराधिक प्रांड. न्याय का सिद्धांत है, जिसका समवर्ती प्रावधान धारा 300 द.प्र.स. में स्थापित है, परंतु धारा 300 द.प्र.स. के प्रावधान का संरक्षण अनुच्छेद 20 (2) के संरक्षण से विस्तृत है। जहाँ अनुच्छेद 20 (2) में प्रावधान है कि ''किसी व्यक्ति को एक ही अपराध के लिए एक बार से अधिक अभियोजित एवं दंडित नहीं किया जाएगा।'' वहीं दूसरी ओर धारा 300 (1) प्रावधानित करती है कि ''व्यक्ति न तो उसी अपराध के लिए पुनः विचारण का भागी होगा और न उन्हीं तथ्यों पर किसी अन्य अपराध के लिए विचारण का भागी होगा।'' यदि पूर्ववर्ती अभियोजन का परिणाम दोषमुक्ति है, तो उक्त सुरक्षा प्राप्त नहीं है, परंतु **कलावती एवं अन्य विरूद्ध हिमाचल प्रदेश राज्य, ए.आई.आर. 1953 एस.सी. 131** में माननीय उच्चतम न्यायालय के द्वारा मत प्रतिपादित किया गया कि धारा 300– द.प्र.सं. दोषमुक्ति की दशा में भी पुनः विचारण किए जाने का प्रतिषेध करती है। कल्ला वीरा राघव राव विरूद्ध गोरनटिया वेकेंटेश्वरा राव एवं अन्य ए.आई.आर. 2011 एस.सी. 641 में माननीय न्यायालय के द्वारा यह मत प्रतिपादित किया गया कि द.प्र.सं. की धारा 300 में समान तथ्य तथा दोषमुक्ति पर पुनः विचारण का प्रतिषेध किया गया है, वहीं अनुच्छेद 20 (2) समान अपराध में दोषसिद्धि की दशा में ही प्रयोज्य है।

(ब) विभागीय या प्रशासनिक कार्यवाहियां न्यायिक कार्यवाही नहीं हैः– गुलाम अहमद विरूद्ध स्टेट ऑफ जम्मू एंड कश्मीर, ए.आई.आर. 1954 जे.एडं के. 59 के प्रकरण में यह मत प्रतिपादित किया गया कि निवारक निरोध न तो अभियोजन है और न ही दण्ड। अतः निवारक निरोध में निरूद्ध व्यक्ति को अभियोजित किया जा सकता है; ऐसे प्रकरण में अनुच्छेद 20 (2) का संरक्षण प्राप्त नहीं है। **मकबूल हसन विरूद्ध बंबई राज्य,** (उपरोक्त) के प्रकरण में माननीय उच्चतम न्यायालय ने निर्णित किया कि कस्टम अधिकारी न्यायालय नहीं है, अतः कस्टम अधिकरण के द्वारा जब्तशुदा सोना राजसात करने और जुर्माना वसूलने की कार्यवाही जो कस्टम एंड गोल्ड कंट्रोल एक्ट के अंतर्गत की जाती है, उनसे अनुच्छेद 20 (2) के अंतर्गत दोहरे दंड से संरक्षण प्राप्त नहीं है। इसी प्रकार वी.के. अग्रवाल विरूद्ध बसंतराज, ए.आई.आर. 1988 एस.सी. 1106 के प्रकरण में निर्णित किया गया है कि कस्टम एक्ट के अंतर्गत गठित अपराध सुभिन्न अपराध है तथा उसके अंतर्गत की गई दोषसिद्धि न्यायिक कार्यवाही नहीं है। उक्त कृत्य के लिए पृथक से आरोप विरचित किया जा सकता है। एस. वेंकटरमन विरूद्ध भारत संघ, ए.आई.आर. 1954 एस.सी. 375, के प्रकरण में कर्मचारी को पब्लिक सर्विस एक्ट 1961 के अंतर्गत जांच में नौकरी से बर्खास्त कर दिया गया था। न्यायालय ने प्रथम कार्यवाही को विभागीय कार्यवाही माना, एवं यह माना की यह न्यायिक प्रकृति की नहीं थी। यदि दूसरी कार्यवाही प्रथम कार्यवाही की अनुवर्ती है, तब भी अनुच्छेद 20 (2) का संरक्षण प्राप्त नहीं होता है। राजनारायण लाल बंशीलाल विरूद्ध मेनका फिरोज मिस्त्री, ए.आई.आर. 1961 एस.सी. 29 के वाद में माननीय उच्चतम न्यायालय ने यह सिद्धांत प्रतिपादित किया कि अर्धन्यायिक निकायों द्वारा की गई कार्यवाही बाद में किसी न्यायालय के समक्ष अभियोजन में बाधा उत्पन्न नहीं करती है।

(स) दोष मुक्ति में दूसरे अभियोजन से वर्जन नहीं :– यदि कोई कृत्य एकाधिक सुभिन्न अधिनियमों में अपराध है, तो ऐसी स्थिति में अनुच्छेद 20 (2) के प्रावधान आकर्षित नहीं होते हैं तथा

उनका संरक्षण प्राप्त नहीं होगा स्टेट ऑफ बिहार विरूद्ध मुराद अली खान, (1988) 4 एस.सी.सी. 655, यदि पूर्ववर्ती कार्यवाही में बिना किसी युक्तियुक्त एवं तार्किक निष्कर्ष के कार्यवाही समाप्त कर दी गई है, ऐसी स्थिति में उसी अपराध के लिए पश्चात्वर्ती संज्ञान और विचारण जो किसी अन्य अधिकरण के द्वारा किया गया हो, दोहरे विचारण की परिधि में नहीं आता है (शिवप्रसाद पांडे विरूद्ध सी.बी. आई, ए.आई.आर. 2003 एस.सी. 1974)। इसी अनुक्रम में लियो राय फ्रे विरूद्ध अधीक्षक जिला कारगार, ए.आई.आर. 1958 एस.सी. 119 में याचिकाकर्ता को धारा 107 (8) सी. कस्टम एक्ट 1878 के अपराध का दोषी पाया गया था तथा विधि अनुसार दंडित भी किया गया था। तत्पश्चात् उसे धारा 120 बी भा.द.सं. के तहत अभियोजित किया गया, जिस संबंध में माननीय सर्वोच्च न्यायालय के द्वारा अभिनिर्णित किया गया कि द्वितीय अभियोजन वर्जित नहीं, क्योंकि दोनों अपराध भिन्न हैं। अतः अनुच्छेद 20 (2) का लाभ याचिकाकर्ता को प्राप्त नहीं होगा।

(द) दोहरे जोखिम का सिद्धांत :– दोहरे दंड का बचाव निश्चित रूप से आपराधिक मामलों में विबंधन से भिन्न है – प्यारसिंह विरूद्ध पंजाब राज्य, 1969 एस.सी.सी. 379 में व्यक्त किया गया है कि जहां किसी विवाद्यक तथ्य को सक्षम न्यायालय के द्वारा निर्णित कर दिया गया हो तथा ऐसे निर्णय में अभियुक्त के पक्ष में कुछ बातें आई हों, तब ऐसा निष्कर्ष अभियोजन के विरूद्ध विबंधन/प्रांड–न्याय तो गठित कर सकता है, परंतु अभियुक्त के विरूद्ध सुभिन्न अपराध के विचारण तथा दोषसिद्धि का वर्जन नहीं करेगा।

अनुच्छेद 20 (3) आत्म अभिशंसन के विरूद्ध प्रतिषेध

अनुच्छेद 20 (3) आत्म अभिशंसन के विरूद्ध प्रतिषेध सिद्धांत को समाविष्ट करता है। जिसका मूल ब्रिटिश आपराधिक न्याय शास्त्र के सर्वविदित सूत्र nemo seipsum accusari है अर्थात् कोई भी व्यक्ति स्वयं के विरूद्ध साक्षी बनने के लिए बाध्य नहीं होगा। अपराधी के अपराध को सिद्ध करने का भार भारतीय साक्ष्य अधिनियम के अनुसार अभियोजन पर होता है न कि अपराधी पर। अतः अपराधी को अपराध में स्वयं के विरूद्ध साक्ष्य देने के लिए दबाव डालकर बाध्य नहीं किया जा सकता। परिणामतः अभियुक्त का पुलिस अधिकारी के समक्ष, जब वह अभिरक्षा में था, दिये गये स्वयं के दोषारोपण संबंधी कथन का प्रयोग उसके विरूद्ध नहीं किया जा सकता है। करतार सिंह विरूद्ध स्टेट ऑफ पंजाब, (1994) 3 एस.सी.सी. 569, अनुच्छेद 20 (3) का मुख्य उद्देश्य अभियुक्त व्यक्ति को स्वयं के विरूद्ध दोषारोपण करने वाली बाध्यता से संरक्षण प्रदान करना है। हमारे देश के आपराधिक विधि का आधारभूत सिद्धांत है कि एक अभियुक्त व्यक्ति के निर्दोष होने की उपधारणा की जाती है और उसे स्वयं के विरूद्ध शपथ पर कथन करने के लिए बाध्य नहीं किया जा सकता है (के. जोसेफ विरूद्ध एम.ए. नारायणन, ए.आई.आर. 1964 एस.सी. 1552) उक्त अनुच्छेद के अंतर्गत संरक्षण के लिये निम्न तथ्य आवश्यक हैं:–

1. व्यक्ति किसी अपराध का अभियुक्त हो।
2. यह साक्षी बनने की बाध्यता के विपरीत संरक्षण है।

3. यह ऐसी बाध्यता के विरूद्ध संरक्षण है जिसका परिणाम स्वयं के विरूद्ध साक्ष्य देना है। यह अभियुक्त के द्वारा स्वयं को दोषारोपित किये जाने के विरूद्ध संरक्षण है। इसका तात्पर्य यह नहीं है कि वह ऐसी बातों की भी सूचना न दे, जिसकी प्रवृत्ति उसे दोषी बनाने की नहीं है (आर.बी.शाह. विरूद्ध डी.के. गुहा, ए.आई.आर. 1973 एस.सी. 1196)

किसी अपराध के अभियुक्त से तात्पर्य :– ऐसा व्यक्ति जिसके विरूद्ध किसी अपराध का विचारण प्रारंभ किया गया है तथा उसकी प्रास्थिति एक अपराध के अभियुक्त की है, तत्समय वह व्यक्ति, एक अपराध का अभियुक्त व्यक्ति है। इस धारा का संरक्षण किसी ऐसे व्यक्ति, जिसके विरूद्ध प्रथम सूचना प्रतिवेदन पंजीबद्ध कर दिया गया हो, को प्राप्त है (एम.पी.शर्मा विरूद्ध सतीश चन्द्र ए.आई.आर. 1954 एस. सी. 300) न्यायालय अवमानना की कार्यवाही में किसी व्यक्ति की प्रास्थिति किसी अपराध के अभियुक्त व्यक्ति की नहीं होती है (देल्ही जुडिशियल सर्विस एसोसिएशन विरूद्ध स्टेट ऑफ गुजरात, ए.आई.आर. 1991 एस.सी. 2176)।

अनुच्छेद 20 (3) के अंतर्गत ''साक्षी होना'' से तात्पर्य :– माननीय सर्वोच्च न्यायालय के द्वारा एम.पी. शर्मा विरूद्ध सतीश चन्द्र, (उपरोक्त) के प्रकरण में अनुच्छेद 20 (3) के विस्तार की विस्तृत रूप से व्याख्या की गयी है – ''यह अधिकार उस व्यक्ति का है जिस पर अपराध करने का आरोप लगाया गया है, यह सुरक्षा स्वयं के विरूद्ध साक्ष्य देने पर उपलब्ध होगी।'' इसी प्रकरण में यह भी स्पष्ट किया गया है कि वास्तविक विचारण या जांच का न्यायालय के समक्ष प्रारंभ होना आवश्यक नहीं है, अपितु यदि व्यक्ति का नाम प्रथम सूचना प्रतिवेदन में अभियुक्त के रूप में लेख होने पर या विवेचना का आदेश होने पर भी इस अधिकार को गारंटी के रूप में प्राप्त किया जा सकता है। माननीय सर्वोच्च न्यायालय ने इसी प्रकरण में स्पष्ट किया है कि अनुच्छेद 20 (3) में “to be a witness” प्रयुक्त है न कि “appear as witness”. Every possible volitional act which furnishes evidence is testimony and testimonial compulsion connotes a coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part”

अभियुक्त को स्वयं के विरूद्ध साक्ष्य देने की बाध्यता एवं संरक्षण की सीमाएं :– उपरोक्त के संबंध में न्यायदृष्टांत एम.पी. शर्मा विरूद्ध सतीश चन्द्र, (उपरोक्त) में माननीय सर्वोच्च न्यायालय के द्वारा साक्षी शब्द का विषद अर्थ निकाला गया तथा इसके अंतर्गत सभी प्रकार की साक्ष्य जैसे मौखिक, दस्तावेजी या अन्य प्रकार उदाहरणार्थ अंगुष्ट चिन्ह या हस्ताक्षर भी सम्मिलित मानते हुए सभी से संरक्षण प्रदान किया गया है, परंतु उक्त न्यायदृष्टांत में प्रतिपादित मत की पुनः व्याख्या न्यायदृष्टांत स्टेट ऑफ बाम्बे विरूद्ध काथी कालू अघोर, ए.आई.आर. 1961 एस.सी. 1808 में करते हुए एम.पी. शर्मा के प्रकरण में साक्षी बनने के लिए विषय व्याख्या को सीमित कर दिया गया। इसमें साक्ष्य का अर्थ मौखिक साक्ष्य या ऐसे लिखित कथन जो उसके विपरीत लगाए आरोपों से संबंधित विवादास्पद विषय पर प्रकाश डालते हो, तक सीमित किया गया तथा यह मत प्रतिपादित किया गया कि इसमें ऐसे कथन या तथ्य शामिल नहीं है, जो व्यक्तिगत ज्ञान पर आधारित हों, इसके अंतर्गत अंगुष्ट चिन्ह, हाथ–पैर की उंगलियों के चिन्ह एवं हस्तलेख आदि सम्मिलित नहीं माने गए एवं इन्हें प्रदान करने को अपने विरूद्ध साक्ष्य देना नहीं माना गया है।

माननीय सर्वोच्च न्यायालय के माननीय न्यायमूर्ति वी. के. कृष्ण अय्यर के द्वारा न्यायदृष्टांत नंदिनी सत्पथी विरूद्ध पी. एल. धनी., ए. आई. आर. 1978 एस.सी. 1025 के प्रकरण में ''बाध्यता'' शब्द का विस्तार कर दिया गया तथा घोषित किया गया कि इसके अंतर्गत शारीरिक मानसिक दबाव, थका देने वाली पूछताछ, भय उत्पन्न करके प्राप्त अभिसाक्ष्य सम्मिलित हैं तथा महत्वपूर्ण रूप से व्याख्या की, कि यदि शंका के आधार पर व्यक्ति से पूछताछ की गयी हो एवं वह व्यक्ति अभियुक्त नहीं हो, तब भी अनुच्छेद 20 (3) का संरक्षण प्राप्त होगा।

रक्त नमूने के संबंध में विधिक स्थिति :– क्या अभियुक्त को उसके रक्त का नमूना देने के लिए बाध्य किया जा सकता है?

न्याय दृष्टांत स्टेट ऑफ बॉम्बे विरूद्ध काथी कालू औघट, ए.आई.आर. 1961 एस.सी. 1808 (11 न्यायमूर्तिगण की पीठ) में माननीय सर्वोच्च न्यायायल के द्वारा यह धारित किया गया था कि यदि अभियुक्त हस्ताक्षर अथवा अंगुष्ट चिन्ह इत्यादि का नमूना देता है, तो इसे स्वयं के विरूद्ध साक्ष्य देना नहीं कहा जा सकता है। यहां ध्यान देने योग्य तथ्य यह है कि उपरोक्त प्रकरण में स्वयं के रक्त का नमूना देने से संबंधित परिस्थिति प्रश्नगत नहीं थी। इसके उपरांत न्याय दृष्टांत गौतम कुन्दू विरूद्ध स्टेट ऑफ वेस्ट बंगाल ए.आई.आर. 1993 एस.सी. 2295 में यह कहा गया है कि किसी भी व्यक्ति को उसके रक्त का नमूना देने के लिए बाध्य नहीं किया जा सकता, परंतु एक तो यह प्रकरण धारा 125 दण्ड प्रक्रिया संहिता का था एवं दूसरा यह प्रकरण दण्ड प्रक्रिया संहिता के उक्त संशोधित प्रावधान के पूर्व का था। अमृत सिंह विरूद्ध स्टेट ऑफ पंजाब ए.आई.आर. 2007 एस.सी. 123 वाले प्रकारण में माननीय सर्वोच्च न्यायालय के समक्ष प्रश्न यह था कि क्या अभियुक्त को उसके बालों का नमूना देने के लिए बाध्य किया जा सकता है। इस संबंध में माननीय सर्वोच्च न्यायालय के द्वारा यह धारित किया गया कि बालों का नमूना देना अथवा न देना उसकी इच्छा पर निर्भर है, उसे नमूने देने के लिए बाध्य नहीं किया जा सकता है। हलप्पा विरूद्ध कर्नाटक राज्य, 2010 सी.आर.एल.जे. 4341 में माननीय कर्नाटक उच्च न्यायालय के द्वारा यह प्रतिपादित किया गया है कि धारा 53 ए दण्ड प्रक्रिया संहिता, जो कि वर्ष 2005 के संशोधन से जोड़ी गयी है, अल्ट्रा वायरस नहीं है। डी.एन.ए. जांच के लिए अभियुक्त के रक्त का नमूना उसकी सहमति के बिना लिया जा सकता है एवं यह संविधान के अनुच्छेद 20 (3) का उल्लघंन नहीं है। इस प्रकरण में यह भी कहा गया है कि न्याय दृष्टांत अमृत सिंह विरूद्ध स्टेट ऑफ पंजाब ए.आई.आर. 2007 एस.सी. 132 दो न्यायमूर्तिगण की पीठ का न्याय दृष्टांत, न्याय दृष्टांत स्टेट ऑफ बाम्बे विरूद्ध काथी कालू औघड़, ए.आई. आर. 1961 एस.सी. 1808 (11 न्यायमूर्तिगण की पीठ) के प्रकाश में अच्छी विधि नहीं है, क्योंकि काथी कालू औघड वाले प्रकरण में 11 न्यायमूर्तिगण की पीठ के द्वारा यह धारित किया गया था कि यदि अभियुक्त हस्ताक्षर अथवा अंगुष्ट चिन्ह आदि का नमूना देता है, तो इसे स्वयं के विरूद्ध साक्ष्य देना नहीं कहा जा सकता है।

न्याय दृष्टांत कृष्ण कुमार मलिक विरूद्ध स्टेट ऑफ हरियाणा ए. आई. आर. 2011 एस.सी. 2877 में निर्णय चरण 45 में माननीय सर्वोच्च न्यायालय ने बलात्कार के एक मामले में, धारा 53 ए

दण्ड प्रक्रिया संहिता के संशोधित प्रावधान के प्रकाश में यह कहा है कि अभियोजन को अभियुक्त के विरूद्ध इस प्रकार के मामलों में अपना प्रकरण प्रमाणित करने के लिए उसका डी. एन. ए. परीक्षण करवाना चाहिए।

अतः दण्ड प्रक्रिया संहिता के संशोधित प्रावधान धारा 53 ए, धारा 53 के स्पष्टीकरण एवं धारा 54 के प्रकाश में नवीनतम वैधानिक स्थिति यह स्पष्ट होती है कि अभियुक्त को उसके रक्त का नमूना देने के लिए बाध्य किया जा सकता है।

डी. एन. ए. प्रोफाइल :– क्या डी. एन. ए. प्रोफाइल अनुच्छेद 20 (3) के अर्थों में प्रमाण संबंधी बाध्यता के अंतर्गत है ? डी.एन.ए. प्रोफाइल तकनीक द.प्र.सं. की धारा 53 तथा 53. क में अभियुक्त के चिकित्सकीय परीक्षण तथा धारा 164. क में पीड़िता के चिकित्सीय परीक्षण में वर्णित है। इसकी साक्ष्यिक मान्यता साक्ष्य अधिनियम की धारा 45 के अंतर्गत है। डी.एन.ए. प्रोफाइल डी.एन.ए. नमूने के आधार पर फॉरेन्सिक विशेषज्ञों द्वारा तैयार किया गया ज्ञात तत्वों का लेख प्रमाण है। अपराधियों एवं संदेही व्यक्तियों के डी.एन.ए. प्रोफाइल तैयार करना एवं उन्हें संधारित करना तथा ऐसे डी.एन. ए. नमूने के अस्तित्व प्रोफाइल से मिलान से प्राणभूत तत्व उद्भूत होता है, जो विशिष्ट आपराधिक कृत्य के संदेही व्यक्ति की साक्ष्य की कड़ियों को जोड़ता है, एवं यह परीक्षण अनुच्छेद 20 (3) की परिधि में नहीं आता है। इस प्रकार यदि डी.एन.ए. प्रोफाइल तकनीक को परीक्षण के उद्देश्यों के लिए विकसित किया गया हो, तब उसका उपयोग न्यायिक क्रियान्वयन में भविष्य में आने वाली चुनौतियों का सामना करने में किया जा सकेगा (सेल्वी विरूद्ध स्टेट ऑफ कर्नाटका, ए.आई.आर.2010 एस.सी. 1974) (3 न्यायमूर्तिगण की पीठ)।

नार्को टेस्ट :– नार्को टेस्ट के संबंध में न्यायदृष्टांत सेल्वी विरूद्ध स्टेट ऑफ कर्नाटक, (उपरोक्त) अवलोकनीय है, जिसमें माननीय सर्वोच्च न्यायालय के द्वारा यह मत प्रतिपादित किया गया कि अभियुक्त के संदर्भ में नार्को टेस्ट की बाध्यता उसके युक्तियुक्त एवं ऋजु विचारण के अधिकार को प्रभावित करती है। इस उपाय के द्वारा वह अपने विधिक सहायता के अधिकार से वंचित हो जाता है। पौलीग्राफी और ब्रेन मेपिंग जैसे परीक्षण न्यायाधीश के रूप में सत्य के अन्वेषण में बाधा उत्पन्न करते हैं। इसके अतिरिक्त ऐसे परीक्षण आपराधिक विचारण में साक्ष्य के क्षीण मानक तथ्य है। ऐसी स्थिति में माननीय सर्वोच्च न्यायालय के द्वारा प्रतिपादित उपरोक्त सिद्धांत के अनुसरण में नार्को परीक्षण कराने की अनुमति नहीं दी जानी चाहिए।

संविधान के अनुच्छेद 20 (3) एवं भारतीय साक्ष्य अधिनियम के प्रावधानों के परिप्रेक्ष्य में अभिरक्षा में लिए गये कथन :– धारा 27 भारतीय साक्ष्य अधिनियम एवं अनुच्छेद 20 (3) के संबंध में काथी कालू के प्रकरण में माननीय सर्वोच्च न्यायालय के द्वारा यह मत पारित किया गया कि अभियुक्त की पुलिस अभिरक्षा में तथ्य की खोज के संबंध में ली गई साक्ष्य ग्राह्य है तथा ऐसी साक्ष्य अनुच्छेद 20 (3) के उल्लघंन में नहीं है। न्यायदृष्टांत श्यामलाल मोहनलाल विरूद्ध स्टेट ऑफ गुजरात, ए.आई.आर. 1965 एस.सी. 1251 में माननीय न्यायालय के द्वारा यह मत प्रतिपादित किया गया कि भारतीय साक्ष्य अधिनियम की धारा 73 न्यायालय को अधिकार प्रदान करती है कि वह

अभियुक्त व्यक्ति से उसके किसी चिन्ह, की जानकारी तथा हस्तलिपि, हस्ताक्षर या अंगुष्ट चिन्ह का नमूना प्राप्त कर सके, जिससे कि उसकी अन्य से तुलना की जा सके। इसमें अनुच्छेद 20 (3) का उल्लघंन नहीं होता है।

धारा 91 एवं धारा एवं 94 दंड प्रक्रिया संहिता के अंतर्गत ली गई साक्ष्य अनुच्छेद 20 (3) के उल्लघंन में नहीं है (स्टेट विरूद्ध श्यामलाल, ए.आई.आर. 1965 एस.सी. 1251 एवं स्टेट विरूद्ध काथी कालू, ए.आई. आर. 1961 एस.सी. 1808) इसी अनुक्रम में युसूफ अली ए.आई.आर. 1968 एस.सी. 147 के प्रकरण में दो व्यक्तियों के बीच बातचीत को पुलिस ने एक व्यक्ति की अनुमति से टेप रेकॉर्ड कर लिया था। इसे साक्ष्य के रूप में प्रयोग किया जा सकता था, क्योंकि यह स्वैच्छिक था। मात्र ''जानकारी के बिना'' के आधार पर उसे साक्ष्य में अग्राहय नहीं किया जा सकता है। अनुच्छेद 20 (3) के अंतर्गत तलाशी वारंट नहीं आता है। यदि कोई व्यक्ति तलाशी के समय अभियुक्त नहीं है, परंतु बाद में हो जाता है, तब वह अनुच्छेद 20 (3) के संरक्षण का दावा नहीं कर सकता है।

किसी प्रशासनिक निकाय के द्वारा की जा रही कार्यवाही में भी 20 (3) का संरक्षण प्राप्त नहीं होता है। न्यायालय अवमाना की कार्यवाही अपराधिक कार्यवाही नहीं है। अतः इसमें 20 (3) का संरक्षण प्राप्त नहीं है (दिल्ली न्यायिक सेवा संघ तीस हजारी न्यायालय गुजरात राज्य, ए.आई.आर. 1991 एस.सी. 2177)

अनुच्छेद 20 (3) के अंतर्गत मौन रहने का अधिकार :– अनुच्छेद 20 (3) प्रावधित करता है कि किसी अपराध के अभियुक्त व्यक्ति को स्वयं के विरूद्ध साक्षी होने के लिए बाध्य नहीं किया जाएगा। ऐसी स्थिति मे अभियुक्त व्यक्ति के मौन रहने का अधिकार संविधान द्वारा प्रदत्त नागरिक स्वतंत्रता के अधिकार तक विस्तारित है आलोक नाथ दत्त विरूद्ध पश्चिम बंगाल राज्य, (2007) 12 एस.सी.सी. 230, अपराधी स्वयं की स्वतंत्र सम्मति के बिना कोई स्वीकृति करने या विवरण देने हेतु बाध्य नहीं है। भारतीय संविधान के अनुच्छेद 20 (3) के द्वारा प्रदत्त यह मूलाधिकार, नागरिक व राजनैतिक अधिकारों के अंतर्राष्ट्रीय कन्वेन्शन (ICCPR) के अनुच्छेद 14 में भी अंगीकृत किया गया है। इसे अक्सर, मौन रहने का अधिकार भी कहा जाता है।

भारतीय संविधान के अनुच्छेद 20 के द्वारा प्रदत्त सुरक्षा को अनुच्छेद 21 के परिप्रेक्ष्य में देखा जाना चाहिए; क्योंकि अनुच्छेद 20 में प्रदत्त अधिकारों को दिए बिना अनुच्छेद 21 के उद्देश्य की पूर्ति नहीं हो पाएगी। अतः व्यक्ति के प्राण व दैहिक स्वतंत्रता को वास्तविक अर्थों में प्राप्त करने के लिए अनुच्छेद 20 व 21 को संयुक्त रूप में ही देखा जाना चाहिए। अनुच्छेद 20 में प्रदत्त अधिकार व्यक्तियों को अत्याचार व यातना से सुरक्षा प्रदान करने हेतु अनिवार्य है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

201. CIVIL PROCEDURE CODE, 1908 – Section 9
LAND REVENUE CODE 1959(M.P.), – Sections 250 and 257
Jurisdiction – Plaintiff is not bound to avail speedy remedy provided under section 250 of MPLRC – He can straightway bring a suit in the Civil Court for possession of agricultural land on the basis of title (Bhumiswamitwa) – Such a suit is maintainable.

Om Prakash & another v. Ashok Kumar and another
Order dated 04.01.2013 passed by the High Court of M.P. in Misc. Appeal No. 1061 of 2003, reported in 2013 (2) MPHT 494

Extracts from Order:

The plaintiff on the basis of his title i.e. Bhumiswami right has filed the present suit for possession which cannot be said to be barred in any manner in civil Court.

In Full Bench decision ***Ramgopal v. Chetu, 1976 JLJ 278***, the civil suit for declaration and possession was filed but in the same decision it has also been categorically held in Para 10 by Full Bench of this Court that determination of the question of title is the province of the civil Court and unless there is any express provision to the contrary, exclusion of the jurisdiction of the civil Court cannot be assumed or implied.

Further it has been held that although a speedy remedy is provided under section 250 of the Code to a Bhumiswami but he is not bound to avail that remedy and it is open to him to take recourse to the summary remedy under section 250 or even without it straightway the plaintiff can bring a suit in the Civil Court for declaration of his title and possession.

Further it has been held in Para 17 that even if there has been a decision under section 250 by a revenue Court, the party aggrieved may institute a civil suit to establish his title to the disputed land. Nowhere in this decision it has been held that simpliciter suit for possession is not maintainable if it has been filed on the basis of title and; therefore, according to me, learned counsel for the plaintiff/respondent No. 1 was right in his submission that the Full Bench decision of this Court in ***Ramgopal*** (supra) does not go against the plaintiff rather it strengthens the case of plaintiff.

I may further add that the Full Bench decision ***Ramgopal*** (supra) has been affirmed and approved by the Apex Court twice. Firstly, in ***Rohini Prasad and others v. Kasturchand and another, (2000) 3 SCC 668*** and secondly in ***Hukum Singh (Dead) by LRs and others v. State of M.P., (2005) 10 SCC 124.*** In these two decisions also it has been held that the jurisdiction of civil Court is not barred under section 257 in respect to question of title. In the case of ***Rohini Prasad*** (supra) a simplicitor

suit for possession on the basis of title was filed which was decreed by High Court in Second Appeal although the ***mesne profits*** were not directed to be paid. The Supreme Court has categorically held that the suit for possession on the basis of title is not barred under section 257 of the Code. The decision of ***Rohini Prasad*** (supra) was also taken into account in later decision by the Supreme Court in ***Hukum Singh*** (supra) and in para 8 of the said decision again the Supreme Court affirmed the Full Bench decision of this Court ***Ramgopal*** (supra). Hence, I am of the view that learned First Appellate Court rightly held that civil suit is maintainable.

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202. CIVIL PROCEDURE CODE, 1908 – Section 47, Order 21 Rule 35 and Order 26 Rule 9

(i) Execution of decree for delivery of immovable property – Permissibility of – Factors and Facts to be considered – Executing Court cannot consider factors and facts other than those considered by the Court in its judgment at the time of passing decree in favour of the decree-holder.

(ii) Unreasonable delay in execution of a decree – Entire effort of successful litigant goes in vain – Requirement of a conceptual change regarding civil litigation needed so that the emphasis is not only on the disposal of the suits, but also on securing relief to litigant.

Satyawati v. Rajinder Singh and another

Judgment dated 29.04.2013 passed by the Supreme Court in Civil Appeal No. 4176 of 2013, reported in (2013) 9 SCC 491

Extracts from Judgment:

By virtue of the decree, the appellant-plaintiff is entitled to possession of land admeasuring 80 sq. yd. forming part of land of Khasra No. 95/24/2 situated within the municipal limits of Palwal Town, Disrtrict Faridabad. When the execution petition was filed, the executing court rejected the execution petition by observing that the decree was not executable because of certain contradictory reports. It is pertinent to note that the judgment in favour of the appellant-plaintiff was delivered by considering a report dated 17-9-1989 and a sketch of land in question, which were made by the Local Commissioner and both are forming part of the record. It appears that some other reports, were considered by the executing court and after considering all the reports, the executing court, by its order dated 16-3-2009 came to the conclusion that the decree was not executable.

Looking to the facts of the case and upon hearing the learned counsel, we are of the view that the order passed by the executing court dated 16-3-2009, which has been confirmed by the High Court is not correct for the reason that

the executing court ought not to have considered other factors and facts which were not forming part of the judgment and the decree passed in favour of the appellant-plaintiff. Once the decree was made in favour of the appellant-plaintiff, in pursuance of the judgment dated 19-1-1996 delivered by the District Judge, Faridabad, in our opinion, the executing court should not have looked into other reports which had been submitted to it afterwards.

Upon perusal of the reports, we find that the Local Commissioner's report clearly describes the land which admeasures 80 sq. yd. and which is forming part of Khasra No. 95/24/2 and the report given by the Local Commissioner also gives details of the land in question by way of a sketch. In our opinion, the executing court ought to have looked at the sketch which was prepared by the Local Commissioner and which was accepted as a correct sketch by the appellate court while delivering the judgment dated 19-1-1996, which has become final.

It is really agonizing to learn that the appellant-decree-holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant-plaintiff had finally succeeded in January 1996. As stated hereinabove, the Privy Council in General Manager of the ***Raj Durbhunga v. Coomar Ramaput Sing, 20 ER 912*** had observed that the difficulties of a litigant in India begin when he has obtained a decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in ***Kuer Jang Bahadur v. Bank of Upper India Ltd., AIR 1925 Oudh 448*** (PC) the Court was constrained to observe that :

> "Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights."

In spite of the aforestated observation made in 1925, this Court was again constrained to observe in ***Babu Lal v. Hazari Lal Kihori Lal, (1982) 1 SCC 525*** in para 29 that :

> "29. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objection."

This Court, again in ***Marshall Sons & Co. (1) Ltd. v. Sahi Oretrans (P) Ltd., (1999) 2 SCC 325*** was constrained to observe in para 4 of the said judgment that :

> "4........ it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant

since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other hand, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time."

Once again in ***Shub Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 699***

> "In the present system, when preliminary decree for partition is passed there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."

As stated by us hereinabove, the position has not been improved till today. We strongly feel that should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

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203. CIVIL PROCEDURE CODE, 1908 – Section 80 (1) & (2) and Order 7 Rule 11

Suit filed without complying with the provisions of Section 80 (1) CPC – No order was passed on the application filed under Section 80 (2), whereby leave of the court for filing the suit without complying with the provisions of Section 80 (1) CPC was sought, till a final order was passed granting the said application – The regularity in filing of suit continued – Procedure for determination of such an application – The court is supposed to give hearing to both the sides and consider the nature of the suits and urgency of the matter before proceeding with the suit.

State of Kerala v. Sudhir Kumar Sharma

Judgment dated 02.09.2013 passed by Supreme Court in Civil Appeal No. 7364 of 2013, reported in (2013) 10 SCC 178

Extracts from Judgment:

It is an admitted fact that no order had been passed on the application filed under Section 80 (2) CPC whereby leave of the court had been sought for filing the suit without complying with the provisions of Section 80(1) CPC. In our opinion, a suit filed without compliance with Section 80 (1) cannot be regularized simply by filing an application under Section 80(2) CPC. Upon filing an application under Section 80 (2) CPC, the court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice under Section 80 (1) to the government authorities concerned. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination can it be presumed that the application is granted. If such a presumption is accepted, it would mean that the court has not to take any action, then we fail to understand as to why such an application should be filed.

It is an admitted fact that no order had been passed on the application filed under Section 80 (2) CPC. Till a final order is passed granting the said application, in our opinion, the irregularity in filing of the suit continues. If ultimately the application is rejected, the plaint is to be returned and in that event the application filed on behalf of the appellants under Order 7 Rule 11 CPC is to be granted. If the application filed under Section 80 (2) is ultimately granted, the objection with regard to non-issuance of notice under Section 80(1) CPC cannot be raised and in that event the suit would not fail on account of non-issuance of notice under Section 80(1) CPC.

We reiterate that till the application filed under Section 80(2) CPC is finally heard and decided, it cannot be known whether the suit filed without issuance of notice under Section 80 (1) CPC was justifiable. According to the provisions of Section 80(2) CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice under Section 80(1) CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application under Section 80(2) CPC. We, therefore, come to the conclusion that mere filing of an application under Section 80(2) CPC would not mean that the said application was granted by the trial court.

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204. CIVIL PROCEDURE CODE, 1908– Order 1 Rule 10 & Order 22 Rule 10
Addition of Parties – Courts' power to direct plaintiff to implead necessary party – Purchaser *pendente lite* is a necessary party and should be impledead as party – Court can direct the plaintiff, though *dominus litus*, to implead him for complete and final decision on the question involved in the matter.

Surendra Babu & ors. v. Abhay Saran & ors.
Order dated 25.03.2013 passed by the High Court of M.P. in W.P. No. 9219 of 2012, reported in 2013 (II) MPJR 165

Extracts from Order:

In ***Kasturi v. Iyyamperumal and others, (2005) 6 SCC 733,*** it was held that a purchaser is a necessary party as he would be affected if he had purchased the property in question. If there is a right to same relief against such party, he should be impleaded as a respondent. In ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others, (1992) 2 SCC 524,*** it was held that Court has jurisdiction under Order 1 Rule 10(2) CPC to exercise its discretion having regard to the facts and circumstances of a case. In exercise of this discretion, Court can direct a plaintiff, though *dominus litis*, to implead a person as a necessary party/defendant. It was held that where the presence of a party is necessary for complete and final decision on the question involved in the proceeding, the addition of party is permissible and such exercise of judicial discretion cannot be said to be without authority of law. In ***M.P. Electricity Board, Rajgarh (Bisora) v. Rukminibai & ors., 1992 (I) MPJR 56,*** this Court held that all persons who may be directly or indirectly interested either in the title to the land or for compensation etc. should be given opportunity to appear before the Court and put forth their case.

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205. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2
Pleadings; construction of – Pleadings are loosely drafted and Courts should not scrutinize the pleading with such meticulous care so as to result in genuine claims being defeated on trivial grounds – Further pleadings have to be read as a whole to ascertain their true import and the passages should not be culled out and read out of context in isolation.

Uday Chand Jain v. Smt. Sharda Jain
Order dated 12.04.2013 passed by the High Court of M.P. in S.A. No. 1112 of 2011, reported in ILR (2013) MP 1142

Extract from Order:

It is settled that the Court should not scrutinize the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial ground.

In ***Madan Gopal v. Mamraj, AIR 1976 SC 461*** it has been held that:

> "...........It is well-settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleading with such meticulous care so as to result in genuine claims being defeated on trivial grounds................"

Furthermore, it has also come to be settled that the pleadings have to be read as whole to ascertain their true import and not to cull out a passage to read the same in isolation. (See ***Udhav Singh v. M.R. Scindia, AIR 1976 SC 744*** wherein it is observed:

> "We are afraid, this ingenious method of construction after compartmentalization, dissection, segregation and inversion of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole."

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206. CIVIL PROCEDURE CODE, 1908 – Order 6 Rules 16 &17, Order 8 Rule 9 and Order 12 Rule 1

(i) Alternative pleas in W.S. – Though the defendant has a right to take alternative pleas in defence by way of amendment, it would be subject to qualifications which are (1) proposed amendment should not result in injustice to the other side, and (2) any admission made in favour of the plaintiff should not be withdrawn, and (3) inconsistent and contradictory allegations which negate admitted facts should not be raised.

(ii) Distinction between order 6 rule 16 and order 6 rule 17 – Under rule 16 a party may seek amendments in or striking out of the opponent's pleadings on the ground that they are unnecessary, scandalous, frivolous or vexatious whereas under rule 17 a party may amend one's own pleadings.

S. Malla Reddy v. Future Builders Coop. Housing Society

Judgment dated 18.04.2013 passed by the Supreme Court in Civil Appeal No. 3914 of 2013, reported in (2013) 9 SCC 349

Extracts from Judgment:

The Apex Court in ***Heeralal v. Kalyan Mal, (1998) 1 SCC 278*** held that once

the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn and such withdrawal would amount to totally displacing the case of the plaintiff which would cause him irretrievable prejudice. In another decision of the Supreme Court in ***B.K. Narayana Pillai v. Parameswaran Pillai, (2000) 1 SCC 712*** it was held that though the defendant has a right to take alternative pleas in defence by way of amendment, it would be subject to qualifications which are (1) proposed amendment should not result in injustice to the other side, and (2) any admission made in favour of the plaintiff should not be withdrawn, and (3) inconsistent and contradictory allegations which negate admitted facts should not be raised.

Order 6 Rule 16 CPC has been substituted by the CPC (Amendment) Act, 1976. This provision deals with the amendment or striking out of the pleadings, which a party desires to be made in his opponent's pleadings. In other words, the plaintiff or the defendant may ask the court for striking out the pleadings of his opponent on the ground that the pleadings are shown to be unnecessary, scandalous, frivolous or vexatious. This Rule is based on the principle of ***ex debito justitiae***. The Court is empowered under this Rule to strike out any matter in the pleadings that appear to be unnecessary, scandalous, frivolous or vexatious or which tends to prejudice, embarrass or delay the fair trial of the suit.

On the other hand, Order 6 Rule 17 CPC empowers the court to allow either party to alter or amend his own pleading and on such application the court may allow the parties to amend their pleadings subject to certain conditions enumerated in the said Rule.

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***207. CIVIL PROCEDURE CODE, 1908 – Order 18 Rule 4**

Examination of witnesses on commission – Provision of Order 18 Rule 4 (1) is introduced with a view to reducing consumption of judicial hours in process of recording oral evidence – However, in cases of serious disputes the Court may prefer to record the cross-examination of material witnesses itself and prayer for recording evidence by commissioner may be declined by court. (*Salem Bar Association, T.N. v. Union of India, AIR 2005 SC 3353* relied on)

Babulal v. Tarachand & anr.

Order dated 22.04.2013 passed by the High Court of M.P. in W.P. No. 21711 of 2012, reported in ILR (2013) MP 1065

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208. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3

COURT FEES ACT, 1870 – Sections 7 (iv) (c) and 28-A

(i) Whether compromise decree can be passed in a suit regarding such property which is not the subject-matter of the suit but related to the parties of the suit? Held, Yes.

(ii) Leviable Court Fees on relief for annulling a transaction which is voidable – Plaintiff is required to pay *ad valorem* court fees as per section 7 (iv) (c) of the Act and if plaintiff fails to pay the same, the State is free to recover the same from the plaintiff as land revenue.

Jivanlal v. Deepchand & ors.

Order dated 01.03.2013 passed by the High Court of M.P. in Civil Revision No. 44 of 2007, reported in 2013 (3) MPLJ 150

Extract of Order:

By amending Rule 3 of Order 23, the legislature has deliberately used the word "whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit". If this provision is applied in its stricto sensu, it would reveal that the property which is not the subject-matter of the suit but related to the parties to the suit, for that property also compromise may be arrived at in the Court and a compromise decree can be passed if it is arrived at by a lawful agreement.

So far as payment of Court fee in respect to smaller house which has been compromised is concerned, since plaintiff has filed the suit that the sale deed is not binding on him, I am of the view that plaintiff is challenging the transaction which is voidable and in this regard the decision of ***Pratap and another v. Punia Bai and others, 1976 MPLJ 627*** is quite relevant and, therefore, plaintiff is required to pay ad valorem Court fee upon it. However, the respondent/State is only having a right to recover the amount of Court fee from the plaintiff. The State Govt. is free to recover the Court fee from the plaintiff as land revenue, if it is not paid.

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209. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1, 2 & 3 and Order 43 Rule 1(r)

(i) *Ex parte* interim injunction – Court's power to grant such injunction is prescribed in rules 1 & 2 of Order 39 – Rule 3 merely provides a method to grant *ex parte* injunction when certain conditions are satisfied.

(ii) Whether order of *ex parte* interim injunction passed under rule 3 of order 39 is appealable? Held, Yes – Merely because in order 43 rule 1 (r), the rule 3 of order 39 is not mentioned, does not mean that the order is not appealable – As such, the petitioner having alternate remedy, a petition under Article 227 would not be maintainable.

Radheshyam Rathi v. Rotary Club, Gwalior & others

Order dated 08.04.2013 passed by the High Court of M.P. in W.P. No. 2285 of 2013, reported in 2013 (3) MPLJ 135

Extract of Order:

Under Order 39 Rule 3 a Court only decides whether to grant injunction ex parte or after giving notice to the other side. If the Court decides to issue notice and passes injunction order after giving notice, the power, in fact, is exercised under Order 39 Rule 1 & 2. In cases where the Court decides to pass injunction order without giving notice, in that eventuality also, the power of granting injunction is traced and flows from Order 39 Rule 1 and 2. Order 39 Rule 3 is only a method and option for the Court to issue injunction after giving notice or without giving notice and prescribes the methodology and procedure for granting ex parte injunction. In the event Court deems it proper to grant *ex parte* injunction, it is obliged to assign reasons for its opinion.

In ***A. Venkatasubbiah Naidu v. S. Chellappan and others, AIR 2000 SC 3032,*** the Apex Court opined that it cannot be contended that the power to pass exparte interim orders of injunction does not emanate from Order 39 Rule 1. The said rule is repository of the power to grant orders of temporary injunction with or without notice, interim or temporary or till further orders or till the disposal of the suit. Thus, it is held by the Apex Court that any order passed in exercise of aforesaid power in Rule 1 would be appealable under Order 43 Rule 1 CPC. This Court in ***Chhaganlal v. Niwasdas Goyal, AIR 1963 MP 208*** opined that where an order of temporary injunction is issued ex parte, that order is nonetheless an order under Rule (1) or (2) of Order 39 CPC and would as such be appealable. The same view is taken by this Court in ***Sitaram v. Rajabeti, 1978 (1) MPWN SN 447***.

Rule 3 of order 39 is part and parcel of Order 39. Rule 3 merely provides a method to grant ex parte injunction when certain conditions are satisfied. When the conditions are satisfied, the Court may grant injunction exparte which is necessarily a power exercised under Order 39 Rule 1 and 2 CPC. Rule 3 cannot be divorced from the nature of power given to the Court u/r 1 & 2 and it has to be read with Rules 1 and 2 CPC. In other words, in my opinion, when Court decides to grant injunction ex-parte by invoking Rule 3 aforesaid, even then it only shows that Court was satisfied that it is a fit case for grant of ex parte injunction and in that eventuality, it exercises the power under Rule 1 & 2 to grant injunction. Therefore, merely because in Order 43 Rule 1 (r), the Rule 3 of Order 39 is not mentioned, it will not mean that the order impugned would not be appealable. Accordingly, I am unable to hold that this petition under Article 227 of the Constitution is maintainable. Petitioner has a remedy of appeal under Order 43 Rule 1 (r).

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210. CONTRACT ACT, 1872 – Section 74

Earnest money deposits – It is paid or given at the time when the contract is entered into, as a pledge for its due performance – Serves two purposes, first being part-payment of the purchase money and second security for the performance of the contract by the party concerned – Liable to be forfeited in case of non-performance by the depositor – To justify the forfeiture of advance money being part of "earnest money", the terms of the contract should be clear and explicit – Payment made towards part-payment of consideration, not intended as earnest money – Forfeiture clause will not apply.

Satish Batra v. Sudhir Rawal

Judgment dated 18.10.2012 passed by the Supreme Court in Civil Appeal No. 7588 of 2012, reported in (2013) 1 SCC 345

Extracts from Judgment:

In ***Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., (1969) 3 SCC 522*** the following principles emerge regarding 'earnest':

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.

(3) It is part of the purchase price when that transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

In ***DDA v. Grihsthapana Coop. Group Housing Society Ltd., 1995 Supp (1) SCC 751*** this Court following the judgment of the Privy Council in ***Chiranjit Singh v. Har Swarup, AIR 1926 PC 1*** and ***Shree Hanuman Cotton Mills v. Tata Air Craft Ltd., (1969) 3 SCC 522*** held that the forfeiture of the earnest money was legal. In ***V. Lakshmanan v. B.R. Mangalagiri, 1995 Supp (2) SCC 33*** this Court held as follows:

> "The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount."

This Court again in ***Videocon Properties Ltd. v. Bhalchandra Laboratories, (2004) 3 SCC 71*** dealt with a case of sale of immovable property. It was a case where the appellant-plaintiffs had entered into an agreement with the

respondent-defendants on 13-5-1994 to sell the landed property owned by the respondents and a sum of Rs 38,00,000 was paid by the appellants as deposit or earnest money on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposited and took the view that the words used in the agreement alone would not be determinative of the character of the "earnest money" but really the intention of the parties and surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned.

The law is therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

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211. COURT FEES ACT, 1870 – Section 17

Multifarious Suit – Leviable Court fees – Suit was filed for the relief of three different declarations and a consequential relief of perpetual injunction – Held, plaintiff is bound to value and pay court fees separately in the suit on every relief of declaration.

Jamna Devi (Smt.) v. Rajenra Prasad Ji

Order dated 12.12.2012 passed by the High Court of M.P. in W.P. No. 12910 of 2009, reported in ILR (2013) MP 1004

Extract from Order:

It is apparent from the prayer clause of the plaint Annex. P/1 that the impugned suit has been filed by the petitioner with the prayer of three declarations: (a) is to declare the charge of her maintenance over the disputed property ; (b) declaring her share in such property and (c) declaring the Will dated 5.7.96, as alleged, executed by Late Ram Prasad projected and filed by respondent to be *ab initio* void and as a consequence perpetual injunction is also prayed for. It is apparent from the plaint that the suit has been valued only for the relief of one declaration and court fees was also paid accordingly. True it is that for the prayer of perpetual injunctions, the valuation is separately made and the court fees was paid accordingly.

In the available scenario when plaintiff herself, according to her paint, has filed the suit for giving three different declaration then even in the absence of

any objection of the other side, in view of the law laid down by the Apex Court in the aforesaid cited case, the petitioner is bound to pay the court fees separately in the suit on every declaration and undisputedly, the petitioner neither valued nor paid the court fees on all the aforesaid prayers of three declarations. So, in such premises and to this extent, the order impugned is hereby affirmed and the petitioner is directed to value the suit for three different declaration and pay the court fees accordingly otherwise the suit cannot proceed further for adjudication.

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212. CRIMINAL PROCEDURE CODE, 1973 – Sections 173, 190, 193, 209 and 319

(i) Can a Sessions Judge issue summons separately u/s 193 Cr.P.C. as a court of original jurisdiction or will he have to wait till the stage u/s 319 Cr.P.C. was reached, in order to take recourse there to?
Even without recording evidence, the sessions court, on committal of a case to it, has jurisdiction to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record and issue summon u/s193 Cr.P.C. as a court of original jurisdiction.

(ii) If the Magistrate disagrees with the police report – What choices does he have? He has two choices – He may act on the basis of a protest petition that may be filed or he may issue process and summon the accused – Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter – The Magistrate has above role to play while committing the case to the Court of Session.

(iii) Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?
The provisions of section 209 will have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session – He has not required to take cognizance of the offence before committing the case to the Court of Session. ***Ranjit Singh v. State of Panjab, AIR 1998 SC 3184*** **overruled.**

(v) In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of

taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law.

If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

Dharam Pal & ors. v. State of Haryana & anr.

Judgment dated 18.07.2013 passed by the Supreme Court in Criminal Appeal No. 148 of 2003, reported in 2013 Cri.L.J. 3900 (SC) (5 Judge Bench)

Extracts from Judgment:

As far as the first question is concerned, we are unable to accept the submissions made by learned Senior Advocates for the appellants that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate had no other function but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to learned Senior Advocate there could be no intermediary stage between taking of cognizance under Section 190 (1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Session Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event, the Session Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same.

In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173 (3) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case

had been made out to proceed against the persons named in column no.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

Questions 4, 5 and 6 are more or less inter-linked. The answer to question 4 must be in the affirmative, namely, that the Session Judge was entitled to issue summons under Section 193 Cr.P.C. upon the case being committed to him by the learned Magistrate. Section 193 of the Code speaks of cognizance of offences by Court of Session and provides as follows :-

> "***193. Cognizance of offences by Courts of Session.***– Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

The key words in the Section are that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code." The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by learned Senior Advocate to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said Section.

This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law.

If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

In that view of the matter, we have no hesitation in agreeing with the views expressed in ***Kishun Singh v. State of Bihar, 1993 AIR SCW 771*** that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

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213. CRIMINAL PROCEDURE CODE, 1973 – Sections 177, 178 (d) and 179
NEGOTIABLE INSTRUMENT ACT, 1881 – Section 138
Places to file a complaint under section 138 of Negotiable Instruments Act, 1881 – Section 178 of the Code has widened the scope of jurisdiction of a criminal court and section 179 of the Code has stretched it to still a wider horizon – Courts exercising jurisdiction in anyone of the five different localities enumerated in *K. Bhaskaran's case* can become the place of trial – The place where there was failure to pay the amount clearly qualifies as the place where the complaint can be filed.

Nishant Aggarwal v. Kailash Kumar Sharma
Judgment dated 01.07.2013 passed by the Supreme Court in Criminal Appeal No. 808 of 2013, reported in (2013) 10 SCC 72

Extracts from judgment:

This court in ***K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510*** quoted the relevant provisions of the Code, particularly, Sections 177, 178 and 179 and in the light of the language used, interpreted Section 138 of the NI Act and laid down that Section 138 has five components, namely:

(i) drawing of the cheque;

(ii) presentation of the cheque to the bank;

(iii) returning the cheque unpaid by the drawee bank;

(iv) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount; and

(v) failure of the drawer to make payment within 15 days of the receipt of the notice.

After saying so, this Court concluded that the complainant can choose any one of the above five places to file a complaint. The further discussion in the said judgment is extracted hereunder : (***K. Bhaskaran's case*** (supra)

> "The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by

the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

> It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a ***sine qua non*** for the completion of the offence under Section 138 of the Act. In this context a reference to Section 178 (d) of the Code is useful. It is extracted below :
>
> '178. **Place of inquiry or trial – (a)-(c)** * * *
>
> (d) where [the offence] consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas.'

Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands to widen and so expansive it is that it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act."

The place of failure to pay the amount has been clearly qualified by this Court as the place where the drawer resides or the place where the payee resides. In view of the same and in the light of the law laid down by this Court in ***K. Bhaskaran*** (supra), we are of the view that the learned Magistrate at Bhiwani has territorial jurisdiction to try the complaint filed by the respondent as the respondent is undisputedly a resident of Bhiwani. Further, in ***K. Bhaskaran*** (supra), while considering the territorial jurisdiction at great length, this Court has concluded that the amplitude of territorial jurisdiction pertaining to a complaint under the NI Act is very wide and expansive and we are in entire agreement with the same.

In ***K. Bhaskaran*** (supra) this Court has held that Section 178 of the Code has widened the scope of jurisdiction of a criminal court and Section 179 of the Code has stretched it to still a wider horizon. Further, for the sake of repetition, we reiterate that the judgment in ***Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd, (2001) 3 SCC 609*** does not affect the ratio in ***K. Bhaskaran*** (supra) which provides jurisdiction at the place of residence of the payer and the payee. We are satisfied that in the facts and circumstances and even on merits, the High Court rightly refused to exercise its extraordinary jurisdiction under Section 482 of the Code and dismissed the petition filed by the appellant-accused.

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214. CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 239 and 245
INDIAN PENAL CODE, 1860 – Section 498-A
DOWRY PROHIBITION ACT, 1961 – Sections 3 and 4
Matter arising out of matrimonial bickering – Duty of Court – Courts are expected to adopt a cautious approach in cases of matrimonial disputes whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR *prima facie* discloses a case of over implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while setting down in her new matrimonial surrounding – FIR doesn't disclose specific allegation against accused moreso against the co-accused – Clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial.

Geeta Mehrotra and anr. v. State of U.P. and anr.
Judgment dated 17.10.2012 passed by the Supreme Court in Criminal Appeal No. 1674 of 2012, reported in AIR 2013 SC 181

Extracts from Judgment:

Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding.

It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of ***G.V. Rao v. L.H.V. Prasad & Ors., AIR 2000 SC 2474*** wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that:

> "There has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have

counselled and brought about rapprochment are rendered helpless on their being arrayed as accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts."

The view taken by the judges in this matter was that the courts would not encourage such dispute.

In yet another case reported in ***AIR 2003 SC 1386*** in the matter of ***B.S. Joshi & ors. v. State of Haryana & anr.,*** it was observed that there is no doubt that the object of introducing Chapter XXA containing Section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punish the husband and his relatives who harass or torture the wife to coerce her relatives to satisfy unlawful demands of dowry. But if the proceedings are imitated by the wife under Section 498-A against the husband and his relatives and subsequently she has settled her disputes with her husband and his relatives and the wife and husband agreed for mutual divorce, refusal to exercise inherent powers by the High Court would not be proper as it would prevent woman from settling earlier. Thus, for the purpose of securing the ends of justice quashing of FIR becomes necessary, Section 320 Cr.P.C. would not be a bar to the exercise of power of quashing. It would however be a different matter depending upon the facts and circumstances of each case whether to exercise or not to exercise such a power.

However, we deem it appropriate to add by way of caution that we may not be misunderstood so as to infer that even if there are allegations of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the name of accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the court to take cognizance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or

the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding.

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215. CRIMINAL PROCEDURE CODE, 1973 – Sections 200, 202, 203, 204, 397 and 401 (2)

(i) Entitlement of accused/suspect to be heard – Up to the stage of issue of process under section 204, the accused cannot claim any right of hearing – Where the complaint has been dismissed by the Magistrate and a challenge is laid to such order at the instance of the complainant in a revision, the suspects get the right of hearing before the revisional Court although such order was passed without their participation – If the revisional Court overturns the order of the Magistrate dismissing the complaint and sends it back for fresh consideration, the persons who are alleged in the complaint to have committed the crime/suspects have no right to participate in the proceedings – Nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process.

(ii) Section 202 Cr.P.C. has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint.

Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel
Judgment dated 01.10.2012 passed by the Supreme Court in Criminal Appeal No. 1577 of 2012, reported in (2012) 10 SCC 517 (Three Judge Bench)

Extracts from Judgment:

In ***Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC (Cri) 507*** this Court had an occasion to consider the scope of the inquiry by the Magistrate under section 202 of the old Code. This Court referred to the earlier two decisions in ***Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar, AIR 1960 SC 1113*** and ***Chandra Deo Singh v. Prokash Chandra Bose, AIR 1963 SC 1430*** and in para 4 of the Report held as under : (***Nagawwa case*** (supra)

> "4. It would thus be clear from the two decision of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited – limited only to

the ascertainment of the truth or falsehood of the allegations made in the complaint – (i) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no ***locus standi*** and is not entitled to be heard on the question whether the process should be issued against him or not".

The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding if the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed the offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 – although it is at preliminary stage – nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid

to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401 (2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203, and 204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

Where the complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401 (2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process.

Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202. The legal position is no more ***res integra*** in this regard. More than five decades back, this Court in ***Vadilal Panchal*** (supra) with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint i.e. for ascertaining whether

there was evidence in support of the complaint so as to justify the issuance of process and commencement of proceedings against the person concerned.

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216. CRIMINAL PROCEDURE CODE, 1973 – Section 233
Summoning of Prosecution witness as defence witness – If the prosecution witness is called as a defence witness then, his statement shall continue which was recorded in the deposition sheet, where his prosecution evidence was completed – His statement shall be started as a defence witness from the end of his previous statements.

Pappu @ Chandra Pravesh Tiwari v. State of M.P.
Order dated 07.05.2013 passed by the High Court of M.P. in Criminal Revision No. 2109 of 2011, reported in ILR (2013) MP 1208

Extracts from Order:

Hon'ble the Apex Court in the case of ***State of M.P. v. Badri Yadav and another, AIR 2006 SC 1769*** has held that if a prosecution witness, who had been examined, cross-examined and discharged to be juxtaposed as defence witness, then he remains as a prosecution witness. In the light of the judgment passed by the Hon'ble Apex Court, the fact as to whether the prosecution witness can be called as a defence witness needs to be examined. For example, if a doctor is examined by the prosecution, who has proved various injury reports of the victims and was released after his cross-examination, it was found that he was required to prove the injuries caused to any of the accused persons and the injury reports are filed after his cross-examination by the defence then, such a doctor can be a defence witness for the injury reports of the accused persons. Therefore, if the prosecution witness who has already been fully examined is required to be recalled as a defence witness then, it is for the accused to show as to how he may be counted as a defence witness. In the order passed by the Single Bench of this Court in the case of ***Harbhajan and others v. State of M.P., 1989 JLJ 217***, it was observed that, though the prosecution's witness was recalled as a defence witness but he shall remain a prosecution witness and a further cross-examination if necessary can be done upon that witness. In that order, the Single Bench of this Court has found an error that one witness, who was examined as a prosecution witness also examined a defence witness and his evidence was recorded for two times in a different manner. In the light of the order passed by the Single Bench of this Court in the case of ***Harbhajan*** (supra) it would be apparent that if the prosecution witness is called as a defence witness then, his statement shall continue, which was recorded in the deposition sheet, where his prosecution evidence was completed. His statement shall be started as a defence witness from the end of his previous statement.

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217. CRIMINAL PROCEDURE CODE, 1973 – Section 354
INDIAN PENAL CODE, 1860 – Section 326
Concept of proper sentencing – What are relevant considerations?

(i) The nature of crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

(ii) Duty of courts – Explained.
Undue sympathy to impose inadequate sentence would do more harm to the justice system and undermine the public confidence in the efficacy of law – It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed – The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

State of M.P. v. Najab Khan & ors.
Judgment dated 01.07.2013 passed by the Supreme Court in Criminal Appeal No. 809 of 2013, reported in 2013 Cri.L.J. 3951 (SC)

Extracts from Judgment:

It is settled principle of law that the punishment should not be prompted by undue sympathy for the accused persons. This Court has repeatedly stressed the central role of proportionality in sentencing of offenders in numerous cases. In ***Shailesh Jasvantbhai and another v. State of Gujarat and others, 2006 AIR SCW 436,*** this Court held that if the sentence imposed is not proportionate to the offence committed, it is not sustainable in the eyes of law. It was further observed as under:

> "The law regulates social interests and arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be – as it should be – a decisive reflection of

social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

> 8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

This position was reiterated by a three-Judge Bench of this Court in ***Ahmed Hussein Vali Mohammed Saiyed and Anr. v. State of Gujarat, AIR 2010 SC (Supp) 846,*** wherein it was observed as follows:-

> ".....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

> In this case, the court further goes to state that meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of society.

In ***Jameel v. State of Uttar Pradesh, (2010) 12 SCC 532,*** this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus: -

> "In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.
>
> It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

In ***Guru Basavaraj alias Benne Settapa v. State of Karnataka, (2012) 8 SCC 734,*** while discussing the concept of appropriate sentence, this Court expressed that:

> "It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

This Court, in ***Gopal Singh v. State of Uttarakhand, JT 2013 (3) SC 444*** held as under:-

> "Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence….."

Recently, the above proposition is reiterated in ***Hazara Singh v. Raj Kumar & Ors., 2013 (6) Scale 142***.

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218. EVIDENCE ACT, 1872 – Sections 17, 21 and 145

Proof of admissions – Admissions are substantive evidence by themselves though they are not conclusive proof of the matter admitted – Witness must be asked questions which would test his veracity moreso where there is a direct contradiction and conflict between his statements before the Court and alleged previous admission.

Jagdish Prasad v. Kanhaiyala @ Kandhai & ors.

Order dated 02.04.2013 passed by the High Court of M.P. in S.A. No. 440 of 1996, reported in ILR (2013) MP 1122

Extracts from Judgment:

The Supreme Court in ***Biswanath Prasad v. Dwaraka Prasad, AIR 1974 SC 117*** and ***Union of India v. Moksh Builders and Financiers Ltd., AIR 1977 SC 409,*** has clearly held while considering and interpreting the provisions of sections 21 and 145 of the Evidence Act, that such admissions are substantive evidence by themselves in view of the provisions of sections 17 and 21 of the Evidence Act, though they are not conclusive proof of the matter admitted. It is also clear from a perusal of the other provisions of the Evidence Act, namely; sections 138 and 146, that even otherwise the witness must be asked questions which would test his veracity more so where there is a direct contradiction and conflict between his statements before the court and the alleged previous admission.

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219. EVIDENCE ACT, 1872 – Sections 25 and 27

Once it is proved that there was definite admission on behalf of accused by which the body of the deceased was recovered from a place which was within the special knowledge of the accused, it is for accused to give convincing explanation for his special knowledge about that place.

Anuj Kumar Gupta alias Sethi Gupta v. State of Bihar

Judgment dated 24.07.2013 passed by the Supreme Court in Criminal Appeal No. 1575 of 2009, reported in 2013 Cri.L.J. 3895 (SC)

Extracts from Judgment:

In the absence of any convincing explanation offered on behalf of the appellant accused as to under what circumstances he was able to lead the Police party to the place where the dead body of the deceased was found, it will have to be held that such recovery of the dead body, which is a very clinching circumstance in the case of this nature, would act deadly against the appellant considered along with rest of the circumstances demonstrated by the prosecution to rope in the appellant in the alleged crime of the killing of the deceased. Therefore, once we find that there was definite admission on behalf of the appellant by which the prosecuting agency was able to recover the body of the deceased from a place, which was within the special knowledge of the appellant,

the only other aspect to be examined is whether the appellant came forward with any convincing explanation to get over the said admission. Unfortunately though, the above incriminating circumstance was put to the appellant in the S.313 questioning where he had an opportunity to explain, except a mere denial there was no other convincing explanation offered by him.

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220. EVIDENCE ACT, 1872 – Section 52

Admissions – The admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions – The former classes of admissions are fully binding on the party that makes them and constitute a waiver of proof.

Lalman Soni & anr. v. Shri Rupinder Singh Gill & anr.

Order dated 07.11.2012 passed by the High Court of M.P. in M.A. No. 516 of 2005, reported in ILR (2013) MP 1088

Extracts from Order:

The admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former classes of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On this proposition I may profitably place reliance on the decision of Supreme Court ***Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others AIR 1974 SC 471 para 26.*** There is a later decision of Supreme Court in ***Seth Ramdayal Jat v. Laxmi Prasad, (2009) 11 SCC 545*** para 26 on the same point.

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221. EVIDENCE ACT, 1872 – Section 134

INDIAN PENAL CODE, 1860 – Sections 141 and 436

When a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.

Busi Koteswara Rao and ors. v. State of A.P.

Judgment dated 27.11.2012 passed by the Supreme Court in Criminal Appeal No. 454 of 2009, reported on AIR 2013 SC 515

Extacts from Judgment:

Even, as early as in 1965, a larger Bench of this Court in ***Masalti & Ors. v. The State of Uttar Pradesh, AIR 1965 SC 202*** considered about how the prosecution

case is to be believed. The principles laid down in para 16 of the decision are relevant which is as under:-

> "16. Mr. Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case."

It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.

No doubt, in ***State of U.P. v. Dan Singh and others, (1997) 3 SCC 747*** a Bench of two-Judges, in para 48 has held that "............. it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least 4 eyewitness............."

We have already quoted the requirements for convicting an accused in a clash between two groups as per ***Masalti*** (supra) which is a larger Bench decision of this Court. In the light of the same, we reiterate and hold that when an unlawful assembly or a large number of persons take part in arson or in a clash between two groups, in order to convict a person, at least two prosecution witnesses have to support and identify the role and involvement of the persons concerned.

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222. HINDU MARRIAGE ACT, 1955 – Sections 1(2) and 2(1)
PRIVATE INTERNATIONAL LAW – Domicile

(i) Extent and applicability of the Hindu Marriage Act, 1955 – It extends to Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India even if they reside outside India – It has extra-territorial operation – Extra territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.

(ii) Kinds of Domicile – The domicile of origin, the domicile by operation of law and the domicile of choice – Domicile of origin is not necessarily the place of birth – Right to change the domicile of birth and acquisition of domicile of choice is available to any person not legally dependent – It is done by residing in the country of choice with intention of continuing to reside there indefinitely – Presumption is against the change of domicile – The person who alleges it has, to prove that – Residence for a long period and change of nationality is evidence of change of domicile.

Sondur Gopal v. Sondur Rajini
Judgment dated 15.07.2013 passed by the Supreme Court in Civil Appeal No. 4629 of 2005, reported in (2013) 7 SCC 426

Extracts from Judgment:

Section 1(2) of the Hindu Marriage Act, 1955 provides for extent of the Act. The same reads as follows:

> "1. Short title and extent – (1) * * *
>
> (2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories."

From a plain reading of Section 1(2) of the Act, it is evident that it has extra territorial operation.

The general principle underlying the sovereignty of States is that laws made by one State cannot have operation in another State. A law which has extra-territorial operation cannot directly be enforced in another State but such a law is not invalid and is saved by Article 245(2) of the Constitution of India. Article 245(2) provides that:

> "**245. (2)** No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

But this does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. In our opinion, unless such

contingency exists, Parliament shall be incompetent to make a law having extra-territorial operation.

In ***Electronics Corpn. of India Ltd. v. CIT, 1989 Supp(2) SCC 642*** it has been held as follows :

> "9. But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists, Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to sub-serve the object, and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India."

Bearing in mind the principle aforesaid, when we consider Section 1(2) of the Act it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act, in our opinion, will apply to Hindus domiciled in India even if they resides outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. In our opinion, this extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.

Section 2(1) of the Hindu Marriage Act, 1955 provides for the application of the Act. The same reads as follows:

> *2. Application of Act* – (1) This Act applies –
>
> (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prathana or Arya Samaj,
>
> (b) to any person who is a Buddhist, Jain or Sikh by religion, and
>
> (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

This section contemplates application of the Act to a Hindu by religion in any of its forms or Hindu within the extended meaning i.e. Buddhist, Jains or Sikh and, in fact, applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, we are of the

opinion that Section 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act. Therefore, in our considered opinion, the Act will apply to a Hindu outside the territory of India only if such a Hindu is domiciled in the territory of India.

Domiciles are of three kinds viz. domicile of origin, the domicile by operation of law and the domicile of choice. In the present case, we are concerned only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child. In domicile of choice one is abandoned and another domicile is acquired but for that, the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin. In order to establish Australia is their domicile of choice, the husband has relied on their residential tenancy agreement dated 25-1-2003 for a period of 18 months; enrollment of Natasha in Warrawee Public School in April 2003; commencement of proceedings for grant of permanent resident status in Australia during October-November 2003; and submission of application by the husband and wife on 11-11-2003 for getting their permanent resident status in Australia.

The right to change the domicile of birth is available to any person not legally dependent and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality.

In the aforesaid background, when we consider the husband’s claim of being a domicile of Australia, we find no material to endorse this plea. The residential tenancy agreement is only for 18 months which cannot be termed for a long period. Admittedly, the husband or for that matter, the wife and the children have not acquired the Australian citizenship. In the absence thereof, it is difficult to accept that they intended to reside permanently in Australia. The claim that the husband desired to permanently reside in Australia, in the face of the material available, can only be termed as a dream. It does not establish his intention to reside there permanently. The husband has admitted that his visa was nothing but a “long-term permit” and “not a domicile document”. Not only this, there is no whisper at all as to how and in what manner the husband had abandoned the domicile of origin. In the face of it, we find it difficult to accept the case of the husband that he is domiciled in Australia and he shall continue to be the domicile of origin i.e. India. In view of our answer that the husband is a domicile of India, the question that the wife shall follow the domicile of the husband is rendered academic. For all these reasons, we are of the opinion

that both the husband and the wife are domiciles of India and, hence, shall be covered by the provisions of the Hindu Marriage Act, 1955. As on fact, we have found that both the husband and the wife are domicile of India, and the Act will apply to them, other contentions raised on behalf of the parties are rendered academic and we refrain ourselves to answer those.

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223. INDIAN PENAL CODE, 1860 – Section 302

Last seen together – Accused persons had hired a Maruti van, which was driven by deceased – Accused persons and deceased were last seen together by son of the deceased – Dead body of the deceased was found on the next day near the place where vehicle was hired by accused persons – It was necessary for the accused persons to offer a reasonable explanation as to what had happened to the deceased with whom he had gone to Haridwar, the previous evening – The accused persons could not have opted to remain silent – They were duty bound to give adequate and reasonable explanation as regards the events that had taken place at Haridwar and the circumstance in which they had parted company with the deceased.

Dharminder Singh alias Vijay Singh v. State.

Judgment dated 12.08.2013 passed by the Supreme Court in Criminal Appeal No. 1614 of 2010, reported in 2013 Cri.L.J. 4054 (SC)

Extracts from Judgment:

Due consideration of the evidence on record makes it abundantly clear that in the present case, the prosecution has proved that on 26.08.2000 at about 4.30 p.m. the appellants and two other co-accused persons were in the van driven by deceased Krishan Kumar and that they had hired the said van to go to Haridwar. On the next morning at about 10.00 a.m. the dead body of Krishan Kumar (subsequently identified by PWs 11 and 12 on the basis of photographs taken before the cremation) was recovered from under a bridge at a place near Haridwar. The accused appellants were apprehended along with vehicle at Purnia in Bihar on 29.08.2000. They had failed to give any explanation for their presence in Purnia and also as to what had happened to Krishan Kumar who was driving the vehicle hired by them on 26.8.2000 to go to Haridwar. In view of the very close proximity of the time between the accused and the deceased being seen together (4.30 P.M. of 26.8.2000) and the recovery of the dead body (10 A.M. of 27.8.2000) it was necessary for the accused to offer a reasonable explanation as to what had happened to the deceased Krishan Kumar with whom they had gone to Haridwar in the previous evening. The accused could not have opted to remain silent. They were duty bound to give adequate and reasonable explanation as regards the events that had taken place at Haridwar and the circumstances in which they had parted company with the deceased. In their statement recorded under Section 313 CrPC the accused while admitting that they were arrested at Purnia in Bihar had given no

explanation whatsoever as to what had happened at Haridwar and to Krishan Kumar and under what circumstances they had gone to Bihar without him.

Applying the law consistently laid down by this Court including the principles noticed in ***Vadlakonda Lenin v. State of A.P., (2012) 12 SCC 260*** to the facts of the present case, we are left with no doubt whatsoever that the circumstances proved by the prosecution, in the absence of any reasonable explanation on the part of the accused, cannot give rise to any other conclusion except that it is the accused alone who had abducted deceased Krishan Kumar and had killed him at Haridwar. We, therefore, have to conclude that the conviction of the accused appellants do not call for any interference. Accordingly, we affirm the conviction and sentence awarded by the trial court, as upheld by the High Court. Both the appeals consequently are dismissed.

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224. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 3

(i) Appreciation of evidence – Stock witness
A panch witness had tendered evidence in another case it cannot be held that on that score alone his evidence should be rejected.

(ii) Clothes worn by accused persons contained human blood – It has to be explained – The accused persons offering no explanation, is an incriminating circumstance.

Nana Keshav Lagad with Balu & anr. v. State of Maharashtra
Judgment dated 03.07.2013 passed by the Supreme Court in Criminal Appeal No. 1010 of 2008, reported in 2013 Cri.L.J. 4011 (SC)

Extracts from Judgment:

The submissions related to the evidence of P.W.3, the panch witness, who supported the recovery of cycle chain etc., covered by Exs. 22,23, 24, 25 and 26, were too trivial in nature, as we find that the submission was on the footing that he was a stock witness. The Trial Court has also rejected the said submission by pointing out that merely because the said witness had tendered evidence in another case, it cannot be held that on that score alone his evidence should be rejected. The Trial Court has found that when his version, as regards the recovery was truthfully and fully corroborated, was acceptable and there was no reason to reject the version of the said witness. Having perused the detailed reasoning adduced by the Trial Court and accepted by the High Court, we do not find any good ground to interfere with the ultimate conclusion on that ground.

In fact, as rightly noted by the Trial Court, it was for the appellants to have explained as to how the clothes worn by them contained human blood. In Section 313 questioning, no explanation was forthcoming from the appellants. In these circumstances, the said contention also does not merit any consideration.

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225. INDIAN PENAL CODE, 1860 – Section 302
EVIDENCE ACT, 1872 – Section 27

(i) The recovery of an incriminating article from a place which is open and accessible to others, alone cannot vitiate the recovery u/s 27 of the Evidence Act in all cases – It depends upon facts and circumstances of each case.

(ii) The Act of taking deceased wife to the hospital cannot absolve the accused from guilt – Specially where the accused has not offered any explanation regarding horizontal ligature mark of 10 c.m. x 1.5c.m. on the neck of the deceased.

(iii) The post-mortem report is not a substantive piece of evidence but the evidence of the doctor, who conducted the post mortem, cannot be insignificant.

State of Himachal Pradesh v. Jai Chand
Judgment dated 03.07.2013 passed by the Supreme Court in Criminal Appeal No. 269 of 2007, reported in 2013 Cri.L.J. 4001 (SC)

Extracts from judgment:

It is true that post-mortem report(PW-10/A) is not a substantive piece of evidence. But the evidence of such doctor cannot be insignificant. This Court in ***State of Haryana v. Ram Singh, (2002)2 SCC 426*** held as under:

> "While it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-à-vis the injuries appearing on the body of the deceased person and likely use of the weapon there for and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses."

The recovery of bucket (Ex.P-8) has been proved as the same has been produced by accused no. 1 (respondent herein) himself before the police as recorded in memo (Ex.PW-5/C) recorded at his instance in the presence of Prem Chand (PW-5) and Pyare Lal. As a matter of fact, the bucket was lying in the courtyard where it is identified by accused no. 1 (respondent herein) and thereafter, was taken into possession by the police. The reference in this behalf can be made to the statement of Prem Chand (PW-5) who stated that accused no. 1 had shown the bucket to the police which was sealed in a parcel and thereafter taken into possession vide recovery memo ((Ex.PW- 5/C). Not only this, he even identified the bucket (Ex.P-8) to be the same. The recovery of an incriminating article from a place which is open and accessible to others, alone cannot vitiate such recovery under Section 27 of the Indian Evidence Act. Thus, the present is the case where there is no difficulty in holding that the bucket

(Ex.P-8) is the same which was used by the respondent (herein) for drowning and strangulating his wife, Vidhya Devi.

The act of bringing his wife, Vidhya Devi to the hospital cannot absolve the guilt of accused no. 1 (respondent herein) of an offence committed by him. He was the best person who could have explained the reasons for the horizontal ligature mark of 10 cm. x 1.5cm. on the neck of the deceased and as to why he did not inform the matter to the villagers before bringing down the body of the deceased.

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226. INDIAN PENAL CODE, 1860 – Section 302

Murder trial – Shirt of the accused was found to be stained with the blood group of which was the same as that of the deceased – Non-examination of blood group of accused, when not fatal?

Where at the instance of accused his shirt was recovered and where on physical examination, absolutely no injuries on his body were found, the question of the stains on the shirt being caused by the blood transmitted from the body of the accused was ruled out.

Barku Bhavrao Bhaskar v. State of Maharashtra

Judgment dated 25.07.2013 passed by the Supreme Court in Criminal Appeal No. 910 of 2010, reported in 2013 Cri.L.J. 4221 (SC)

Extracts from Judgment:

The circumstance about the blood stains found on the clothes of the appellant was concerned, it was contended that though the blood group found on the clothes of the appellant was 'A' and that the blood group of the deceased was also 'A', it was submitted on behalf of the appellant that the blood group of the appellant was not tested. While examining the said contention, the High Court has taken pains to note that when at the instance of the appellant, his shirt was recovered under Exts.16 and 17 and when the appellant was physically examined, it was found that there were absolutely no injuries on the body of the appellant and, therefore, the question of the blood stains from the body of the appellant to get transmitted to his shirt was ruled out. It was, therefore, held that the blood stains found on the appellant's shirt, considered along with the factum of the appellant having led the prosecution to discover his blood stained clothes and the body of the deceased put together, the blood stains found in the shirt of the appellant, could have been only that of the deceased and none else. The said conclusion arrived at by the High Court was fully justified and no fault can be found with the said conclusion. As regards the blood stains found on the shirt of the appellant, except the ipsi dixit submission made on this aspect, no other submission was made and there was no valid explanation offered on behalf of the appellant as to how the blood stains came to be found on his shirt, which was recovered at his instance, in the presence of the panch witnesses.

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227. INDIAN PENAL CODE, 1860 – Section 302 r/w/s 149
CRIMINAL TRIAL:

(i) Applicability of Section 149 IPC – It has its foundation on constructive liability which is the sine qua non for its application – It is not necessary that for common object there should be a prior concert as the common object may be formed on spur of the moment – Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage.

(ii) Non-explanation of injuries on the person of accused – It may affect the prosecution case – The Court has to satisfy the existence of two conditions (a) that the injuries on the person of the accused were also of serious nature and (b) that such injuries must have been caused at the time of occurrence in question.

State of Rajasthan v. Shiv Charan & ors.
Judgment dated 01.07.2013 passed by the Supreme Court in Criminal Appeal No. 1425 of 2007, reported in 2013 (3) Crimes 305 (SC)

Extracts from Judgment:

The pivotal question of applicability of Section 149 IPC has its foundation on constructive liability which is the ***sine qua non*** for its application. It contains essentially only two ingredients, namely, (I) offence committed by any member of any unlawful assembly consisting five or more members and; (II) such offence must be committed in prosecution of the common object (Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object. It is not necessary that for common object there should be a prior concert as the common object may be formed on spur of the moment. Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed. For instance, if a body of persons go armed to take forcible possession of the land, it may be presumed that someone is likely to be killed, and all the members of the unlawful assembly must be aware of that likelihood and, thus, each of them can be held guilty of the offence punishable under Section 149 IPC. The court must keep in mind the distinction between the two parts of Section 149 IPC, and, once it is established that unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted for vicarious liability. However, it may be relevant to determine whether the assembly consist of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to

entertain the common object of the assembly. However, it is only the rule of caution and not the rule of law. Thus, a mere presence or association with other members alone does not *per se* be sufficient to hold everyone of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act, being a member of unlawful assembly as provided for under Section 142 IPC. It may also not be a case of group rivalry or sudden or free fight or an act of the member of unlawful assembly beyond the common object. (Vide: ***Baladin & Ors. v. State of U.P., AIR 1956 SC 181; Masalti v. State of U.P., AIR 1965 SC 202; Chandra Bihari Gautam & Ors. v. State of Bihar, AIR 2002 SC 1836; Ramesh & Ors. v. State of Haryana, AIR 2011 SC 169; Ramachandran & Ors. Etc. v. State of Kerala, AIR 2011 SC 3581; Onkar & Anr. v. State of Uttar Pradesh, (2012) 2 SCC 273; Roy Farnandez v. State of Goa & Ors., AIR 2012 SC 1030;*** and ***Krishnappa & Ors. v. State of Karnataka, AIR 2012 SC 2946***).

Non-explanation of serious injuries on the person of accused may be fatal to the prosecution case. But where the injuries sustained by the accused are minor in nature, even in absence of proper explanation of prosecution, story of the prosecution cannot be disbelieved. [Vide: ***Laxman v. State of Maharashtra, (2012) 11 SCC 158***]

This Court considered the issue in ***Mano Dutt & Anr. v. State of Uttar Pradesh, (2012) 4 SCC 79*** and held as under:

> "38. The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.
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> 39. Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:
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> (i) that the injuries on the person of the accused were also of a serious nature; and
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> (ii) that such injuries must have been caused at the time of the occurrence in question.
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> 40. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused

are not explained by the prosecution cannot, by itself, be the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to ***Rajender Singh v. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav v. State of Bihar, (1998) 7 SCC 365*** and ***Vijayee Singh v. State of U.P., (1990) 3 SCC 190***."

In view of the above, we are of the opinion that the High Court has not considered the issue of non-explanation of injuries on the person of accused in correct perspective.

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228. INDIAN PENAL CODE, 1860 – Sections 302/34 and 304 Part I r/w/s 109 & 498-A

EVIDENCE ACT, 1872 – Sections 106 and 114

(i) The accused having faced trial for offence punishable under section 302 r/w/s 34, could not have been, in absence of a charge under Section 109 IPC, convicted under section 304 Part I with the aid of section 109 IPC.

(ii) The fact within exclusive personal knowledge of accused – Drawing of inference – Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but it would apply to cases where prosecution has succeeded in proving facts from which a reasonable inference can be drawn – The conclusion may be otherwise if an explanation of the events is offered by the accused.

Babu alias Balasubramaniam and another v. State of Tamil Nadu

Judgment dated 02.07.2013 passed by the Supreme Court in Criminal Appeal No. 1738 of 2007, reported in (2013) 8 SCC 60

Extracts from Judgment

We must now turn to the conviction of the appellants under Section 304 part I of the IPC. We are of the confirmed opinion that this charge is made out only against A1-Babu and not against A2-Pappathi.

A2- Pappathi's involvement in this offence could be held to be proved only if PW-3 Ponnusamy's evidence is believed. PW-3 Ponnusamy has been disbelieved by the trial court as well as the High Court and, in our opinion, rightly so. This witness claimed that when he visited the house of the accused, he heard the accused asking the deceased as to why the sum of Rs.10,000/- was not brought by her. He claimed that he peeped through the window and saw A1-Babu catching hold of the deceased and dashing her head against a pillar. According to him, at that time, A2-Pappathi intervened and asked A1-Babu to pour poison in her mouth. A1-Babu accordingly brought poison.

According to this witness, further, A1-Babu gave poison to A2-Pappathi, who poured it in the mouth of the deceased. It is at that time that he went inside the house and questioned them. Thereupon, they took the deceased to the hospital telling him that they would save her life. This entire story is inherently improbable and totally unbelievable. If this witness has seen A2-Pappathi pouring poison in the mouth of the deceased, he should have screamed and called people. He should have tried to prevent A2 - Pappathi from pouring poison in the mouth of the deceased. He should have rushed to the police station rather than waiting in the house. The exaggerated evidence of this witness must, therefore, be kept out of consideration. If this witness is disbelieved, A2-Pappathi cannot be said to be involved in offence punishable under Section 304 Part I of the IPC. In our opinion, her conviction for the said offence must be set aside.

There is yet one other strong reason why we cannot confirm the conviction of A2-Pappathi for offence punishable under Section 304 Part I read with Section 109 of the IPC. Though she has been convicted as aforesaid, she was charged for offence punishable under Section 302 read with Section 34 of the IPC. There was no charge under Section 109 of the IPC. Section 109 of the IPC by itself is an independent offence though punishable in the context of other offences. A2-Pappathi has faced trial for offence punishable under Section 302 read with Section 34 of the IPC i.e. for murdering the deceased by sharing common intention with A1-Babu. She cannot therefore be convicted for offence punishable under Section 304 Part I of the IPC with the aid of Section 109 of the IPC in the absence of a charge under Section 109 of the IPC.

In this connection, we may usefully refer to ***Wakil Yadav v. State of Bihar, (2000) 10 SCC 500*** where the appellant therein had faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased. No charge was framed for offence punishable under Section 302 read with Section 109 of the IPC. However, the appellant was convicted for offence punishable under Section 302 read with Section 109 of the IPC and sentenced to life imprisonment. This Court held that the appellant therein having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence under Section 302 of the IPC with the aid of Section 109 of the IPC. This Court observed that there was not only a legal flaw but also a great prejudice to the appellant therein in projecting his defence. Drawing a parallel from this decision, we hold that A2-Pappathi could not have been convicted for offence punishable under Section 304 Part I of the IPC read with Section 109 of the IPC and sentenced for the same. On this count also, A2-Pappathi’s conviction and sentence under Section 304 Part I read with Section 109 of the IPC will have to be set aside.

It is also pertinent to note that PW-5 Dr. Rajabalan stated that the injuries sustained by the deceased could have been caused 10 to 12 hours prior to the post-mortem. We have already stated that the post-mortem was conducted at

5.00 p.m. Thus, the death occurred around 6.00 a.m. The death occurred in the house where the deceased resided with A1-Babu. Presence of the accused at 6.00 a.m. in the house is natural. Besides, it is not contended by A1-Babu that he was not present in the house when the incident occurred. To this fact situation, Section 106 of the Evidence Act is attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of A1-Babu. It was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance must be kept in mind while dealing with this case. We are mindful of the fact that this would not relieve the prosecution of its burden of proving its case. But, it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference. In this case, in our opinion, the prosecution has succeeded in proving facts from which reasonable inference can be drawn that the death of the deceased was homicidal and A1-Babu was responsible for it. A1-Babu could have by virtue of his special knowledge regarding the said facts offered an explanation from which a different inference could have been drawn. Since he has not done so, this circumstance adds up to other circumstances which substantiate the prosecution case.

In ***Tulshiram Sahadu Suryawanshi & Anr. v. State of Maharashtra, (2012) 10 SCC 373*** while dealing with Section 106 of the Evidence Act, this Court observed as under:

> "A fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilized. Section 106 however is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence

of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference."

The above observation is attracted to this case.

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229. INDIAN PENAL CODE, 1860 – Sections 304B and 498A
EVIDENCE ACT, 1872 – Sections 113B and 113A

(i) Dowry Death – Essential Ingredients – Discussed – Cruelty – No requirement under Section 498-A IPC that cruelty should be within 7 years of marriage or in connection with demand of dowry.

(ii) Presumption as to dowry death – Under section 113B, expression is "Court shall presume" – Being a mandatory presumption on guilty conduct of accused under section 304B, it is for prosecution to first show availability of all ingredients of offence so as to shift burden of proof in terms of section 113B of the Evidence Act – Once all the ingredients are present, presumption of innocence fades away – If prosecution fails to establish crucial fact as to the death occurring within 7 years of marriage – Offence would fall only under section 498A, IPC – Section 304B, IPC permits presumption of law only in a given set of facts and not presumption of fact – Fact is to be proved and then only, law will presume.

Gurdip Singh v. State of Punjab
Judgment dated 03.09.2013 passed by the Supreme Court in Criminal Appeal No. 1308 of 2013, reported in III (2013) DMC 333 (SC)

Extracts from Judgment:

"Dowry death" in the Indian Penal Code was introduced under section 304B as per Act 43 of 1986. Under the said provision, if a married woman dies:

(i) on account of burns or bodily injury or dies otherwise than under normal circumstances,

(ii) such death occurs within seven years of marriage,

(iii) it is shown that she was subjected to cruelty or harassment by her husband or any relative,

(iv) such cruelty or harassment be soon before her death and

(v) such cruelty or harassment by the husband or his relative be or for or in connection with demand for dowry.

Such death is called dowry death under section 304B of IPC and the husband or relative shall be presumed to have caused the dowry death. Section 498A of IPC deals with the offence of cruelty by the husband or relative. If a married woman is subjected to cruelty by the husband or his relative, he is

liable for conviction under section 498A. There is no requirement under section 498A that the cruelty should be within seven years of marriage. It is also not invariably necessary under Section 498A that the cruelty should be in connection with the demand for dowry. It is interesting to note that section 498A was introduced as per Act 46 of 1983 to ***"suitably deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in-laws"*** and section 304B was introduced as per Act 43 of 1986 to make the penal provisions ***"more stringent and effective"***.

[Emphasis supplied]

In this context, the background for the amendments would be a relevant reference. In the 91st Report on Dowry Deaths and Law Reform submitted by Justice K.K. Mathew, Chairman, Law Commission of India, on 10.8.1983, it is stated at Paragraphs 1.3 to 1.5 as follows:

> **"1.3.** If, in a particular incident of dowry death, the facts are such as to satisfy the legal ingredients of an offence already known to the law, and if those facts can be proved without much difficulty, the existing criminal law can be resorted to for bringing the offender to book. In practice, however, two main impediments arise –
>
> (i) either the facts do not fully fit into the pigeonhole of any known offence: or
>
> (ii) the peculiarities of the situation are such that proof of directly incriminating facts is thereby rendered difficult.
>
> The first impediment mentioned above is aptly illustrated by the situation where a woman takes her life with her own hands, though she is driven to it by ill treatment. This situation may not fit into any existing pigeonhole in the list of offences recognized by the general criminal law of the country, except where there is definite proof of instigation, encouragement or other conduct that amounts to "abetment" of suicide. Though, according to newspaper reports, there have been judgments of lower Courts which seem to construe "abetment" in this context widely, the position is not beyond doubt.
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> The second situation mentioned above finds illustration in those incidents in which even though the circumstances raise a strong suspicion that the death was not accidental, yet, proof beyond reasonable doubt may not be forthcoming that the case was really one of homicide. Thus, there is need to address oneself to the substantive criminal law as well as to the law of evidence.
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> Speaking of the law of evidence, it may be mentioned that one of the devices by which the law usually tries to bridge the gulf between one fact and another, where the gulf is so wide that it cannot be crossed with the help of the normal rules of evidence, is the device of inserting presumptions. In this sense, it is possible to consider the question

whether, on the topic under discussion, any presumption rendering the proof of facts in issue less difficult, ought to be inserted into the law.

> Coming to substantive criminal law, if a deficiency is found to exist in such law, it can be filled up only by creating a new offence. Before doing so, of course, the wise law maker is expected to take into account a number of aspects, including the nuances of ethics, the ever-fluctuating winds of public opinion, the demands of law enforcement and practical realities."

(Emphasis supplied)

Though the expression "presumed" is not used under Section 304B of IPC, the words "shall be deemed" under Section 304 B carry, literally and under law, the same meaning since the intent and context requires such attribution. Section 304B of IPC on dowry death and Section 113B of the Indian Evidence Act, 1872 on presumption, were introduced by the same Act, i.e. Act 43 of 1986, with effect from 19.11.1986, and Section 498A of IPC and Section 113A of the Evidence Act were introduced by Act 46 of 1983, with effect from 25.12.1983.

The amendments under the Evidence Act are only consequential to the amendments under the Dowry Prohibition Act, 1961 and the Indian Penal Code. It is significant to note that under Section 113A, the expression is "Court may presume". The Parliament did intend the provisions to be more stringent and effective in view of the growing social evil as can be seen from the Statement of Objects and Reasons in the amending Act.

Having carefully gone through the entire evidence as appreciated by both the Sessions Court as well as the High Court, we are not inclined to take a different view except on one aspect, viz., the date of marriage................... It has to be noted that DW-1 elder Devrani/sister-in-law of the deceased had stated in her evidence that the marriage had taken place around eleven years back. Nobody has even spoken on the exact date of marriage. The death reportedly took place on 6.4.1990. The evidence was recorded in 1996. The High Court counted the eleven years from the date of recording of the evidence. However, on going through the evidence, it is not at all clear as to whether the same is with respect to the date of tendering evidence or with respect to the date of incident. In view of the mandatory presumption of law under Section 304B of IPC/113B of the Evidence Act, it is obligatory on the part of the prosecution to establish that the death occurred within seven years of marriage. Section 304B of IPC permits presumption of law only in a given set of facts and not presumption of fact. Fact is to be proved and then only, law will presume. In the instant case, prosecution has failed to establish the crucial fact on the death occurring within seven years of marriage.

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230. INDIAN PENAL CODE, 1860 – Sections 306 and 376

EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – Delay – How to consider – Where witnesses were all of rural and illiterate persons and therefore some allowance will have to be given for their laxity in bringing the factum of the rape alleged to have been committed by the accused on the deceased prosecutrix to the notice of the prosecution agency.

Kailash v. State of M.P.

Judgment dated 24.07.2013 passed by the Supreme Court in Criminal Appeal No. 2260 of 2009, reported in 2013 Cri.L.J. 3964 (SC)

Extracts from Judgment:

Keeping the findings of the trial Court, as well as that of the High Court on the commission of the offence of rape by the appellant on the deceased Radha Bai, when we heard learned counsel for the appellant, the only submission placed before us was that PW-5, stated to have informed PWs-1 and 2, namely, the grand-mother and mother of the deceased Radha Bai on the very next day after the funeral had taken place, but yet the statement of PW-5, was recorded by the police only on 04.08.2002. In so far as the said submission is concerned, it was true that the evidence of PWs-1 and 2 disclose that PW-5 informed them about the alleged rape committed by the appellant on the deceased Radha Bai, on 24.07.2002 i.e. on the very next day after the funeral had taken place. However, there was nothing on record to suggest that the said information was passed on to the prosecution agency immediately after the receipt of the said information by PWs1 and 2. In such circumstances, it can only be stated that as soon as it was brought to the notice of the prosecution agency as to the commission of the offence by the appellant through PW- 5, further action was taken by the police by nabbing the appellant and proceeding with the prosecution in accordance with law. Therefore, when we consider the submission of the learned counsel about the abnormal delay in proceeding against the appellant up to the alleged date of occurrence, the trial Court has also held that the witnesses were all of rural background and illiterate persons and, therefore, some allowance will have to be given for their laxity in bringing the factum of the rape alleged to have been committed by the appellant on the deceased Radha Bai. When we consider the evidence of PW-5, who was a child witness, who was stated to be between 13 to 14 years at the time of occurrence, we find that his evidence was found to be natural and he withstood the lengthy cross-examination, which did not bring out any contradiction in his version apart from the fact that he had no axe to grind against the appellant. Further when based on the evidence of PW 5 and the medical reports, the incriminating circumstances that existed against the appellant were put in 313 questioning, he had no explanation to offer. The medical evidence also fully supported the crime alleged against the appellant. Moreover, the evidence of PW-7, also corroborated the version of PW-5 to considerable extent regarding the involvement of the appellant in the commission of the crime

on the deceased Radha Bai. Therefore, the ultimate conclusion of guilt found proved against the appellant as held by the trial Court as well as the High Court cannot be faulted.

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231. INDIAN PENAL CODE, 1860 – Section 307

(i) In order to attract life imprisonment under section 307 IPC, the injury need not be on a vital part of the body – If accused does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment under section 307 I.P.C..

(ii) Whether it is sufficient ground to reduce sentence that injury was not caused on vital part of the body? Held, No.

State of M.P. v. Mohan & others

Judgment dated 30.07.2013 passed by the Supreme Court in Criminal Appeal No. 1052 of 2013, reported in 2013 Cri.L.J. 4007 (SC)

Extracts from Judgment:

High Court was of opinion that injuries have not been caused on vital parts of the body. In order to attract Section 307, the injury need not be on the vital parts of the body. In order to attract Section 307, causing of hurt is sufficient. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word 'hurt' which has been explained in Section 319, IPC and not "grievous hurt" within the meaning of Section 320, IPC. Therefore, in order to attract Section 307, the injury need not be on the vital part of the body. A gun shot, as in the present case, may miss the vital part of the body, may result in a lacerated wound, that itself is sufficient to attract Section 307. High Court is, therefore, in error in reducing the sentence, holding that the injury was not on the vital part of the body. Period undergone by way of sentence also in our view is not commensurate with the guilt established.

We also have to remind ourselves the object and purpose of imposing adequate sentence. Reference may be made to the judgment of this Court in ***State of Madhya Pradesh v. Saleem alias Chamaru and Anr., AIR 2005 SC 3996***.

> "8. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose "'such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.
>
> 9. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping,

misappropriation of public money, treason and other offences involving moral turpitude - or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and ***per se*** require exemplary treatment. An liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences, will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

> 10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"."

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232. INDIAN PENAL CODE, 1860 – Section 498-A
EVIDENCE ACT, 1872 – Section 32 (1)

(i) Cruelty – Permitting the first wife to enter the house of second wife with new born child – Does not amount to it Cruelty to second wife within the meaning of the second limb of clause (a) of the explanation under section 498-A IPC.

(ii) Dying declaration – Whether admissible for the purpose of section 498A – The appellant was held to be not guilty of the offence under Section 306, IPC – It is no longer a case in which the cause of any person's death is in question – The statements made by the deceased in the letter to the police Station is not admissible as dying declaration – Cannot be taken to be proof of cruel acts for holding him guilty under Section 498-A, IPC.

Kantilal Martaji Pandor v. State of Gujarat & anr.
Judgment dated 25.07.2013 passed by the Supreme Court in Criminal Appeal No. 1567 of 2007, reported in AIR 2013 SC 3055

Extracts from Judgment:

Obviously, the finding of the High Court that permitting the first wife to enter the house of deceased Ambriben with new born child amounts to a cruel act is erroneous as such act cannot amount to cruelty within the meaning of second limb of clause (a) of the Explanation under Section 498-A, IPC. However,

the High Court, relying on the letter written by deceased to the Police Station on 26.03.1992 (Ext. 10), has also come to a finding that the appellant had starved the deceased of food when she was pregnant by spending the salary earned by the deceased on his own family and had also subjected the deceased to other acts of mental cruelty.

The question that we have, therefore, to decide is whether the Court could have arrived at this finding that the appellant had starved the deceased and committed various acts of mental cruelty towards the deceased only on the basis of the contents of the letter dated 26.03.1992 written by the deceased to the Police Station. The letter written by the deceased on 26.03.1992 could be relevant only under Section 32 (1) of the Indian Evidence Act, 1872, which provides that a statement, written or verbal, of relevant facts made by a person who is dead, is relevant when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. The High Court in the present case has already held that the appellant was not guilty of abetting the suicide of the deceased and was, therefore, not guilty of the offence under Section 306, IPC. As the cause of the death of the deceased is no more in question in the present case, the statements made by the deceased in the letter dated 26.03.1992 to the police Station cannot be taken to be proof of cruel acts committed by the appellant for the purpose of holding him guilty under Section 498-A, IPC.

For taking this view, we are supported by the decision of this Court in ***Inderpal v. State of M.P., 2001 AIR SCW 5092*** in which it was held by this Court in paragraph 7 of the judgment as follows :

> "Unless the Statement of a dead person would fall within the purview of Section 32 (1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the Statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned".

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233. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 2 (k)
JUVENILE JUSTICE ACT, 1986 (since repealed) – Section 21

(i) When the juvenile is found guilty of the offence alleged to have been committed, he simply cannot go unpunished – However, as the law stands, the punishment to be awarded to him must be left to the Juvenile Justice Board constituted under the Act of 2000.

(ii) The accused appearing to be juvenile – An accused who physically appears to be a juvenile when produced before a Magistrate, a *prima facie* opinion on the juvenility of the accused has to be recorded – If any doubt persist, the Magistrate should conduct an enquiry as required by Section 7-A of the Act of 2000.

Jitendra Singh @ Babboo Singh & anr. v. State of U.P.
Judgment dated 10.07.2013 passed by the Supreme Court in Criminal Appeal No. 763 of 2003, reported in 2013 (3) Crimes 319 (SC)

Extracts from Judgment:

The Report given by the Additional Sessions Judge has been examined with the assistance of learned counsel and there is no reason to reject it. While the circumstances are rather unusual, the fact remains that there is documentary evidence to show from the school admission register (which has not been tampered with) that the date of birth of the appellant is 31st August 1974. That apart, the medical examination of the appellant conducted on 8th July 1988 less than two months after the incident, also shows his age to be about 17 years. This was not doubted by the Additional Session Judge while rejecting the bail application of the appellant and was also not doubted by the Allahabad High Court while granting bail to him. Therefore, it does appear that the appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. In other words, the appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Act.

Whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a ***prima facie*** opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident.

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234. MEDICAL TERMINATION OF PREGNANCY ACT, 1971 – Section 3

Termination of Pregnancy – Pregnancy on account of forced prostitution/rape – Such victim cannot be forced to give birth to a child of a rapist as it would cause grave injury to her mental health – The victim has to be permitted to terminate her pregnancy with the aid of Exception 1 of Section 3, clause (ii) of the Act.

Hallo Bi @ Halima v. State of M.P. and ors.

Order dated 16.01.2013 passed by the High Court of M.P. in W.P. No. 408 of 2013, reported in 2013 (2) MPLJ 655

Extracts from Order:

The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on humanitarian grounds where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc.

Section 3 of the Act provides for opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or intercourse with a lunatic woman also.

In the present case, the petitioner who was present in the court was brave enough to state before everyone that she was forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution/ rape. Forced prostitution, in the considered opinion of this court, this virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Exception I of Section 3, clause (ii) of the Act of 1971.

We cannot force a victim of violent rape/forced sex to give birth to the child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to the child.

The petitioner understands what pregnancy is. She has consented for abortion. The medical opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately.

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235. MOTOR VEHICLES ACT, 1988 – Sections 147 and 149

Liability of insurance company:

Insurance policy had covered the risk of four agricultural labourers – At the time of the accident, the vehicle was being used to collect gravel (gitti) for construction of a well in the farm – Insurance company held liable for compensation.

Vijaysingh v. Rukmabai and others

Judgment dated 23.07.2012 passed by the High Court of M.P. in M.A. No. 1382 of 2005, reported in 2013 ACJ 2362

Extracts from Judgment:

From perusal of record, it transpires that cross-objections filed by respondent No.1 have already been dismissed for want of compliance of section 173 of the Motor Vehicles Act but same point has been raised by the appellant in the appeal, therefore it has to be examined whether learned Tribunal was justified in exonerating the respondent No.3. So far as amount of compensation is concerned, it appears that amount awarded is just and proper which requires no enhancement. So far as liability is concerned, risk of labourers was covered under the policy and in the evidence it has come that offending vehicle was being used at the relevant time for collection of gravel (gitti) for construction of well at the farm, this court is of the view that learned Tribunal committed error in exonerating the respondent No.3.

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

Cancellation of policy due to dishonour of cheque – Liability of insurance company – Cheque of premium was dishonoured before the date of accident but the intimation regarding the dishonour of the cheque and cancellation of policy was communicated to the policy holder after the date of accident – Insurance company is held liable for compensation.

National Insurance Co. Ltd. v. Balkar Ram and others

Judgment dated 09.07.2013 passed by the Supreme Court in Civil Appeal No. 2159 of 2007, reported in 2013 ACJ 2416 (SC)

Extracts from Judgment:

We compliment the learned counsel for the appellant, for cutting short the controversy by fairly pointing out the ratio of the judgment titled ***United India Insurance Co. Ltd. v. Laxmanmma, 2012 ACJ 1307 (SC),*** wherein it has been held that the insurance company is liable to satisfy the award if the intimation regarding the dishonor of the cheque and cancellation of policy is communicated to the policyholder after the date of the accident. Thus, the defence of the insurance company that the policy of insurance was not valid since the cheque had been dishonoured prior to the accident would not exonerate them from making the payment of compensation. In this matter, admittedly the accident had taken

place on 19.4.2000 and the cheque although had been dishonoured prior to the accident on 17.4.2000 the intimation to the policy- holder had been given by the insurance company on 26.4.2000, in view of which the insurance company cannot be allowed to contend that the policyholder was not holding a valid policy of insurance in regard to the vehicle which met with an accident. Admittedly, the policyholder had already issued another cheque substituting the cheque which had earlier been dishonoured.

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237. MOTOR VEHICLES ACT, 1988 – Sections 147 (1) and 149 (1), (2) (a) (I) (c)

Where an overloaded tempo carrying 10 passengers including driver, instead of seven, met with an accident the Insurance company is liable only in respect of seven passengers, including driver – The direction to the Insurance Company to pay the compensation in respect of all ten of them and then recover the same from the insured – Not proper.

Munsingh v. Chagan and others

Judgment dated 06.11.2012 passed by the High Court of M.P. in M.A. No. 2794 of 2007, reported in 2013 ACJ 2181

Extracts from Judgment:

In the present case undisputedly the respondent No. 3 is liable to satisfy seven awards including the driver, while by the impugned award it is 10 claim petitions which were filed. In the facts and circumstances of the case learned Tribunal committed error in giving right of recovery to respondent No.3 in all the claim cases, as the respondent No. 3 was liable to satisfy seven awards including the award, if any, in favour of driver.

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238. MOTOR VEHICLES ACT, 1988 – Section 149 (2) (a) (ii)

Fake driving licence – Liability of insurance company – Where driver was possessing fake driving licence, insurance company would be exonerated completely, regardless of the fact that at the time of accident, the driver was not driving the vehicle negligently.

United India Insurance Co. Ltd. v. Sujata Arora and others

Judgment dated 10.01.2012 passed by the Supreme Court in Civil Appeal No. 231 of 2012, reported in 2013 ACJ 2129 (SC)

Extracts from Judgment:

The findings of learned single Judge that even if driver was having a fake licence, it would not exonerate the insurance company as he was not negligent in driving, are certainly erroneous. Driving without licence or with a fake licence and driving a vehicle negligently are two different aspects of the matter. Holding a valid driving licence is a requirement of law. If the vehicle was being driven by a person holding a valid licence, but rashly and negligently, is a matter of evidence.

The very fact which stood established that licence of the driver Jagdish was a fake one, would completely exonerate the insurance company.

We are also fortified in our view in the light of the two judgments of this court reported in ***National Insurance Co. Ltd. v. Laxmi Narain Dhut, 2007 ACJ 721 (SC)*** and ***Jawahar Singh v. Bala Jain, 2011 ACJ 1677 (SC),*** wherein it has been held that in case it is found that the offending vehicle was driven by driver who was either holding no licence or a fake licence, then it amounts to violation of terms and conditions of policy and in that circumstance, no liability can be fastened on the insurance company.

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239. MOTOR VEHICLES ACT, 1988 – Section 166

Negligence :

Whether finding on negligence in connected claim cases before another tribunal, operates as *res judicata* against mother and siblings who were not parties in other claims? Held, No – Even against the widow who, remained *ex parte* and did not contest other claims, that finding does not operate as *res judicata*.

Shantabai and others v. Ajay Mourya and others

Judgment dated 06.12.2012 passed by the High Court of M.P. in M.A. No. 212 of 2007, reported in 2013 ACJ 2283

Extracts from Judgment:

Learned counsel for respondent No. 3 submits that total 7 claim petitions were filed which arose out of the same accident, out of which 6 were decided by one award dated 29.6.2004, in which in 2 appeals, Sunita was party as wife of the deceased owner and in all those cases it was held that deceased Yogesh was equally liable for the accident. It is submitted that no appeal has been filed by the appellant No. 2 challenging the findings recorded, therefore learned Tribunal was not justified in taking a different view while the copy of the award was on record. Learned counsel further submits that since accident is of the year 2003, therefore income assessed as Rs. 9,000 without any basis is on higher side which deserves to be set aside. It is also submitted that registration number of the vehicle shows that vehicle was of the year 1986, therefore it is beyond imagination that income/earnings can be taken as Rs. 9,000 in the year 2003. It is submitted that appeal filed by the respondent No. 3 be allowed and appeal filed by the appellants be dismissed and amount be reduced accordingly. Facing to this, learned counsel for appellants placed reliance on a decision in the matter of ***K.P. Nayer v. Pitamberdas, 2012 (2) MPLJ 32,*** wherein death of five persons travelling in Tata Sumo carrying 9 passengers on account of collision with a bus and L.Rs. of the deceased filed claim petitions in different Claims Tribunals and different awards were drawn by the Tribunals, this court held that it is duty of the insurance company to keep watch and get all the claim cases consolidated. It is submitted that since respondent No. 3 failed to get all the claim petitions consolidated, therefore if any findings has been recorded in other

award against the appellants, then that cannot be binding, especially in the circumstances when the appellants were exparte. Learned counsel further submit that even if it is assumed that different view was taken by the learned Tribunal in other awards, then too, it cannot be treated as res judicata. For this contention, reliance is placed on a decision of this court in the matter of ***New India Assurance Co. Ltd. v. Shambhu Nath Gupta, 2001 ACJ 1816 (MP)***, wherein Division Bench of this court has held that each case has to be decided on evidence adduced thereon. It is submitted that in view of this, the contention raised by the respondent No.3 cannot be allowed to sustain. So far as finding regarding contributory negligence on the part of Yogesh is concerned, it is true that in other cases wherein the award was passed on 29.6.2004, learned Tribunal found that Yogesh was equally liable for the accident, that award has been filed in the present case on 2.9.2006 while the impugned award is passed on 6.9.2006. In other Cases, it is only Sunita, who is appellant No. 2 herein, who was the party and appellant Nos. 1 and 3 to 6 were not the party, therefore the findings recorded in those cases cannot be treated as res judicata against appellant Nos, 3 to 6. So far as the appellant No.2 is concerned, it appears that she was exparte and she has not contested. In the facts and circumstances, only because in other awards, Yogesh Gupta was held equally liable, it cannot be said that learned Tribunal was not justified in taking a different view. So far as amount is concerned, since accident is of the year 2003 and there is nothing on record to show that offending vehicle was purchased by Yogesh in which year and for what amount, the income assessed by the learned Tribunal at the rate of Rs. 9,000 appears to be on higher side.

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240. MOTOR VEHICLES ACT, 1988 – Section 166

Claim for injury – Assessment of compensation – The claimant had suffered grievous injuries in the pelvic region and he has become impotent – Will have to take further treatment in an institute like NIMS for at least ten years – The award of Rs. 4,35,000 enhanced to Rs. 20,20,000.

G. Ravindranath v. E. Srinivas and another

Judgment dated 01.07.2013 passed by the Supreme Court in Civil Appeal No. 5520 of 2013, reported in 2013 ACJ 2131 (SC)

Extracts from Judgment:

In our view, the appellant is entitled to Rs. 2,20,000 for the expenses incurred on the treatment including hospitalization charges, mess and lodging charges, transportation, etc. For future medical expenses including hospitalization, medicines, attendant charges, etc., the appellant is entitled to Rs. 6,00,000. For pain, suffering and trauma, the appellant is entitled to a sum of Rs. 3,00,000. For loss of amenities and prospects of marriage, the appellant is entitled to Rs. 4,00,000. For the loss of expectation of life and loss of future earning, the appellant is entitled to a sum of Rs. 5,00,000.

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***241. MUSLIM LAW:**

REGISTRATION ACT, 1908 – Section 17

Gift of immovable property by a Muslim – Oral gift is valid provided if it satisfied the following essentials : (1) Declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery possession – If the declaration of gift is reduced in writing, the document does not require registration under section 17 of the Registration Act – Transaction of gift in writing is complete and irrevocable though not registered, if all the three essential requisites of valid gift are satisfied. (*Hafeeza Bibi v. Shaikh Farid, AIR 2011 SC 1695*, relied on)

Asgar Ali v. Tahir Ali

Order dated 30.04.2013 passed by the High Court of M.P. in Writ Petition No. 9020 of 2012, reported in 2013(3) MPLJ 160

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242. N.D.P.S. ACT, 1985 – Sections 41, 42 and 50

(i) Search of person of accused – Section 50 is applicable only in cases of search of a person as contrasted from search of premises, vehicles or articles – But in cases where the line of separation is thin and fine between search of a person and artificial object, the test of inextricable connection is to be applied and then the conclusion has to be reached as to whether search was of a person or not.

(ii) Search and seizure – Application of proviso of section 42 (1) – Where a search is conducted and the contraband is seized by the Gazetted Officer from the residential premises of accused, the proviso of section 42 (1) is not applicable.

Yasihey Yobin and anr. v. The Department of Customs, Shillong

Order dated 20.02.2013 passed by the Supreme Court in Criminal Appeal No. 1199 of 2010, reported in 2013 (3) Crimes 342 (SC)

Extracts from Order:

The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in the case of ***State of Haryana v. Suresh, AIR 2007 SC 2245*** and in a three judges bench decision in ***State of Himachal Pradesh v. Pawan Kumar, (2005) 4 SCC 350,*** wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of

Section 50, cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc., but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.

The first impression of ours was that learned Advocate for appellants may be justified in canvassing the above proposition. But, on a deeper consideration and after looking into the decision of this Court in the case of ***Union of India v. Satrohan, (2008) 8 SCC 313,*** we see no merit in the contention canvassed. In the aforesaid decision it is stated as under :

> "It can, thus, be seen that Sections 42 and 43 do not require an officer to be a gazetted officer whereas Section 41(2) requires an officer to be so. A gazetted officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a gazette officer. The High Court is, thus, right in coming to the conclusion that since the gazetted officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decision in ***State of Punjab v. Balbir Singh, (1994) 3 SCC 299, Abdul Rashid Ibrahim Mansure v. State of Gujarat, (2000) 2 SCC 513*** and ***Beckodan Abdul Rahiman v. State of Kerala, (2002) 4 SCC 299*** on the aspect under consideration or neither relevant nor applicable."

A perusal of Section 42 contemplates two situations. It contemplates entry into and search of any building, conveyance or enclosed place in anytime between sunrise and sunset by an officer authorized under the Act with a reason to believe that any narcotic substance or any other controlled substance is kept or concealed in such premises and secondly, if the search is made between the sunset and sunrise, the requirement of the proviso to Section 42 is to be complied with under which the officer authorized under the Act is to record the grounds of his belief. But if the search is made by an officer authorized under Section 41(2) of the Act then the said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. This principle is reiterated in the case of ***M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449*** and in ***Mohd. Hussain Farah v. Union of India & Anr., (2001) 1 SCC 329,*** wherein it is observed that a gazetted officer is

an empowered officer and so when a search is carried out in his presence and under his supervision, the provision of Section 42 has no application.

In view of the observation and the law laid down by this court, since the search is conducted and the contraband is seized by a gazette officer from the residential premises of A1, the proviso to Section 42(1) of the Act is not attracted.

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243. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141
CRIMINAL TRIAL:
Fastening of constructive/vicarious liability – Accused cannot be held liable under the criminal law unless statute specifically provides for fastening of constructive/vicarious liability – A non-signing joint account holder cannot be held liable for the offence of dishonour of cheque under section 138 N.I. Act.

Aparna A. Shah v. Sheth Developers Private Limited and another

Judgment dated 01.07.2013 passed by the Supreme Court in Criminal Appeal No. 813 of 2013, reported in (2013) 8 SCC 71

Extracts from Judgment

In order to constitute an offence under Section 138 of the N.I. Act, this Court, in ***Jugesh Sehgal vs. Shamsher Singh Gogi, (2009) 14 SCC 683,*** noted the following ingredients which are required to be fulfilled:

"(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has 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;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. Being cumulative, it is

only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act."

Considering the language used in Section 138 and taking note of background agreement pursuant to which a cheque is issued by more than one person, we are of the view that it is only the "drawer" of the cheque who can be made liable for the penal action under the provisions of the N.I. Act. It is settled law that strict interpretation is required to be given to penal statutes.

In ***Jugesh Sehgal*** (supra), after noting the ingredients for attracting Section 138 on the facts of the case, this Court concluded that there is no case to proceed under Section 138 of the Act. In that case, on 20.01.2001, the complainant filed an FIR against all the accused for the offence under Sections 420, 467, 468, 471 and 406 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC) and there was hardly any dispute that the cheque, subject-matter of the complaint under Section 138 of the N.I. Act, had not been drawn by the appellant on an account maintained by him in Indian Bank, Sonepat Branch. In the light of the ingredients required to be fulfilled to attract the provisions of Section 138, this Court, after finding that there is little doubt that the very first ingredient of Section 138 of the N.I. Act enumerated above is not satisfied and concluded that the case against the appellant for having committed an offence under Section 138 cannot be proved.

In ***S.K. Alagh v. State of Uttar Pradesh and others, (2008) 5 SCC 662,*** this Court held:

> … …. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See ***Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581***)"

In ***Sham Sunder and others v. State of Haryana, (1989) 4 SCC 630,*** this Court held as under:

> "The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

As rightly pointed out by learned senior counsel for the appellant, the interpretation sought to be advanced by the respondents would add words to Section 141 and extend the principle of vicarious liability to persons who are not named in it.

In the case on hand, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer, if it is a Company, then

Drawer Company and is extended to the officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability. To put it clear, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. For example, Section 141 of the N.I. Act is an instance of specific provision that in case an offence under Section 138 is committed by a company, the criminal liability for dishonor of a cheque will extend to the officers of the company. As a matter of fact, Section 141 contains conditions which have to be satisfied before the liability can be extended. Inasmuch as the provision creates a criminal liability, the conditions have to be strictly complied with. In other words, the persons who had nothing to do with the matter, need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, the officers of the company, who are responsible for the acts done in the name of the company, are sought to be made personally liable for the acts which result in criminal action being taken against the company. In other words, it makes every person who, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. It is true that the proviso to sub-section enables certain persons to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence. The liability under Section 141 of the N.I. Act is sought to be fastened vicariously on a person connected with the company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.

It is not in dispute that the first respondent has not filed any complaint under any other provisions of the Penal Code and, therefore, the argument pertaining to the intention of the parties is completely misconceived. We were taken through the notice issued under the provisions of Section 138, reply given thereto, copy of the complaint and the order issuing process. In this regard, learned senior counsel for the respondent after narrating the involvement of the appellant herein and her husband contended that they cannot be permitted to raise any objection on the ground of concealing/suppressing material facts within her knowledge. For the said purpose, he relied on ***Oswal Fats and Oils Limited v. Additional Commissioner (Administration), Bareilly Division, Bareilly and others, (2010) 4 SCC 728, Balwantrai Chimanlal Trivedi v. M.N. Nagrashna & Ors., AIR 1960 SC 1292, J.P. Builders & Anr. v. A. Ramadas Rao & Anr., (2011) 1 SCC 429.*** Inasmuch as the appellant had annexed the relevant materials, namely, copy of notice, copy of reply, copy of the complaint and the order issuing process which alone is relevant for consideration in respect of complaint under Section 138 of the N.I. Act, the argument of learned senior counsel for Respondent No.1 that the stand of the appellant has to be rejected for suppressing of material facts or relevant facts, cannot stand. In such circumstances, we are of the view that the case law relied upon by the contesting respondent No.1 is inapplicable to the facts of the present case.

Learned senior counsel for respondent No.1, by drawing our attention to the definition of "person" in Section 3 (42) of the General Clauses Act, 1897 submitted that in view of various circumstances mentioned, the appellant herein being wife, is liable for criminal prosecution. He also submitted that in view of the explanation in Section 141 (2) of the N.I. Act, the appellant wife is being prosecuted as an association of individual. In our view, all the above contentions are unacceptable since it was never the case of respondent No.1 in the complaint filed before learned Magistrate that the appellant wife is being prosecuted as an association of individuals and, therefore, on this ground alone, the above submission is liable to be rejected. Since, this expression has not been defined, the same has to be interpreted ***ejusdem generis*** having regard to the purpose of the principle of vicarious liability incorporated in Section 141. The terms "complaint", "persons" "association of persons" "company" and "directors" have been explained by this Court in ***Raghu Lakshminarayanan v. Fine Tubes, (2007) 5 SCC 103***.

The above discussion with reference to Section 138 and the materials culled out from the statutory notice, reply, copy of the complaint, order, issuance of process etc., clearly show that only the drawer of the cheque being responsible for the same.

In addition to our conclusion, it is useful to refer some of the decisions rendered by various High Courts on this issue.

Learned Single Judge of the Madras High Court in ***Devendra Pundir v. Rajendra Prasad Maurya, Proprietor, Satyamev Exports, 2008 CriLJ 777,*** following decisions of this Court, has concluded thus:

> "This Court is of the considered view that the above proposition of law laid down by the Hon'ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case. Even in this case, as already pointed out, the first accused is admittedly the sole proprietrix of the concern namely, "Kamakshi Enterprises" and as such, the question of the second accused to be vicariously held liable for the offence said to have been committed by the first accused under Section 138 of the Negotiable Instruments Act not at all arise."

After saying so, learned Single Judge, quashed the proceedings initiated against the petitioner therein and permitted the Judicial Magistrate to proceed and expedite the trial in respect of others.

In ***Gita Berry vs. Genesis Educational Foundation, 151 (2008) DLT 155,*** the petitioner therein was wife and she filed a petition under Section 482 of the Code seeking quashing of the complaint filed under Section 138 of the N.I. Act. The case of the petitioner therein was that the offence under Section 138 of the Act cannot be said to have been made out against her only on the ground that

she was a joint account holder along with her husband. It was pointed out that she has neither drawn nor issued the cheque in question and, therefore, according to her, the complaint against her was not maintainable. Learned Single Judge of the High Court of Delhi, after noting that the complaint was only under Section 138 of the Act and not under Section 420 IPC and pointing out that nothing was elicited from the complainant to the effect that the petitioner was responsible for the cheque in question, quashed the proceedings insofar as the petitioner therein.

In ***Smt. Bandeep Kaur vs. S. Avneet Singh, (2008) 2 PLR 796,*** in a similar situation, learned Single Judge of the Punjab and Haryana High Court held that in case the drawer of a cheque fails to make the payment on receipt of a notice, then the provisions of Section 138 of the Act could be attracted against him only. Learned Single Judge further held that though the cheque was drawn to a joint bank account which is to be operated by anyone, i.e., the petitioner or by her husband, but the controversial document is the cheque, the liability regarding dishonouring of which can be fastened on the drawer of it. After saying so, learned Single Judge accepted the plea of the petitioner and quashed the proceedings insofar as it relates to her and permitted the complainant to proceed further insofar as against others.

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244. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 142
LIMITATION ACT, 1963 – Section 12
GENERAL CLAUSES ACT, 1897 – Section 9

(i) Whether the date on which the cause of action arose is to be excluded? Held, Yes – Though Limitation Act is not applicable to proceedings under N.I. Act but by taking the aid of section 9 of the General Clauses Act, it can be safely held that while calculating the period of one month which is prescribed under section 142 (b) of the N.I. Act, the period has to be calculated by excluding the date on which the cause of action arose.
M/s. SIL Import, USA v. M/s. Exim Aides Silk Exporters, Bangalore, AIR 1999 SC 1609 **overruled.**

(ii) Words “of” “from” and “after” may, in given situation, mean same thing – It is not possible to hold that the word ‘of’ occurring in section 138 (c) and 142 (b) of the N.I. Act is to be interpreted differently as against the word ‘from’ occurring in section 138 (a) of the N.I. Act; and that for the purposes of section 142 (b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises, should be included for computing the period of 30 days – The words ‘of’, ‘from’ and ‘after’ may, in a given case, mean really the same thing.

Econ Antri Ltd. v. Rom Industries Ltd. & anr.

Judgment dated 26.08.2013 passed by the Supreme Court in Criminal Appeal No. 1079 of 2006, reported in 2013 Cri.L.J. 4195 (SC) (3 Judge Bench)

Extracts from Judgment:

It was submitted that in ***Saketh India Ltd. & ors. v. India Securities Ltd., AIR 1999 SC 1090*** this Court has erroneously placed reliance on Section 12 (1) and (2) of the Limitation Act, 1963. Section 12 (1) states that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. In Section 12 (2) the same principle is extended to computing period of limitation for an application for leave to appeal or for revision or for review of a judgment. Our attention was drawn to ***Subodh S. Salaskar v. Jayprakash M. Shah & Anr., AIR 2008 SC 3086***wherein this Court has held that the Limitation Act, 1963 is not applicable to the N.I. Act. It is true that in ***Subodh S. Salaskar*** (supra)**,** this Court has held that the Limitation Act, 1963 is not applicable to the N.I. Act. However even if the Limitation Act, 1963 is held not applicable to the N.I. Act, the conclusion reached in ***Saketh*** (supra) could still be reached with the aid of Section 9 of the General Clauses Act, 1897. Section 9 of the General Clauses Act, 1897 states that in any Central Act or Regulation made after the commencement of the General Clauses Act, 1897, it shall be sufficient to use the word 'from' for the purpose of excluding the first in a series of days or any other period of time and to use the word 'to' for the purpose of including the last in a series of days or any other period of time. Sub-Section (2) of Section 9 of the General Clauses Act, 1897 states that this Section applies to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. This Section would, therefore, be applicable to the N.I. Act.

As the Limitation Act is held to be not applicable to N.I. Act, drawing parallel from ***Tarun Prasad Chatterjee v. Dinanath Sharma, AIR 2001 SC 36*** here the Limitation Act was held not applicable, we are of the opinion that with the aid of Section 9 of the General Clauses Act, 1897 it can be safely concluded in the present case that while calculating the period of one month which is prescribed under Section 142 (b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. It is not possible to agree with the counsel for the respondents that the use of the two different words 'from' and 'of' in Section 138 at different places indicates the intention of the legislature to convey different meanings by the said words.

In view of the above, it is not possible to hold that the word 'of' occurring in Section 138 (c) and 142 (b) of the N.I. Act is to be interpreted differently as against the word 'from' occurring in Section 138(a) of the N.I. Act; and that for

the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in ***Ex parte Fallon, (1793) 5 Term Rep 283*** the words 'of', 'from' and 'after' may, in a given case, mean really the same thing. As stated in Stroud's Judicial Dictionary, Vol. 3 1953 Edition, Note (5), the word 'of' is sometimes equivalent of 'after'.

Having considered the question of law involved in this case in proper perspective, in light of relevant judgments, we are of the opinion that ***Saketh*** (supra) lays down the correct proposition of law. We hold that for the purpose of calculating the period of one month, which is prescribed under Section 142 (b) of the N.I. Act, the period has to be reckoned by excluding the date on which the cause of action arose. We hold that ***SIL Import, USA v. Exim Aides Silk Exporters, Bangalore, AIR 1999 SC 1609*** does not lay down the correct law. Needless to say that any decision of this Court which takes a view contrary to the view taken in ***Saketh*** (supra) by this Court, which is confirmed by us, do not lay down the correct law on the question involved in this reference. The reference is answered accordingly.

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245. PREVENTION OF CORRUPTION ACT, 1988 – Sections 3 (1) (b), 4 (3) and 22
CRIMINAL PROCEDURE CODE, 1973 – Sections 220 and 223
Jurisdiction of Special Judge – A special Judge alone can take cognizance of the offence specified in section 3 (1) and can also try any offence other than offence specified in section 3(1) of the Prevention of Corruption Act.

Essar Teleholdings Limited v. Registrar General, Delhi High Court and others

Judgment dated 01.07.2013 passed by the Supreme Court in Writ Petition (C) No. 57 of 2012, reported in (2013) 8 SCC 1

Extracts from Judgment

A mere perusal of Section 3 read with Section 4 of the PC Act clearly mandates that apart from an offence punishable under the PC Act, any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified under the PC Act can also be tried by a Special Judge. Sub section (3) of Section 4 specifies that when trying any case, a Special Judge can also try any offence, other than an offence specified in Section 3, with which the accused may, under the Cr.P.C., be charged at the same trial. Sections 3 and 4 of the PC Act read as under:

> **“3. Power to appoint special Judges –** (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely: –
>
> (a) any offence punishable under this Act; and
>
> (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).
>
> (2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).
>
> **4. Cases triable by special Judges –** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.
>
> (2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.
>
> (3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.
>
> (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.”

Section 22 of PC Act provides that provisions of the Cr.P.C., shall in their application to any proceeding in relation to an offence punishable under the Act to apply subject to certain modifications. It is, therefore, apparent that provisions of the Cr.P.C. are to be applied to trials for offence under the PC Act, subject to certain modifications.

Section 220 of the Cr.P.C. relates to trial for more than one offence, if, in one series of acts so connected together as to form the same transaction more offence than one are committed and provides as follows:

“220 - Trial for more than one offence – (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of properly as provided in sub-section (2) of section 212 or in sub-section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, or such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).”

Persons accused of different offences committed in the course of the same transaction may be charged jointly as per Section 223 of the Cr.P.C., which reads as under:

“223. What persons may be charged jointly.– The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) *********

(d) persons accused of different offences committed in the course of the same transaction;

(e) to (g) *********

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Sessions may, if such persons by an

application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

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246. PROBATION OF OFFENDERS ACT, 1958 – Sections 3, 4 and 6
INDIAN PENAL CODE, 1860 – Section 354
JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Sections 2 (k) and 7A

(i) Offence of outraging the modesty of a woman is a heinous crime – Accused aged 16 years at the time of commission of offence in 1995 – Incident 18 years old – Not entitled to the benefit of Probation of Offenders Act, 1958 – In the social conditions prevailing in the society, the modesty of woman has to be guarded – Sympathy or delay cannot be any ground for reduction of sentence – Appeal dismissed.

(ii) Plea of juvenility may be raised at any stage – The accused was found to be entitled to the benefit of the provisions of 2000 Act – However, remanding the case at hand to the JJB would serve no purpose, as the maximum sentence that may be imposed by the JJB is 3 years and the punishment awarded in this case is only six months, so the cause of the juvenile is not prejudiced.

(iii) Sentencing policy – Courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot be any ground for reduction of sentence.

Ajahar Ali v. State of West Bengal

Judgment dated 04.10.2013 passed by the Supreme Court in Criminal Appeal No. 1623 of 2013, reported in (2013) 10 SCC 31

Extracts from Judgment :

This Court in ***Karamjit Singh v. State of Punjab, (2009) 7 SCC 178,*** after considering various earlier judgments and particularly ***Om Prakash v. State of Haryana, (2001) 10 SCC 477*** and ***Manjappa v. State of Karnataka, (2007) 6 SCC 231*** held that a relief under the 1958 Act should be granted in the offences which were not of a very grave nature or where the *mens rea* is absent.

In the instant case, as the appellant has committed a heinous crime and with the social conditions prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a roadside Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the appellant.

This brings us to the next question regarding the applicability of the JJ Act, 2000. This issue has been raised for the first time in this Court and the appellant can do so in view of the larger Bench judgment of this Court in ***Abuzar Hossain v. State of W.B., (2012) 10 SCC 489*** wherein it was held that the plea of juvenility can be raised at any stage irrespective of delay in raising the same. But the question that would arise is if the matter came before the Juvenile Justice Board, the maximum sentence that can be awarded in such a case is of 3 years. In the instant case, the punishment awarded is only six months so the cause of the appellant is not prejudiced.

The provisions of Section 354 IPC have been enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged, he is to be punished.

In ***State of Punjab v. Major Singh, AIR 1967 SC 63*** this Court observed that modesty is the quality of being modest which means as regards women, decent in manner and conduct, scrupulously chaste, though the word "modesty" has not been defined in the Code. The ultimate test for determining whether modesty has been outraged is whether the action of the offender as such can be perceived as one which is capable of lowering the sense of decency of a woman. (See also: ***Aman Kumar v. State of Haryana, AIR 2004 SC 1677, Raju Pandurang Mahale v. State of Maharashtra, AIR 2004 SC 1677*** and ***Tarkeshwara Sahu v. State of Bihar, (2006) 8 SCC 560***.

In ***Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194*** slapping a woman on her posterior amounted to outraging of her modesty within the meaning of Sections 354 and 509 IPC.

In ***Vishaka v. State of Rajasthan, AIR 1997 SC 3011*** and ***Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625*** this Court held that the offence relating to modesty of a woman cannot be treated as trivial and a lenient view by giving six months imprisonment on the ground of juvenility does not require consideration.

In ***Chinnadurai v. State of T.N., AIR 1996 SC 546*** this Court rejected the plea for reduction of sentence in view of considerable delay and other circumstances observing that sentence has to be awarded taking into consideration the gravity of injuries.

In ***State of U.P. v. Shri Kishan, (2005) 10 SCC 420*** this Court has emphasised that just and proper sentence should be imposed. The Court held:

> "..... Any liberal attitude by imposing meager sentence or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal

interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

> The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crimes has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."

In ***Sadhupati Nageshwara Rao v. State of A.P., AIR 2012 SC 3242*** this Court observed that the courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot be any ground for reduction of sentence.

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247. SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Sections 13, 14 and 17

SECURITY INTEREST (ENFORCEMENT) RULES, 2002 – Rule 8

(i) Taking possession of the secured assets of the borrower by the secured creditor – It is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under section 14.

(ii) Information required to be furnished in the application accompanied by an affidavit filed by the secured creditor to the Magistrate for the purpose of taking possession or control of secured assets – Proviso to section 14(1) as inserted by the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012 with effect from 15th January, 2013 – Duty of Magistrate before passing suitable orders for the purpose of taking possession of the secured assets – Second proviso to Section 14 (1) as inserted by the aforesaid (Amendment) Act, 2012 requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction – Magistrate is not required to abide by the procedure under rule 8 of 2002 Rules before passing order under section 14 – Rule 8 applies to secured creditor, if possession of secured assets is to be obtained directly without taking recourse to court – It does not apply to Magistrate or receiver who are

bound by Cr. P.C., 1973 or CPC, 1908 as the case may be – Magistrate is required to act in accordance with the provisions of Cr.P.C., 1973 to take possession of property, unless expressly ordained otherwise by any other law.

(iii) Right of appeal of borrower – When arises – Appeal to Debt Recovery Tribunal under section 17 is available only after losing possession of secured assets but not prior to it – Either the reasons indicated for rejection of the objections of the borrower or the likely actions of the secured creditor shall not confirm any right under section 17.

Standard Charted Bank v. V. Noble Kumar & others

Judgment dated 22.08.2013 passed by the Supreme Court in Criminal Appeal No.1218 of 2013, reported in (2013) 9 SCC 620

Extracts from Judgment:

Sub-section (2) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 authorises the secured creditor to exercise any of the rights under sub-section (4). Sub-section (2) reads as follows:

> "**13.(2)** where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)."

It can be seen from the said sub-section that for the secured creditor to take possession of the secured assets, the following conditions must be satisfied :

(i) That there must be a security agreement which creates the liability of the borrower to make repayment to the secured creditor of the secured debt;

(ii) The secured creditor is required to demand the borrower by notice in writing to discharge the full liability within a period of 60 days from the date of the notice.

Sub-section (3) stipulates that such notice shall give the details of (i) the amount payable by the borrower, (ii) the interest in the secured asset intended to be enforced by the secured creditor. Sub-section (4) provides for various measures which can be resorted to by the secured creditor in order to recover

his debt. Such measures are (1) taking possession of the secured asset, or (2) taking over the management of the business of the borrower. The secured creditor is also given the right either to make a further assignment of his interest or lease out the secured assets or sell the same in order to realise his debt. Such right of the secured creditor is hedged with limitations/ safeguard designed to protect the interest of the borrower so that the secured creditor may not abuse his rights i.e. except to take possession of the property and alienate the same only to the extent necessary to realise the actual amount due to him. Details of which may not be necessary for the purpose of this case. We are only concerned in this case with the method and manner in which possession of the secured assets could be obtained and the conditions precedent that are required to be satisfied for taking possession of the secured assets.

In every case where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. In our opinion, such action-having regard to the object and scheme of the Act-could be taken directly by the secured creditor. However, visualising the possibility of resistance for such action, Parliament under Section 14 also provided for seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it.

The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

It is in the abovementioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17.

The “appeal” under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is

only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (***sic*** the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.

It can be noticed from the language of the proviso to Section 13 (3-A) and the language of Section 17 that an "appeal" under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words "aggrieved by .... taken by the secured creditor" (emphasis supplied) in Section 17 (1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso to sub-section
(3-A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17.

Under Rule 8, the secured creditor is required to deliver to the borrower a notice prepared as nearly as possible in Appendix IV to the Rules any by affixing such notice to the property. Further, sub-rule (2) which came to be substituted in 2007 in original provides that the notice contemplated under sub-rule (1) is required to be published in two leading newspapers having sufficient circulation in the locality of which at least one should be in vernacular language. Prior to 2007 the requirement of publication in vernacular newspaper was not there.

The High Court recognised that the language of Rule 8 does not expressly warrant the compliance with the procedure contemplated therein when Section 14 is resorted to for obtaining possession of the secured asset:

> "In the absence of the rule, the strict compliance with the provisions of Section 13(4) and Rule 8, even in case of possession taken by virtue of an order under Section 14, assumes importance."

The language of Rule 8 does not demand such a construction. On the other hand, a Magistrate whose functioning is structured by the Code of Criminal Procedure is required to act in accordance with th provisions of the said Code unless expressly ordained otherwise by any other law. It is not a case that Cr.P.C. never prescribed for the procedure to be followed by the Magistrate in a case where the Magistrate is required to take possession of property. For example, under Section 83 of the Code, a criminal court is authorised to attach the movable or immovable property or both belonging to a proclaimed offender. Sub-sections (3) and (4) to Section 83 specifically provide that once an order of attachment under sub-section (1) is made by the criminal court, the property which is the subject-matter of such attachment shall either be seized or taken possession of as the case may be depending upon the fact whether the property is movable or immovable. Both the sub-sections contemplate the appointment of Receiver. It is declared under sub-section (6) that the powers, duties and liabilities of a Receiver appointed under Section 83 are the same as those of a Receiver appointed under the Code of Civil Procedure, 1908.

Order 40 of the Code of Civil Procedure deals with the appointment of the Receiver. Rule 1 authorises the court to appoint a Receiver:

> **“1. Appointment of Receivers –** (1) Where it appears to the court to be just and convenient, the court may by order –
>
> (a) appoint a Receiver of any property, whether before or after decree;
>
> (b) remove any person from the possession or custody of the property;
>
> (c) commit the same to the possession, custody or management of the Receiver, and
>
> (d) confer upon the Receiver all such powers, as to bringing and defending suit and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.
>
> (2) Nothing in this Rule shall authorise the court to remove from the possession or custody of property, any person whom any party to the suit has not a present right so as to remove.”

It can also be noticed from Rule (1) that the power of the civil court to appoint a Receiver could be exercised either before or after passing of the decree.

Therefore, there is no justification for the conclusion that the Receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the Receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by a secured creditor taking possession of the secured asset without the intervention of the court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

Thus, there will be three methods for the secured creditor to take possession of the secured assets:

(i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

(ii)The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

(iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2(ii) above.

In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002,shall apply.

In this connection, it is material to refer to the judgment in ***Mardia Chemicals v. Union of India***, ***(2004) 4 SCC 311*** wherein the Court was concerned with the legality and validity of SARFAESI Act. The Court held the Act to be valid except Section 17(2) thereof as it then stood. In paras 59, 62 and 76 of the judgment

of the Court in terms held that in remedy under Section 17 of the Act was essentially like filing a suit in a civil court though it was called an appeal. It is also relevant to note that in the ultimate conclusions in para 80 of the judgment this Court held in sub-para (2) thereof as follows:

> "**80.(2)** As already discussed earlier, on measured having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal."

The grievance of the respondent that it will be left with no remedy is therefore, misplaced. As held by a Bench of three Judges in Mardia Chemicals, it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13(4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate.

Coming to the facts of this case, a notice under Section 13(2) was in fact served on the respondent for which the respondent did not choose to respond. Therefore, there was no occasion for the appellant to consider the objections as there was none of the respondent against the demand made in the said notice. It is brought to our notice that even while making application under Section 14 the appellant filed an affidavit substantially providing for the necessary information contemplated under the newly introduced proviso to Section 14(1). We have already noticed that there was not statutory requirement as on the date when the application under Section 14 was made in the instant case either to give such an affidavit or regarding the content of the affidavit. Nonetheless the appellant chose to give such an affidavit, a copy of which is placed before us. We have perused the affidavit and it substantially complies with the conditions stipulated in the newly introduced proviso. Maybe the appellant did it by way of abundant caution to avoid any litigation.

However, the respondent submitted before us that there is nothing in the impugned order of the Magistrate which indicates that the Magistrate applied his mind to such an affidavit and satisfied that it is necessary to deliver possession of the secured asset to the appellant. No doubt that there is no material on record to show the Magistrate applied his mind to the facts stated in the affidavit filed by the appellant. On the date of the impugned order the law did not oblige the Magistrate to undertake any such exercise. Apart from that we are satisfied on examination of the content of the affidavit that all the basic requirements necessary for granting the request of the appellant of delivery of the possession of the secured asset are asserted to have existed on the date of application.

Therefore, we do not see any illegality in the impugned order. The appeal is allowed. The order of the High Court is set aside.

In view of our conclusion on the scope of Section 17 recorded earlier it would normally have been open to the respondent to prefer an appeal under Section 17 raising objections regarding legality of the decision of the Magistrate to deprive the respondent of the possession of the secured asset. But in view of the fact that the respondent chose to challenge the decision of the Magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution and in view of the fact that the respondent does not have any substantive objection as can be discerned from the record, we make it clear that the respondent in the instant case would not be entitled to avail the remedy under Section 17 as the respondent stalled the proceedings for a period of almost 4 years. It is worthwhile remembering that the respondent did not even choose to raise any objections to the demand issued under Section 13(2) of the Act. However, we make it clear that it is always open to the respondent to seek restoration of his property by complying with sub-section (8) of Section 13 of the Act.

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248. SPECIFIC RELIEF ACT, 1963 – Section 6

Restoration of possession over encroached land – Plaintiff being an encroacher having no title over the suit property, was in peaceful possession thereof – Defendant forcibly dispossesses him by taking law in his own hands – Plaintiff can sue the defendant/owner who has forcibly ousted him.

Gulab Singh v. Virendra Singh

Order dated 06.03.2013 passed by the High Court of M.P. in C.R. No. 1054 of 2003, reported in ILR (2013) MP 1474

Extracts from Order:

The defendant was an encroacher upon the Govt. land and he was fined with a penalty. On the basis of the revenue record, the land in question is found to be owned by the State Govt. upon which the plaintiff has been shown to be an encroacher. To me, merely because plaintiff is an encroacher, the defendant by taking law in his own hands cannot dispossess him and if he has dispossessed him certainly he is legally bound to deliver the possession. This Court in ***Pannalal Bhagirath Marwadi v. Bhaiyalal Birndraban Pardeshi Teli, 1937 AIR (Nag) 281*** has held that section 9 of the Specific Relief Act of 1877 (which is equivalent to section 6 of the present Act of 1963) the plaintiff can bring a suit for possession under this provision. This Court in the same judgment has further held that one who entered into peaceful possession though having no legal title can defend his title against one who forcibly ousted him. If the decision of this Court in

Pannalal (supra) is tested on the touchstone and anvil of the present factual scenario it would reveal that the plaintiff who has entered into a peaceful possession and whose possession has also been found in the revenue record though he may be an encroacher and having no title over the suit property, can sue the defendant who has forcibly ousted him. The view which was taken up by this Court long back near about 83 years ago was affirmed by the Apex Court in ***M. Kallappa Setty v. M.V. Lakshminarayana Rao, AIR 1972 SC 2299*** in which the same principle has been reiterated that plaintiff is in possession of the suit property on the strength of his possession can resist interference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession.

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***249. SUCCESSION ACT, 1925 – Section 63**

EVIDENCE ACT, 1872 – Sections 67 and 68

Execution of Will – Onus of proof – Where the execution of the Will is surrounded by suspicious circumstances, the propounder, apart from the statutory requirements, is also required to remove all legitimate doubts to the satisfaction of the judicial conscience of the court.

(*H. Venkatachala Iyengar v. B. N. Thimmajamma, AIR1959 SC 443, Rani Purnima Devi v. Khagendra Narayan Dev, 1962 AIR SC 567, S. R. Srinivasa and others v. S. Padmavathamma, (2010) 5 SCC 274* and ***Balathandayutham and another v. Ezhilarasan, (2010) 5 SCC 770,*** **relied on)**

Sitaram Dubey v. Manaklal

Judgment dated 02.05.2013 passed by the High Court of M.P. in S.A No. 111 of 1996, reported in 2013 (3) MPLJ 114

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250. LAW OF TORTS – Tort of alienation of affection by a stranger or "Heart Balm" action

FAMILY LAW – Marital relationship – Meaning

INDIAN PENAL CODE, 1860 – Section 498-A

EVIDENCE ACT, 1872 – Section 113-A

(i) Alienation of affection by a stranger i.e. interference in the marital relationship with intent to alienate one spouse from the other is an intentional tort known as "Heart Balm" action – Both the spouses can lay such a claim – The liability arises only if there is any active participation, initiation or encouragement on the part of the defendant – Acts which lead to the loss of affection must be wrongful, intentional, calculated to entice the affection of one spouse away from the other, in order to support a cause of action for alienation of affection – Merely becoming a passive

object of affection does not incur liability – It is not necessary for a party to prove an adulterous relationship.

(ii) "Marital relationship" means the legally protected marital interest of one spouse in another which includes marital obligation to another like companionship, living under the same roof, exclusive enjoyment of sexual relations, to have children, their upbringing, services in the home, support, affection, love, liking and so on.

(iii) Extramarital relationship leading to cruelty and amounting to abetment of suicide – Mere fact that the husband has developed some intimacy with another, during the subsistence of marriage and failed to discharge his marital obligations, as such, would not amount to "cruelty" – To fall within the Explanation to Section 498-A IPC, it must be of such a nature as is likely to drive the spouse to commit suicide.

(iv) Section 113-A only deals with a presumption which the court may draw in a particular fact situation which may arise – Burden of proof of showing that an offence under Section 498-A IPC has been committed by the accused is on the prosecution.

Pinakin Mahipatray Rawal v. State of Gujarat

Judgment dated 09.09.2013 passed by the Supreme Court in Criminal Appeal No. 811 of 2013, reported in III (2013) DMC 245 (SC)

Extracts from Judgment:

Alienation of affection by a stranger, if proved, is an intentional tort i.e. interference in the marital relationship with intent to alienate one spouse from the other. Alienation of affection is known as "Heart Balm" action. Anglo-Saxon common law on alienation of affection has not much roots in this Country, the law is still in its nascent stage. Anglo Saxon based action against the third parties involving tortious interference with the marital relationship was mainly compensatory in nature which was earlier available to the husband, but of late, a wife could also lay such a claim complaining of alienation of affection. The object is to preserve marital harmony by deterring wrongful interference, thereby to save the institution of marriage. Both the spouses have a valuable interest in the married relationship, including its intimacy, companionship, support, duties, affection, welfare of children etc.

In India, if the marital relationship is strained and if the wife lives separately due to valid reasons, the wife can lay a claim only for maintenance against the husband and if a third party is instrumental for disrupting her marriage, by alienating her spouse's affection, companionship, including marital obligations, seldom, we find, the disgusted spouse proceeds against the intruder into her

matrimonial home. Possibly, in a given case, she could question the extent, that such injuries can be adequately compensated, by a monetary award. Such an action, of course, may not protect a marriage, but it compensates those who have been harmed.

We are, however, of the view that for a successful prosecution of such an action for alienation of affection, the loss of marital relationship, companionship, assistance, loss of consortium, etc. as such may not be sufficient, but there must be clear evidence to show active participation, initiation or encouragement on the part of a third party that he/she must have played a substantial part in including or causing one spouse's loss of other spouse's affection. Mere acts, association, liking as such do not become tortious. Few countries and several States in the United States of America have passed legislation against bringing in an action for alienation of affection, due to various reasons, including the difficulties experienced in assessing the monetary damages and a few States have also abolished "criminal conversation" action as well.

We may, however, indicate that a few States and countries strongly support such an action, with the object of maintaining and preserving marriage as a sacred institution. Strong support comes from the State of Mississippi in the United Sates. In ***Knight v. Woodfield wife*** [50 So 3d 995 (Miss 2011)] the husband filed a suit for alienation against his wife. The wife's alleged paramour, after gaining access to text message and talked for more than 16 hours in two months. In that case jurisdictional issues were raised, but the Court reaffirmed that law of alienation of affection is firmly established in the State of Mississippi. Another case of some importance is ***Dare v. Stokes*** [62 So 3d 858 (Miss 2011)], where in a property settlement agreement of divorced couple, a provision was made that the husband would not bring suit against any other person for alienation of affection. The agreement was reduced to a final order by the trial court. Later the husband came to know that his wife had a love affair with one Dare and hence sought for a modification of the agreement. He also sent a notice to Dare as well of his intention to file a suit for alienation of affection. Dare's attempt to intervene and oppose the application for modification of the agreement was not favourably considered by the Court on the ground that he cannot meddle with the marital relationship.

Action for alienation of affection lies for all improper intrusions or assaults on the marriage relationship by another, whether or not associated with "extramarital sex", his or her continued overtures or sexual liaisons can be construed as something akin to an assumption of risk that his/her conduct will injure the marriage and give rise to an action. But all the same, a person is not liable for alienation of affection for merely becoming a passive object of affection. The liability arises only if there is any active participation, initiation or encouragement on the part of the defendant. Acts which lead to the loss of

affection must be wrongful, intentional, calculated to entice the affection of one spouse away from the other, in order to support a cause of action for alienation of affection. For proving a claim for alienation of affection it is not necessary for a party to prove an adulterous relationship.

"Marital relationship" means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their upbringing, services in the home, support, affection, love, liking and so on. Extramarital relationship as such is not defined in the Penal Code.

This Court in ***Girdhar Shankar Tawade v. State of Maharashtra, (2002) 5 SCC 177*** examined the scope of the Explanation to Section 498-A and held as follows :

> "The basic purport of the statutory provision is to avoid "cruelty' which stands defined by attributing a specific statutory meaning attached thereto as noticed herein before. Two specific instances have been taken note of in order to ascribe a meaning to the word 'cruelty' as is expressed by the legislatures: whereas Explanation (a) involves three specific situations viz. (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in Explanation (b) there is absence of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed, is equally heinous to match the physical injury: whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of Section 498-A".

In ***Gananath Pattnaik v. State of Orissa, (2002) 2 SCC 619*** this Court held that the concept of cruelty under Section 498-A IPC and its effect under Section 306 IPC varies from individual to individual also depending upon the social and economic status to which such person belongs. This Court held that cruelty for the purpose of offence and the said section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty or harassment in a given case.

We are of the view that the mere fact that the husband has developed some intimacy with another, during the subsistence of marriage and failed to discharge his marital obligations, as such would not amount to "cruelty", but it

must be of such a nature as is likely to drive the spouse to commit suicide to fall within the Explanation to Section 498-A IPC. Harassment of course, need not be in the form of physical assault and even mental harassment also would come within the purview of Section 498-A IPC. Mental cruelty, of course, varies from person to person depending upon the intensity and the degree of endurance, some may meet with courage and some others suffer in silence, to some it may be unbearable and a weak person may think of ending one's life. We, on facts, found that the alleged extramarital relationship was not of such a nature as to drive the wife to commit suicide or that A-1(husband of deceased) had ever intended or acted in such a manner which under normal circumstances, would drive the wife to commit suicide.

Section 113-A only deals with a presumption which the court may draw in a particular fact situation which may arise when necessary ingredients in order to attract that provision are established. Criminal law amendment and the rule of procedure was necessitated so as to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry. Legislative mandate of the section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her husband had subjected her to cruelty as per the terms defined in Section 498-A IPC, the court may presume having regard to all other circumstances of the case that such suicide has been abetted by the husband of such person. Though a presumption could be drawn, the burden of proof of showing that such an offence has been committed by the accused under Section 498-A IPC is on the prosecution. On facts, we have already found that the prosecution has not discharged the burden that A-1 had instigated, conspired or intentionally aided so as to drive the wife to commit suicide or that the alleged extramarital affair was of such a degree which was likely to drive the wife to commit suicide.

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PART - III

CIRCULARS/NOTIFICATIONS

MEMORANDUM OF HIGH COURT OF MADHYA PRADESH REGARDING REPORT OF TRANSACTION OF MOVABLE PROPERTY BY THE JUDICIAL OFFICER TO THE HIGH COURT

No.D/4005 Jabalpur, dated: 04/09/2014

To,

All District & Sessions Judges of
MADHYA PRADESH

Sub:- Report of transaction of movable property by the Judicial Officer to the High Court.

Ref:- Gazettee Notification No. C. 3-14-2012-1-3, Bhopal dated 28 Jan, 2013 published on 1st Feb., 2013 in Gazettee of M.P.

As directed, on the above cited subjected and reference, I am to inform you in accordance with the amendment in Rule 19 (2-A) M.P. Civil Services (Conduct) Rules, 1965 as referred above. You are hereby requested to inform all your subordinate Judicial Officers to send the report to the Hon'ble High Court regarding transaction entered into by them in their own name or in the name of a member of their family in respect of movable property, only, if value of such property exceeds two months' basic pay of the concerned Judicial Officer.

(SHAMBHU DAYAL DUBEY)
PRINCIPAL REGISTRAR
(INSPECTION & VIGILANCE)

NOTIFICATION OF THE MINISTRY OF FINANCE DATED 15TH JANUARY, 2013 REGARDING DATE OF ENFORCEMENT OF THE PROVISIONS OF THE ENFORCEMENT OF SECURITY INTEREST AND RECOVERY OF DEBTS LAWS (AMENDMENT) ACT, 2012, EXCEPT SECTIONS 8 & 15 (B)

S.O. 171(E) – In exercise of powers conferred by sub-section (2) of Section 1 of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 (No. 1 of 2013), the Central Government hereby appoints the 15th day of January, 2013, as the date on which the provisions of the said Act, except Sections 8 and 15(b), shall come into force.

[F.No.3/1/2011-DRT (Recovery)]
ANURAG JAIN, Jt. Secy.

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NOTIFICATION OF THE MINISTRY OF FINANCE DATED 15TH JANUARY, 2013 REGARDING DATE OF ENFORCEMENT OF SECTIONS 8 & 15 (B) OF THE ENFORCEMENT OF SECURITY INTEREST AND RECOVERY OF DEBTS LAWS (AMENDMENT) ACT, 2012

S.O. 1223(E) – In exercise of powers conferred by sub-section (2) of Section 1 of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 (No. 1 of 2013), the Central Government hereby appoints the 15th day of May, 2013, as the date on which the provisions of Sections 8 and 15 (b) of the said Act shall come into force

[F.No.1/1/2013- Recovery]
ANURAG JAIN, Jt. Secy.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE ENFORCEMNENT OF SECURITY INTEREST AND RECOVERY OF DEBTS LAWS (AMENDMENT) ACT, 2012

No.1 of 2013*

[3rd January, 2013]

*(*Received the assent of the President on the 3rd January, 2013; assent first published in the Gazette of India (Extraordinary) Part II Section 1 dated 4th January, 2013 pages 1-7 [Sl. No. 2])*

An Act further to amend the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows: –

CHAPTER I

Preliminary

1. Short title and commencement.– (1) This Act may be called the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

CHAPTER II

Amendments to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

2. Amendment of Section 2. – In Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), (hereafter in this Chapter referred to as the principal Act), in clause (c), after sub-clause (iv), the following sub-clause shall be inserted, namely : –

"(iva) a multi-State Co-operative Bank; or".

3. Amendment of Section 5. – In Section 5 of the principal Act, after sub-section (4), the following sub-section shall be inserted, namely : –

"(5) On acquisition of financial assets under sub-section (1), the securitisation company or reconstruction company, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of securitisation company or

reconstruction company in such pending suit, appeal or other proceedings."

4. Amendment of Section 9.– In Section 9 of the principal Act, After clause(f), the following clause shall be inserted, namely :-

"(g) to convert any portion of debt into shares of a borrower company :

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times."

5. Amendment of Section 13. – In Section 13 of the Principal Act, –

(a) in sub-section (3A), for the words "within one week", the word "within fifteen days" shall be substituted;

(b) after sub-section (5), the following sub-sections shall be inserted, namely : –

"(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of Section 13.

(5C) The provisions of Section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A)."

(c) in the opening portion of sub-section (9), and in the Explanation thereto, for the word "three-fourth", occurring at both the place, the words "sixty per cent" shall be substituted.

6. Amendment of Section 14. – In Section 14 of the principal Act, –

(a) in sub-section (1), the following provisos shall be inserted, namely : –

"Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the Authorised Officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of Section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and Authorised Officers is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of Section 13 read with Section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets :

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.";

(b) after sub-section (1), the following sub-section shall be inserted, namely: –

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him, –

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.";

(c) in sub-section (3), after the words "the District Magistrate", the words "any officer authorised by the Chief Metropolitan Magistrate or District Magistrate" shall be inserted.

7. Insertion of new Section 18C. – After 18B of the Principal Act, the following section shall be inserted, namely : –

"18C. Right to lodge a caveat. – (1) Where an application or an appeal is expected to be made or has been made under sub-section (1) of Section 17 or Section 17A or sub-section (1) of Section 18 or Section 18B, the secured creditor or any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), –

(a) the secured creditor by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgment due, on the person by

whom the application has been or is expected to be made under sub-section (1);

(b) any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been or is expected to be made under sub-section (1).

(3) Where after a caveat has been lodged under sub-section (1), any application or appeal is filed before the Tribunal or the court of District Judge or the Appellate Tribunal or the High Court, as the case may be, the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

(4) Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal referred to in sub-section (1) has been made before the expiry of the said period.

8. Amendment of Section 23.– In Section 23 of the principal Act, after the proviso, the following proviso shall be inserted, namely : –

"Provided further that the Central Government may, by notification, require registration of all transactions of securitisation, or asset reconstruction or creation of security interest which are subsisting on or before the date of establishment of the Central Registry under sub-section (1) of Section 20 within such period and on payment of such fees as may be prescribed."

9. Insertion of new Section 26A. – After Section 26 of the principal Act, the following section shall be inserted, namely : –

"26A. Rectification by Central Government in matters of registration modification and satisfaction, etc. – (1) The Central Government, on being satisfied-

(a) that the omission to file with the Registrar the particulars of any transaction of securitisation, asset reconstruction or security interest or modification or satisfaction of such transaction or; the omission or mis-statement of any particular with respect to any such transaction or modification or with respect to any satisfaction or other entry made in pursuance of Section 23 or Section 24 or Section 25 of the principal Act was accidental or due to inadvertence or some other sufficient cause or it is not a nature to prejudice the position of creditors; or

(b) that on other grounds, it is just and equitable to grant relief, may, on the application of a secured creditor or securitisation company or reconstruction company or any other person interested on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for filing of the particulars of the transaction for registration or modification or satisfaction shall be extended or, as the case may require, the omission or mis-statement shall be rectified.

(2) Where the Central Government extends the time for the registration of transaction of security interest or securitisation or asset reconstruction or modification or satisfaction thereof, the order shall not prejudice any rights acquired in respect of the property concerned or financial asset before the transaction is actually registered."

10. Substitution of new Section for Section 30. – For Section 30 of the principal Act, the following section shall be substituted, namely : –

"30. Cognizance of offences – (1) No court shall take cognizance of any offence punishable under Section 27 in relation to non-compliance with the provisions of Section 23, Section24 or Section 25 or under Section 28 or Section 29 or any other provisions of the Act, except upon a complaint in writing made by an officer of the Central Regisry or an officer of the Reserve Bank, generally or specially authorised in writing in this behalf by the Central Registrar or, as the case may be, the Reserved Bank.

(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act."

11. Insertion of new section 31A. – After Section 31 of the principal Act, the following section shall be inserted, namely :-

31A. Power to exempt a class or classes of banks or financial institutions – (1) The Central Government may, by notification in the public interest, direct that any of the provisions of this Act, -

(a) shall not apply to such class or classes of banks or financial institutions; or

(b) shall apply to the class or classes of banks or financial institutions with such exceptions, modifications and adaptations,

as may be specified in the notification.

(2) A copy of every notification purposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforsesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses."

CHAPTER III

Amendments to the Recovery of Debts due to Banks and Financial Institutions Act, 1993

12. Amendment of Section 2.– In the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), (hereafter in this Chapter referred to as the principal Act), in Section 2, in clause (d), after sub-clause (v), the following sub-clause shall be inserted, namely: –

"(vi) a multi-State Co-operative Bank;"

13. Amendment of Section 15.– In Section 15 of the principal Act, in sub-section (2), the following proviso shall be inserted namely: –

"Provided that the Central Government, during the pendency of the inquiry against the Presiding Officer or a Chairperson, as the case may be, may, after consulting the Chairperson of the Selection Committee constituted for selection of Presiding Officer or Chairperson, pass an order suspending the Presiding Officer or the Chairperson, if it is satisfied that he should cease to discharge his functions as a Presiding Officer or Chairperson, as the case may be."

14. Amendment of Section 18 – In Section 18 of the principal Act, the following proviso shall be inserted, namely :-

"Provided that any proceedings in relation to the recovery to debts due to any multi-State Co-operative Bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this Section shall, after such commencement, apply to such proceedings."

15. Amendment of Section 19.– In Section 19 of the principal Act, –

(a) after sub-section (1), the following sub-sections shall be inserted, namely: –

"(1A) Every bank being, multi-State Co-operative Bank referred to in sub-clause (vi) of clause (d) of Section 2, may, at its option, opt to initiate proceedings under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) to recover debts, whether due before or after the date of commencement of the Enforcement of the Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 from any person instead of making an application under this Chapter.

(1B) In case, a bank being, multi-State Co-operative bank referred to in sub-clause (vi) of clause (d) of Section 2 has filed and application under this Chapter and subsequently opts to withdraw the application for the purpose of initiating proceeding under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) to recover debts, it may do so with the permission of the Tribunal and every such application seeking permission from the Tribunal to withdraw the application made under sub-section (1A) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided that in case the Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.";

(b) after sub-section (3), the following sub-section shall be inserted,

namely: –

"(3A) If any application filed before the Tribunal for recovery of any debt is settled prior to the commencement of the hearing before that Tribunal or at any stage of the proceedings before the final order is passed, the applicant may be granted refund of the fees paid by him at such rates as may be prescribed."

(c) for sub-section (5), the following sub-section shall be substituted, namely: –

"(5) The defendant shall, within a period of thirty days from the date of service of summons, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, the presiding Officer may, in exceptional cases and in special circumstances to be recorded in writing, allow not more than two extensions to the defendant to file the written statement."

(d) after sub-section (5), the following sub-section shall be inserted, namely: –

"(5A) After hearing of the application has commenced, it shall be continued from day-to-day until the hearing is concluded:

Provided that the Tribunal may grant adjournments if sufficient cause is shown, but no such adjournment shall be granted more than three times to a party and where there are three or more parties, the total number of such adjournments shall not exceed six:

Provided further that, the Presiding Officer may grant such adjournment on imposing such costs as may be considered necessary.";

(e) after sub-section (20), the following sub-section shall be inserted, namely:-

"(20A) Where it is proved to the satisfaction of the Tribunal that the claim of the applicant has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant has repaid or agreed to repay the claim of the applicant, the Tribunal shall pass orders recording such agreement, compromise or satisfaction of the claim."

16. Amendment of Section 31.– In Section 31 of the principal Act, after the proviso, the following proviso shall be inserted, namely: –

"Provided further that any recovery proceedings in relation to the recovery of debts due to any multi-State Co-operative Bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 (39 of 2002), shall be continued and nothing contained in this section shall apply to such proceedings."

17. Amendment of Section 36.– In Section 36 of the principal Act, in sub-section (2),after clause (c), the following clause shall be inserted,namely: –

"(cc)the rate of fee to be refunded to the applicant under sub-section (3A) of Section 19 of the Act."

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