JOTI JOURNAL

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OCTOBER 2021

MADHYA PRADESH STATE JUDICIAL ACADEMY
JABALPUR

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

JOTI JOURNAL OCTOBER- 2021

SUBJECT- INDEX

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

EDITORIAL

Esteemed Readers,

One of the finest brains, Albert Einstein said; "Education is not the learning of facts but the training of mind to think." The recognition of this proposition is reflected in the observation of judicial education and training which is well accepted as a part of judicial life. It is imperative for the preservation of judicial independence that our mental prowess is sharpened and enhanced at every single step of the way. This feat can only be achieved if the element of accountability is present in the areas of judging.

The object of judicial education and training is to promote the competency and professionalism of the judiciary. Withal, the task of maintaining judicial competence depends on the disposition of the judiciary itself to assure that its members are knowledgeable and skilled in the study of the law and its development and that judges are disciplined in the application of legal principles and the art of conducting judgments.

Judicial education is the primary means to advancing judicial competency and building public trust and confidence in the judiciary. The opportunity to learn new things and review current information valuable to maintaining the wholeness of the judicial system is limitless. Proper administration of justice can be accomplished through education and training. It increases efficiency, innovation and effectiveness in justice dispensation to the citizenry. As litigation becomes increasingly complex, judges must have an informed understanding of a broad rung of scientific and technical legal issues. The judicial education and training help maintain a high level of competence to assist judges in carrying out their responsibilities and to provide accurate and timely justice to the public.

Our Academy is undertaking this task through a comprehensive system of mandatory induction as well as continuing education and training to the members of the District Judiciary.

Coming to the activities of the Academy, in the months of September & October, Workshops on – Key issues relating to Family Laws, Cyber Laws & Electronic Evidence, Interactive Sessions on – Identified Legal Issues and Key issues relating to Criminal Appeals & Revisions/Civil Appeals as well as Symposium on – Forest & Wildlife Laws were conducted. The Academy, in a phased manner, is also resuming its in-person training, which is conducted physically, unlike the online course that was conducted virtually. Two Refresher Courses for the Civil Judge (Entry Level) of the 2019 batch were organized in the Academy. In all these programmes, 939 Judges of the District Court

participated. Over time the Academy will conduct a full-fledged programme in its premises. Slowly, the old glory shall return.

This Journal is the collective involvement of all the members of the district judiciary. For the past couple of months, there has been a surge in the number of articles that the Academy is receiving from young and promising Judges. I appreciate your involvement and hope to see more content for the Journal in the future.

As our family of intellectuals intrigued by the law widens, the response to the performance of this Journal has been overwhelming, to say the least. This Journal is held at such high standards only because of the positive feedback and efforts put in by the consumers of our content. Refinements as and when required that are mentioned by our esteemed readers help us to strive for academic and literary perfection consistently and constantly. Every single feedback with constructive criticism helps us reach one step closer to that goal. This symbiotic relationship helps us remain motivated to put in more effort, research and take the time to fine-tune our content that best suits you. Owing to the massive importance that our valuable readers have in the making of this Journal, we appreciate and encourage feedback from all of you. We invite your feedback on this iteration of the Journal so that our aim to constantly improve ourselves remains undeterred.

The journey through 2021 has been tumultuous. But as we arrive to the final quarter of this year, the ray of hope that is often mentioned by wise people, is finally presenting itself in front of us. With the threat of the pandemic subsiding, we are now observing the resumption of physical courts all over the country. It is commendable how the judiciary managed to continue its pursuit to provide justice to the people even as the whole world was in shambles. There is a reinvigorated spirit amongst us that gives us hope to continue our journey in this pursuit.

Lastly, we are ecstatic to function under the patronage of our new Chief Justice Hon'ble Shri Ravi Malimath from this month. We are sure, with His Lordship's multi-dimensional forethought, the Academy will touch new heights in the paths that lie ahead.

Ramkumar Choubey
Director

WELCOME TO HON'BLE THE CHIEF JUSTICE SHRI RAVI MALIMATH

Hon'ble Shri Justice Ravi Malimath has been appointed as the 27th Chief Justice of Madhya Pradesh.

His Lordship was born on 25th May, 1962. His Lordship's paternal grandfather late Justice S.S. Malimath was a freedom-fighter and a pioneer in the struggle for the unification of Karnataka. He rendered yeoman service to the State as Chairman of the Inter-State Border Dispute Committee concerning the districts of Belgaum and Kasargod. He was one of the first two judges to be appointed as a Judge of the High Court of Mysore (now Karnataka).

His Lordship's maternal grandfather late Dr. S.C. Nandimath was an acclaimed scholar in Theology, Linguistics, Epigraphy, Sanskrit and Kannada. He was conferred with a Doctorate by the University of London on the subject "Theology of the Saivaagamas". He dedicated his life to the cause of education and established various educational institutions in the backward areas of Northern Karnataka. He was an eminent Professor and a Principal, who, subsequently, became the Vice Chancellor of Karnataka University.

His Lordship's father late Dr. Justice V.S. Malimath is recognised as one of the finest Chief Justices ever. He was an eminent Chief Justice of the High Court of Karnataka and, later on, of Kerala. He has made monumental contributions for reformation of the legal system. He was Chairman of the Arrears Committee, Chairman of the Committee on the Reforms in Criminal Justice System, etc.

His Lordship graduated in Commerce from M.E.S. College, Bangalore and completed Law Degree from Sri Jagadguru Renukacharya College of Law. Thereafter, joined the chambers of Sri Shivraj Patil, who was, later on, elevated as a Judge of the High Court of Karnataka and, thereafter, as a Judge of the Supreme Court of India. His Lordship practiced in almost all fields of law. His Lordship was appointed as an Additional Judge of the High Court of Karnataka on 18th Febuary, 2008 and as Permanent Judge on 17th Febuary, 2010.

As a Judge of the High Court of Karnataka from 18th February, 2008 to 2nd March, 2020, His Lordship delivered final judgments in 44,886 cases. The statistics indicate that this is one of the highest number of disposals in the State. As a Judge of the High Court of Karnataka, worked very effectively as the Administrative Judge of many districts and chaired various Administrative Committees. His Lordship was the President of the Bangalore Mediation Centre from 1st May, 2017 to 26th January, 2018 and President of the Karnataka Judicial Academy from 27th November, 2018 to 12th January, 2020. Was also the Executive Chairman of the Karnataka State Legal Services Authority from 6th October, 2019 to 4th March 2020. His Lordship was transferred as a Judge of the High Court of Uttarakhand and was administered oath on 5th March, 2020. His Lordship was appointed as the Executive Chairman of the Uttarakhand State Legal Services Authority w.e.f. 13th May, 2020 and was appointed as the Acting Chief Justice of the High Court of Uttarakhand w.e.f. 28th July, 2020. Various reforms for the betterment of the judiciary in Uttarakhand were undertaken and in a short span of 149 days, rendered final judgments in 1501 cases.

His Lordship was transferred and took oath as a Judge of the High Court of Himachal Pradesh on 7th January, 2021. Was appointed as the Executive Chairman of the Himachal Pradesh State Legal Services Authority on 25th Febuary, 2021. Assumed charge of the office of Chief Justice (Acting) w.e.f. 1st July, 2021.

A number of reforms were introduced on the judicial as well as the administrative side. In 105 working days of the Court, His Lordship disposed 1,511 main cases. More importantly, 29 cases which were more than 10 years old and 128 cases which were more than five years old were disposed of during this period.

On being appointed as the Chief Justice of Madhya Pradesh, His Lordship was administered oath of office at Raj Bhawan, Bhopal by the Governor of Madhya Pradesh on 14th October, 2021. His Lordship was accorded welcome ovation on 20th October, 2021 in the Conference Hall of South Block of High Court of Madhya Pradesh, Jabalpur.

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

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FAREWELL TO HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ ON HIS LORDSHIP'S TRANSFER TO HIGH COURT OF HIMACHAL PRADESH AS CHIEF JUSTICE

Hon'ble Shri Justice Mohammad Rafiq, Chief Justice of the High Court of Madhya Pradesh has been transferred to High Court of Himachal Pradesh as Chief Justice.

His Lordship was born on 25th May, 1960 at Sujangarh in Churu district of Rajasthan. After obtaining degrees of B.Com, LL.B and M.Com., His Lordship was enrolled as an Advocate on 8th July, 1984.

His Lordship practised in Rajasthan High Court in almost all branches of law. Worked as Assistant Government Advocate for the State of Rajasthan from 15th July, 1986 to 21st December, 1987 and Deputy Government Advocate from 22nd December, 1987 to 29th June, 1990. His Lordship appeared for the State of Rajasthan from 1993 to 1998 and also represented the Union of India as Standing Counsel from 1992 to 2001. His Lordship also represented the Indian Railways, Rajasthan State Pollution Control Board, Rajasthan Board of Muslim Wakfs, Jaipur Development Authority, Rajasthan Housing Board and Jaipur Municipal Corporation. His Lordship was appointed as Additional Advocate General for the State of Rajasthan on 7th January, 1999 and worked as such till his Lordship's elevation.

His Lordship was appointed as Judge of the Rajasthan High Court on 15th May, 2006. His Lordship also worked as Acting Chief Justice of Rajasthan High Court twice; from 7th April, 2019 to 4th May, 2019 and from 23rd September, 2019 to 5th October, 2019. His Lordship was also the Executive Chairman of the Rajasthan State Legal Services Authority and the Administrative Judge of the Rajasthan High Court prior to appointment as the Chief Justice. His Lordship was the Chief Justice of the High Court of Meghalaya from 13th November, 2019 to 26th April, 2020 and was Chief Justice of Orissa High Court from 27th April, 2020 to 2nd January, 2021.

On appointment as 26th Chief Justice of the High Court of Madhya Pradesh, His Lordship was administered oath of office on 3rd January, 2021.

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

On being appointed as the Chief Justice of High Court of Himachal Pradesh, His Lordship was accorded farewell ovation on 12th October, 2021.

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

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APPOINTMENT OF HON'BLE SHRI JUSTICE PRAKASH SHRIVASTAVA AS CHIEF JUSTICE OF CALCUTTA HIGH COURT

Hon'ble Shri Justice Prakash Shrivastava, who occupied the august office of the Judge of the High Court of Madhya Pradesh for more than thirteen years has been appointed as the Chief Justice of Calcutta High Court.

Hon'ble Shri Justice Prakash Shrivastava was born on 31st March, 1961. After obtaining B.A. degree from St. Aloysius College (University Merit) and M.A. in Economics in First Class First and LL.B. in First Class First from RDVV, enrolled as an Advocate on 2nd February, 1987.

His Lordship is a recipient of various medals like Jabalpur Rotary Club Gold Medal and Late N.M. Deshpande Memorial Gold Medal for scoring highest marks in M.A. (Economics), Late Nishikant Chouksey Memorial Gold Medal for obtaining highest marks in Statistics in M.A. (Economics) and Shri O.P. Mishra Memorial Gold Medal for scoring highest marks in LL.B. His Lordship was a practicing lawyer at the Supreme Court and the High Court of Madhya Pradesh at Jabalpur for about 20 years i.e. from 1987

to 2007. His Lordship represented State of Chhattisgarh in the Supreme Court as standing Counsel from June 2001 to December 2004 and counsel for Municipal Corporation, Jabalpur and Bilaspur, Regional Rural Bank, Chhattisgarh and M.P. Warehousing Corporation.

His Lordship was appointed as Additional Judge, High Court of Madhya Pradesh on 18th January, 2008 and Permanent Judge on 15th January, 2010.

During His Lordship's tenure in the High Court of Madhya Pradesh, rendered valuable services as Administrative Judge, Chairman, Governing Council of Madhya Pradesh State Judicial Academy, Executive Chairman of State Legal Services Authority (SLSA) and Senior Member of various Executive Committees of High Court.

His Lordship has been a constant source of inspiration for the Judges of Madhya Pradesh. His Lordship took keen interest in the academic activities of the Academy and provided wholesome motivation and support. The Academy is deeply indebted for His Lordship's kind support and benevolent guidance.

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

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HON'BLE SHRI JUSTICE VIVEK AGARWAL ASSUMES CHARGE AS JUDGE OF HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Vivek Agarwal, on His Lordship's transfer from Allahabad High Court to High Court of Madhya Pradesh, was administered oath of office on 20th October, 2021 by Hon'ble the Chief Justice Shri Ravi Vijaykumar Malimath.

His Lordship was born on 28th June 1967 in Kasganj, Uttar Pradesh. After completion of education, His Lordship was enrolled as an Advocate in August 1992 and practiced at Civil, Criminal and Constitutional sides.

His Lordship was appointed as Additional Judge of High Court of Madhya Pradesh on 7th April, 2016 and Permanent Judge on 17th March, 2018.

After approximately three and half years, His Lordship was transferred to the High Court of Allahabad and took oath as Judge of the Allahabad High Court on 17th October, 2019. After almost two years, His Lordship is again with us.

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

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APPOINTMENT OF HON'BLE SHRI JUSTICE PURUSHAINDRA KUMAR KAURAV AS JUDGE OF THE HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Purushaindra Kumar Kaurav was administered oath of office on 8th October, 2021 as Judge of the High Court of Madhya Pradesh by Hon'ble the then Chief Justice Shri Mohammad Rafiq.

His Lordship was born on 4th October, 1976 at Village Dongargaon, Tehsil Gadarwara District Narsinghpur (M.P.). After obtaining degrees of B.A. from RDVV, Jabalpur (M.P.) and LL.B. from NES Law College Jabalpur (M.P.), enrolled as an Advocate on 31st July, 2001 with State Bar Council of Madhya Pradesh. His Lordship started practice under the able guidance of his maternal uncle Shri V.S. Choudhary, Advocate and independent practice from the year 2006 onwards in various fields of Law.

His Lordship was Deputy Advocate General from 15th July, 2009 to 27th December, 2012, Additional Advocate General from 27th December, 2012 to 6th June, 2017 and held the post of Advocate General twice from 6th June, 2017 to 15th December, 2018 & from 26th March, 2020 till elevation. His Lordship was designated as Senior Advocate by the High Court of Madhya Pradesh on 19th May, 2017.

His Lordship, as an advocate, served in different capacities as Member,

Supreme Court Legal Service Committee, Chairman, Special Committee of the State Bar Council of M.P., Joint Secretary of Madhya Pradesh High Court Bar Association, Member of the Supreme Court Bar Association, New Delhi and MP High Court Bar Association, Jabalpur, Member of Executive Council and also in different capacities with various educational bodies like State Universities and Colleges, Ex-officio member in the Governing Council and Executive Council of the National Law Institute University at Bhopal (M.P.) and Dharmashastra National Law University, Jabalpur (M.P.). Also appeared as Special Counsel for the office of the Hon'ble Chancellor of M.P. (who happens to be Hon'ble Governor of Madhya Pradesh). His Lordship was appointed as Amicus Curie by High Court of Madhya Pradesh in various cases and as Court Commissioner by the Supreme Court. His Lordship was also part of various Committees of High Court as Advocate General, such as Arrears Committee, Rule Making Committee, Dispute Resolution Committee etc.

His Lordship represented the State of Haryana and also appeared in various cases for High Courts of Madhya Pradesh, Delhi, Chhattisgarh, Allahabad, Andhra Pradesh, etc. as also various Tribunals in Supreme Court and various Govt. and PSU's at different Courts & Tribunals. His Lordship participated as delegate for India on 16th December, 2020 in the "4th virtual meeting of BRICS head for prosecution services". His Lordship was recognized as Paul Harris Fellow (End Polio Now) in appreciation of tangible and significance assistance given for the furtherance of better understanding and friendly relations aiming people of the world.

His Lordship published various articles, viz. 'Continuing writ of Mandamus – Classic Example' and 'Genesis of NGT' in Journals such as Madhya Pradesh Judicial Reporter and Madhya Pradesh Law Journal.

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

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MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Valedictory Session of Institutional Advance Training Course for District Judges (Entry Level) appointed on promotion (04.09.2021)

Online Workshop on – Family Laws (04.09.2021)

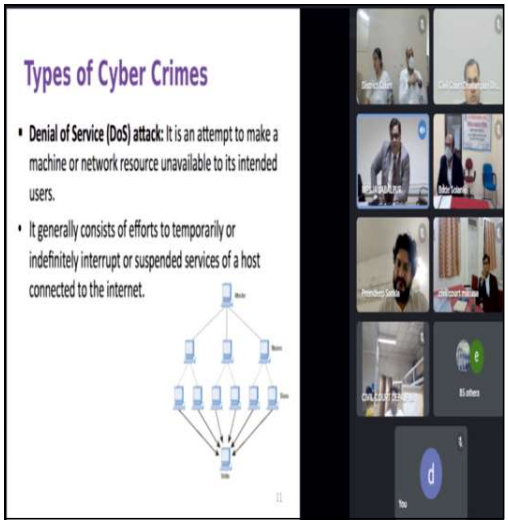
Online Interactive Session on – Identified Legal Issues (18.09.2021)

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Refresher Course for the Civil Judges, Junior Division of 2019 Batch (Group-I)
(13.09.2021 to 17.09.2021)

Refresher Course for the Civil Judges, Junior Division of 2019 Batch (Group-II)
(20.09.2021 to 24.09.2021)

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR



Online Workshop on – Cyber Laws & Electronic Evidence (25.09.2021)

Online Interactive Session on – Key issues relating to Criminal Appeals & Revisions (25.09.2021)

Online Symposium on – Forest & Wild Life Laws (23.10.2021)

Online Interactive Session on – Key issues relating to Civil Appeals (30.10.2021)

PART - I

अर्थदण्ड की वसूली एवं व्यतिक्रम में कारावास के दण्ड का निष्पादन

जयंत शर्मा
संकाय सदस्य (कनिष्ठ)
मध्यप्रदेश राज्य न्यायिक अकादमी

भारतीय दण्ड संहिता (***संक्षेप में– ''भा.द.सं.''***) की धारा 53 दण्डादेशों का वर्गीकरण करती है जो किसी अपराध के लिए दिए जा सकते हैं जिसमें छठवां खण्ड अर्थदण्ड से सम्बंधित है। भा.द.सं. और अन्य सभी अधिनियमों जिनमें कोई अपराध दण्डनीय है, अपराध के लिए कारावास के दण्ड के विकल्प में अथवा अतिरिक्त रूप से अर्थदण्ड का भी प्रावधान करते हैं। अर्थदण्ड वसूली से संबंधित प्रावधान दण्ड प्रक्रिया संहिता, 1973 (***संक्षेप में–''द.प्र.सं.''***) की धारा 421, 424 तथा 429 में भी किए गए हैं। न्यायालय के समक्ष अर्थदण्ड की वसूली और अर्थदण्ड अदायगी में व्यतिक्रम पर कारावास भुगताये जाने को लेकर कई प्रश्न उपस्थित होते हैं। इस लेख के माध्यम से ऐसे प्रश्नों पर विचार किया जा रहा है।

1. क्या प्रत्येक अपराध के लिए अर्थदण्ड अधिरोपित करना अनिवार्य है तथा क्या अर्थदण्ड का भुगतान करने में व्यतिक्रम होने पर प्रत्येक अपराध के लिए कारावास का दण्ड देना अनिवार्य है?

प्रत्येक अपराध के लिए अर्थदण्ड अधिरोपित किया जाना अनिवार्य नहीं है। दण्ड विधि के अन्तर्गत अपराध हेतु उल्लेखित दण्ड में ''कारावास से दण्डनीय होगा और अर्थदण्ड से भी'' अथवा ''कारावास से अथवा अर्थदण्ड से दण्डनीय होगा'' वाक्यों का सामान्यतः प्रयोग किया जाता है। ऐसी स्थिति में स्पष्ट है कि जहां 'अथवा' शब्द का प्रयोग किया गया है वहां अर्थदण्ड अधिरोपित किया जाना वैकल्पिक है और जहां 'और' शब्द का प्रयोग किया गया है वहां अर्थदण्ड अधिरोपित किया जाना आज्ञापक है। भा.द.सं. की धारा 64 एवं धारा 30 अर्थदण्ड के व्यतिक्रम पर कारावास का दण्डादेश देने का प्रावधान करती है जिसमें ''कर सकता है'' (may) शब्द का प्रयोग किया गया है। इसके अतिरिक्त द.प्र.सं. की धारा 421 के परन्तुक का वाक्यांश ''परन्तु यदि दण्डादेश निर्दिष्ट करता है कि अर्थदण्ड देने में व्यतिक्रम होने पर अपराधी कारावासित किया जाएगा'' में 'यदि' शब्द का प्रयोग किया जाना ऐसे अधिरोपण को आज्ञापक प्रभाव नहीं देता है।

न्यायदृष्टांत ***राज्य विरूद्ध कृष्णा पिल्लई, 1953 क्रि.लॉ.ज. 1265*** में केरल उच्च न्यायालय द्वारा अभिमत दिया गया है कि ''विचारण न्यायालय द्वारा अर्थदण्ड अदा करने में व्यतिक्रम होने पर कारावास का दण्ड अधिरोपित किया जाना अनुमत है किन्तु यह अनिवार्य नहीं है कि ऐसा दण्ड अधिरोपित किया जावे''। अतः स्पष्ट है कि प्रत्येक मामले में अर्थदण्ड के व्यतिक्रम के लिए कारावास का दण्ड दिया जाना अनिवार्य नहीं है।

2. क्या जहां मृत्युदण्ड या आजीवन कारावास का दण्ड दिया जाए वहां भी अर्थदण्ड अधिरोपित किया जाना आज्ञापक है?

भा.द.सं. की धारा 302 हत्या के अपराध के लिए मृत्यु या आजीवन कारावास से और अर्थदण्ड से दण्डित किये जाने का प्रावधान करती है। इसी तरह के प्रावधान संहिता में अन्य अपराधों के सम्बंध में तथा अन्य अधिनियमों में भी हो सकते हैं। यहां 'और' शब्द का प्रयोग किया जाना अर्थदण्ड अधिरोपित किये जाने को आज्ञापक बनाता है। अतः यह स्पष्ट है कि ऐसे मामले में अर्थदण्ड अधिरोपित किया जाना आज्ञापक है। इस सम्बंध में न्यायदृष्टांत ***पलानी अप्पा गोन्डर विरूद्ध तमिलनाडू राज्य, एआईआर 1977 एससी 1323*** अवलोकनीय है। किन्तु जैसा कि सुस्थापित है कि आजीवन कारावास का तात्पर्य सामान्य रूप से शेष सम्पूर्ण जीवन का कारावास होता है तथा मृत्यु दण्ड का तात्पर्य जीवन के अन्त से है ऐसी स्थिति में कितना अर्थदण्ड अधिरोपित किया जाए यह सदैव विचारणीय होगा। साथ ही ऐसे अर्थदण्ड की वसूली किस प्रकार की जाएगी। न्यायदृष्टांत ***पलानी अप्पा गोन्डर*** (पूर्वोक्त) के अनुसार जहां मृत्यु दण्ड जैसा दण्ड दिया जा रहा हो वहां पृथक से अर्थदण्ड अधिरोपित करना शायद ही कोई सामाजिक उद्देश्य की पूर्ति करता हो, अतः ऐसे मामलों में अर्थदण्ड अधिरोपित करने में अधिक कठोर रूख नहीं अपनाना चाहिए और अधिक अर्थदण्ड अधिरोपित नहीं करना चाहिए। यहां पीड़ित प्रतिकर योजना के अन्तर्गत पीड़ित को प्रतिकर दिलाया जाना एक अच्छा विकल्प हो सकता है।

3. अर्थदण्ड वसूली की प्रक्रिया क्या है? यदि अर्थदण्ड के व्यतिक्रम हेतु कारावास अधिरोपित किया गया हो तो क्या वहां तत्काल वसूली वारंट जारी करना चाहिए यदि अर्थदण्ड के व्यतिक्रम में कारावास का दण्ड भुगत लिया हो तो क्या अर्थदण्ड वसूल करना चाहिए?

मध्यप्रदेश में लागू नियम तथा आदेश (आपराधिक) के नियम 352 के अनुसार यदि न्यायालय द्वारा अर्थदण्ड का दण्डादेश दिया गया है और अर्थदण्ड जमा नहीं किया गया है या अंशतः जमा किया गया है तब न्यायालय तत्काल नियम 575 के खण्ड (8) के अन्तर्गत विविध आपराधिक प्रकरण पंजीबद्ध कर वसूली की कार्यवाही करेगा। नियम 360 भी अर्थदण्ड अदा नहीं किये जाने की स्थिति में सामान्यतः वारंट तुरन्त जारी करने का उल्लेख करता है। न्यायदृष्टांत ***कुमारन विरूद्ध केरल राज्य, (2017) 7 एससीसी 471*** में भी अभिमत दिया गया है कि केवल व्यतिक्रम का कारावास भुगत लेने मात्र से अभियुक्त धारा 421 द.प्र.सं. के अन्तर्गत अर्थदण्ड वसूली से मुक्त नहीं हो जाता है। इसका अर्थ उन मामलों में अर्थदण्ड की वसूली से है जिनमें धारा 421 द.प्र.सं. के परन्तुक के अनुसार प्रतिकर दिलाये जाने का आदेश होने से अथवा अभिलिखित किए गए किन्हीं विशेष कारणों से अर्थदण्ड वसूल करने का प्रावधान है।

इस प्रकार स्पष्ट है कि यदि अर्थदण्ड का दण्डादेश दिया गया है और अर्थदण्ड पूर्णतः जमा नहीं किया जाता तब तुरंत वसूली की कार्यवाही संस्थित करना चाहिए अर्थात नियम 575 खण्ड (8) के अनुसार अर्थदण्ड की वसूली हेतु विविध आपराधिक प्रकरण संस्थित किया जाना चाहिए। लेकिन जहां

तक वसूली करने हेतु वारंट जारी करने का प्रश्न है तो इस संबंध में मध्यप्रदेश उच्च न्यायालय का ज्ञापन क्र. सी/417 दिनांक 07.10.2017 महत्वपूर्ण है जिसके अन्तर्गत अर्थदण्ड वसूली की कार्यवाही में नियम तथा आदेश (आपराधिक) के अतिरिक्त मध्यप्रदेश उच्च न्यायालय के न्यायदृष्टांत ***लौआसिंह विरूद्ध मध्य प्रदेश राज्य, 2001 (2) एमपीडब्ल्यूएन नोट 88*** तथा ***दुलेसिंह विरूद्ध मध्य प्रदेश राज्य, 1981 जेएलजे 659*** में दिए गए निर्देशों को भी ध्यान में रखना है।

न्यायदृष्टांत ***लौआसिंह*** (पूर्वोक्त) में अभिमत दिया गया है कि यदि अभियुक्त को अर्थदण्ड के भुगतान के व्यतिक्रम पर अतिरिक्त कारावास का दण्ड दिया जाता है तो न्यायालय के लिए अर्थदण्ड की वसूली के लिए वारंट का निर्देश करना उचित नहीं है। इसके अतिरिक्त न्यायदृष्टांत ***दुलेसिंह*** (पूर्वोक्त) में अभिमत दिया गया है कि यदि एक बार अभियुक्त के द्वारा अर्थदण्ड अदा करने में व्यतिक्रम के लिए कारावास का दण्ड भुगत लिया गया है तो अर्थदण्ड वसूली की कार्यवाही नहीं की जा सकती है। इस सम्बंध में मध्यप्रदेश उच्च न्यायालय का अधोवर्णित ज्ञापन अवलोकनीय है।

HIGH COURT OF MADHYA PRADESH: JABALPUR

//Memo//

No. C/4107/ Jabalpur, dt. 07.10.2017
III-15/57 Ch – 19

To,

The District & Sessions Judge,

…….(M.P.).

Sub : Disposal of Miscellaneous cases (Criminal) pending for more than 5 years.

Ref : Registry Memo No. B/5326/III3-1-5/67 Ch-19, Jabalpur dt. 06.10.2017.

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On the subject & reference mentioned above, it is stated that during the Video Conferencing with the Districts, it has been observed that there are number Miscellaneous Cases (Criminal) pending in almost all of the Districts, in Magistrates Court and Sessions Court. Most of them are related to recovery of fine or proceedings against surety under Section 446 of Code of Criminal Procedure, 1973.

In supersession of above referred Memo, I am further directed to draw your kind attention that, if miscellaneous proceeding is pending against any surety either for hearing of the surety or for recovery of fine, the Court should endeavor to search out that whether the case of the concerning accused is still pending in the Court or it has been disposed-off. If pending then search out that whether the accused has appeared or not. If main case has been disposed-off or the accused has appeared the miscellaneous proceedings against surety may be disposed-off with appropriate order. Considering the facts of particular

case keeping in mind that the object is not to recover money but to ensure presence of the accused.

In the matter of recovery of fine go through the provision of **Section 421 & 424 of Code of Criminal Procedure, 1973 and Rules 363 of Madhya Pradesh Rules & Orders (Criminal) and also to the Judgments of the High Court of *Madhya Pradesh, Dulesingh v. State of M.P., 1981 JLJ 659 and Laua Singh v. State of M.P., 2001 Vol. II MPWN no.88***.

The consolidated list of pending cases for recovery of fine amount be provided to the Collector of the concerning District to seek the report that whether there is possibility of recovery of fine in such cases. After obtaining the status report appropriate steps may be taken accordingly. For the purpose of regular monitoring this matter may be taken in the Meeting of "Monitoring Cell".

Therefore, hereby it is requested that in the matter of recovery of fine kindly go through the above referred provisions as well as the directions of Hon'ble the High Court on judicial side.

Sd/-
Registrar (DE)

इस प्रकार उपरोक्त विवेचन से यह स्पष्ट है कि यदि अर्थदण्ड जमा करने में व्यतिक्रम का कारावास दिया गया हो अथवा नहीं दिया गया हो वहां नियम 360 के अनुसार विविध आपराधिक प्रक्ररण पंजीबद्ध किया जा सकता है। जहां व्यतिक्रम के लिए कारावास नहीं दिया गया है वहां अर्थदण्ड जमा नहीं किया जाता है तो तुरंत वसूली की कार्यवाही की जानी चाहिए। लेकिन जहां अर्थदण्ड जमा करने में व्यतिक्रम होने पर कारावास का दण्डादेश दिया गया है वहां विविध आपराधिक प्रकरण पंजीबद्ध करने में रोक तो नहीं है लेकिन अर्थदण्ड वसूली हेतु वारंट तुरंत जारी नहीं करना चाहिए। ऐसा तब किया जा सकता है जबकि धारा 421 द.प्र.सं. के परन्तुक के अनुसार या तो प्रतिकर दिलाये जाने का आदेश है या विशेष कारण उल्लेख किये गए हैं। वसूली की कार्यवाही संस्थित करने में भा.द.सं. की धारा 70 में उल्लेखित परिसीमा सम्बंधी प्रावधान को भी ध्यान में रखना चाहिए। जहां अभियुक्त द्वारा अर्थदण्ड जमा करने में व्यतिक्रम का कारावास भुगत लिया गया है वहां प्रतिकर के आदेश तथा विशेष कारण के अभाव में वसूली की कार्यवाही नहीं की जानी चाहिए।

4. जहां समस्त प्रयास के उपरांत भी अर्थदण्ड वसूल ना हो पा रहा हो वहां प्रकरण किस प्रकार समाप्त किया जावे? यदि अभियुक्त ने व्यतिक्रम का कारावास भुगत लिया हो, क्या तब भी नियम 363 मे जिला न्यायाधीश (अब प्रधान जिला न्यायाधीश) की पूर्व अनुमति आवश्यक है?

जहां न्यायालय द्वारा अधिरोपित अर्थदण्ड धारा 421 द.प्र.सं. के परन्तुक के अन्तर्गत प्रतिकर का आदेश होने अथवा विशेष कारण लेखबद्ध करते हुए वसूल योग्य है और इस हेतु नियम तथा आदेश (आपराधिक) के नियम 575 के खण्ड (8) के अनुसार वसूली की कार्यवाही हेतु विविध आपराधिक

प्रकरण पंजीबद्ध कर वसूली की कार्यवाही प्रारंभ कर दी गई है और समस्त प्रयास करने के उपरांत भी वसूली संभव नहीं हो पा रही है वहां नियम तथा आदेश (आपराधिक) के नियम 363 के अनुसार कार्यवाही की जा सकती है।

> "**नियम 363** – भारतीय दण्ड संहिता की धारा 70 के उपबन्ध यह अनिवार्य नहीं करते कि शास्ति या उसके ऐसे भाग जो वसूल न हो, को दण्डादेश की तारीख से पूरे 6 वर्ष की अवधि के लिए रजिस्टर पर रखा जावे, यदि उसे वसूल करने के हर संभव उपाय किए जा चुके हों तथा असफल रहे हैं। कोई सत्र न्यायाधीश, कोई जिला मजिस्ट्रेट तथा जिला मजिस्ट्रेट या जिला जज जैसी भी स्थिति हो, की लिखित अनुमति से जिला मजिस्ट्रेट के अधीनस्थ कोई मजिस्ट्रेट या सिविल न्यायालय किसी भी समय शास्ति की वसूल न हो सकने योग्य राशि जिसका कि भुगतान उसके न्यायालय या उसके पूर्वाधिकारी के न्यायालय में आदेशित हो चुका है, को बट्टे–खाते में डाल सकता है, यदि उसे प्रतीत होता है कि यह राशि वसूल नहीं की जा सकती है।"

अतः यह स्पष्ट है कि नियम 363 के अन्तर्गत मजिस्ट्रेट अथवा सिविल न्यायालय सत्र न्यायाधीश या प्रधान जिला न्यायाधीश की पूर्व अनुमति से अवसूलनीय अर्थदण्ड की राशि को बट्टे–खाते में डाल सकते हैं और लंबित वसूली प्रकरण को समाप्त कर सकते हैं।

नियम 363 तथा धारा 421 द.प्र.सं. के परन्तुक का क्षेत्र भिन्न है। ***दुले सिंह*** (पूर्वोक्त) के मामले में प्रतिपादित विधि के अनुसार, जहां व्यतिक्रम का कारावास भुगत लिया गया है और धारा 421 द. प्र.सं. के परन्तुक के आलोक में अर्थदण्ड वसूलनीय नहीं रह जाता है वहां ऐसे अवसूलनीय अर्थदण्ड के लिए नियम 363 आकर्षित नहीं होगा। नियम 363 के अन्तर्गत बट्टे–खाते में डालने की कार्यवाही उस दशा में ही की जा सकेगी जबकि अर्थदण्ड वसूल योग्य है। इस प्रकार वसूली की कार्यवाही समाप्त करने से संबधित दोनों ही प्रावधानों का क्षेत्र भिन्न है। अतः यदि ***दुले सिंह*** (पूर्वोक्त) के मामले में दिये निर्देशों के अनुसार अर्थदण्ड वसूल नहीं किया जाना है तब नियम 363 के अधीन सत्र न्यायाधीश की पूर्व अनुमति आवश्यक नहीं है वरन् वसूली का विविध प्रकरण ही समाप्त हो जाएगा।

5. क्या विचारण न्यायालय द्वारा अर्थदण्ड के दण्डादेश का निष्पादन धारा 389 द.प्र.सं. में निलंबित किया जा सकता हैं?

विचारण न्यायालय द्वारा अभियुक्त को दोषसिद्ध ठहराये जाने पर कारावास और अर्थदण्ड अधिरोपित किये जाने की दशा में अभियुक्त की ओर से धारा 389(3) द.प्र.सं. के अंतर्गत कारावास एवं अर्थदण्ड दोनों के दण्डादेश को निलंबित किये जाने की प्रार्थना की जाती है। धारा 389(3) द.प्र.सं. के प्रावधान से प्रकट है कि जहां अभियुक्त जमानत पर होते हुए तीन वर्ष से अनधिक की अवधि के लिये कारावास से दण्डादिष्ट किया गया है या जिस अपराध के लिये वह दोषसिद्ध किया गया वह

जमानतीय है और वह जमानत पर है, वहां विचारण न्यायालय अभियुक्त को अपील न्यायालय से स्थगन आदेश प्राप्त करने के लिये समय देते हुए जमानत पर रिहा कर सकता है और जब तक वह ऐसे जमानत पर रिहा रहता है तब तक कारावास का दण्डादेश निलंबित समझा जायेगा। वही धारा 389 (1) अपील न्यायालय के संबंध में है जिसमे दण्डादेश के निलंबन का प्रावधान है।

यदि धारा 389 (1) दं.प्र.सं. एवं धारा 389 (3) दं.प्र.सं. के मध्य अंतर देखा जाए तो धारा 389 (1) दं.प्र.सं. में कारावास के साथ–साथ अर्थदण्ड के निलंबन की व्यवस्था दी गई है दूसरी ओर धारा 389 (3) दं.प्र.सं. में मात्र कारावास के दण्डादेश के स्थगन की बात कही गयी है। न्यायदृष्टांत ***रमेशचंद विरूद्ध मध्यप्रदेश राज्य 1999 (1) जेएलजे 223*** के अनुसार ''दण्डादेश'' में कारावास एवं अर्थदण्ड दोनों समाविष्ट हैं इसी से स्पष्ट है कि अर्थदण्ड के दण्डादेश के स्थगन की कोई व्यवस्था धारा 389 (3) दं.प्र.सं. में नहीं है। जहां केवल अर्थदण्ड का ही दण्डादेश दिया गया हो वहां ऐसे दण्डादेश के निलंबन का प्रावधान धारा 424 द.प्र.सं. में है।

स्पष्ट है कि विचारण न्यायालय को केवल कारावास के दण्डादेश को ही निलंबित करने का अधिकार है। इसके साथ ही यदि अर्थदण्ड का दण्डादेश भी दिया गया है तो उसे निलंबित नहीं किया जा सकता है। ऐसी स्थिति में यदि अभियुक्त द्वारा अर्थदण्ड की राशि तत्काल जमा नहीं करायी जाती है तो विचारण न्यायालय को उसके व्यतिक्रम में दी गई कारावास की सजा भुगताये जाने हेतु ऐसे अभियुक्त को कारावास भेजना होगा। लेकिन अपील न्यायालय सम्पूर्ण दण्डादेश जिसमें अर्थदण्ड भी सम्मिलित है, का निष्पादन स्थगित कर सकता है। इस सम्बंध में न्यायदृष्टांत ***सत्येन्द्र कुमार मेहरा विरूद्ध झारखण्ड राज्य, एआईआर 2018 एससी 1587*** अवलोकनीय है।

6. क्या प्रतिकर अदायगी के आदेश के साथ उसके व्यतिक्रम के कारावास की सजा का आदेश भी दिया जा सकता है? और क्या प्रतिकर के भुगतान को धारा 389 द.प्र.सं. में स्थगित किया जा सकता है?

न्यायदृष्टांत ***हरि किशन एवं हरियाणा राज्य विरूद्ध सुखबीर सिंह एवं अन्य, एआईआर 1988 एससी 2127*** के अनुसार धारा 357(3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के आदेश के साथ उसके व्यतिक्रम में कारावास की सजा का आदेश भी दिया जा सकता है तथा प्रतिकर राशि की वसूली धारा 431 द.प्र.सं. के अनुसार अर्थदण्ड की वसूली के प्रावधान अंतर्गत धारा 421 द.प्र.सं. के अनुसार ही की जा सकती है। इस सम्बंध में न्यायदृष्टांत ***के. ए. अब्बास विरूद्ध साबू, (2010) 6 एससीसी 230*** भी अवलोकनीय है।

धारा 357(1) दं.प्र.सं. में अर्थदण्ड की राशि में से प्रतिकर दिलाए जाने का प्रावधान है। धारा 357(2) दं.प्र.सं. के अंतर्गत यह स्पष्ट कर दिया गया है कि यदि अर्थदण्ड ऐसे मामले में अधिरोपित किया गया है जो अपीलनीय है वहां ऐसा कोई संदाय यानि प्रतिकर का संदाय अपील प्रस्तुत करने के लिये अनुज्ञात अवधि के व्यतीत होने के पूर्व या यदि अपील प्रस्तुत की जाती है तो उसके विनिश्चय के पूर्व नहीं किया जायेगा। लेकिन धारा 357(3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के

आदेश के संबंध में धारा 357(2) द.प्र.सं. के समान अन्य कोई विशिष्ट प्रावधान नहीं होने से विचारण न्यायालय के समक्ष यह भ्रमपूर्ण स्थिति उत्पन्न होती है कि क्या धारा 389(3) द.प्र.सं. के अंतर्गत जब विचारण न्यायालय को कारावास के साथ दिये गये अर्थदण्ड को निलंबित करने का अधिकार नहीं है तो धारा 357(3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के आदेश को भी तत्काल प्रवर्तित कराया जाए और प्रतिकर अदा नहीं करने पर क्या अभियुक्त को इसके व्यतिक्रम में दिये गये कारावास की सजा भुगताये जाने हेतु कारावास भेजना होगा।

यह स्पष्ट है कि प्रतिकर राशि की वसूली धारा 421 द.प्र.सं. के प्रावधान अनुसार ही किया जाना चाहिए। लेकिन अर्थदण्ड और प्रतिकर में अंतर है। जहां कारावास के साथ अधिरोपित अर्थदण्ड की अदायगी तत्काल होना आवश्यक है किन्तु धारा 357(3) द.प्र.सं. के अंतर्गत आदेशित प्रतिकर राशि के भुगतान हेतु समय दिया जाना और यदि आवश्यक हो तो इसकी अदायगी किश्तों में करने की सुविधा दी जाना विधिपूर्ण है। इस संबंध में न्यायदृष्टांत ***हरि किशन*** (पूर्वोक्त) अवलोकनीय है।

माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत ***दिलीप एस. दहानुकर विरूद्ध कोटक महिन्द्रा कं. लि. एवं अन्य, (2007) 6 एससीसी 528*** में प्रतिपादित किया गया है कि जब धारा 357(1) द. प्र.सं. के अंतर्गत अर्थदण्ड में से प्रतिकर अदायगी का आदेश धारा 357(2) द.प्र.सं की सीमा में रहते हुए ही लागू हो सकेगा तब उसी प्रकार से धारा 357(3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के मामले में भी धारा 357(2) द.प्र.सं. का ही प्रावधान लागू होगा। अर्थात ऐसी प्रतिकर राशि अपील अवधि पश्चात् या अपील होने पर उसके विनिश्चय के पश्चात् ही व्यथित पक्षकार को संदाय होगी। ऐसी स्थिति में धारा 357(3) द.प्र.सं. के अंतर्गत आदेशित प्रतिकर राशि को तत्काल जमा करने की अपेक्षा प्रकरण की परिस्थिति को देखते हुए कुछ शर्तों सहित उसकी अदायगी को अपीलीय न्यायालय से योग्य आदेश प्राप्त कर प्रस्तुत करने तक स्थगित किया जा सकता है। अर्थात धारा 357(3) द.प्र.सं. के अंतर्गत आदेशित प्रतिकर राशि को तुरंत अदा नहीं कर सकने पर अभियुक्त को इसके व्यतिक्रम में दिये गये कारावास को भुगताये जाने हेतु तुरंत ही कारावास में भेजना आवश्यक नहीं है। प्रतिकर अदायगी हेतु राशि की मात्रा व अन्य परिस्थितियों को ध्यान में रखकर युक्तियुक्त समय अभियुक्त को प्रदान किया जा सकता है।

7. क्या व्यतिक्रम का कारावास, मूल कारावास तथा एक से अधिक अपराधों के लिए अर्थदण्ड में व्यतिक्रम का कारावास एक साथ भुगताया जा सकता है?

अर्थदण्ड जमा करने में व्यतिक्रम होने पर अधिरोपित किये जाने वाले कारावास का उद्देश्य अधिरोपित अर्थदण्ड के प्रभाव को बल प्रदान करना है। यदि एक ही प्रक्रण में अभियुक्त को कई अपराधों के लिए दण्डादिष्ट किया गया है और प्रत्येक अपराध के लिए अर्थदण्ड अधिरोपित किया गया है तब ऐसे प्रत्येक अर्थदण्ड अदा करने में व्यतिक्रम होने पर प्रत्येक व्यतिक्रम हेतु पृथक–पृथक कारावास अधिरोपित किया जाता है। धारा 30 तथा धारा 429(2) द.प्र.सं. इस संबंध में उल्लेख करते है कि अर्थदण्ड के व्यतिक्रम का कारावास मूल कारावास के अतिरिक्त होता है। धारा 30(2) द.प्र.सं.

के अनुसार मजिस्ट्रेट द्वारा दिए जा सकने वाले अधिकतम कारावास की अवधि में व्यतिक्रम के कारावास की अवधि को जोड़ा नहीं जाता है। व्यतिक्रम में दिया कारावास न तो अनुसंधान, जांच अथवा विचारण के दौरान निरोध में व्यतीत अवधि में समायोजित किया जा सकता है न ही इसका मूल कारावास में विलय हो सकता है और न ही यह मूल कारावास के साथ भुगताया जा सकता है। इस संबंध में न्यायदृष्टांत ***शरद हीरू कोलम्बे विरूद्ध महाराष्ट्र राज्य, एआईआर 2018 एससी 4595*** अवलोकनीय है।

निष्कर्ष

1. प्रत्येक अपराध के लिए अर्थदण्ड अधिरोपित किया जाना अनिवार्य नहीं है। जहां अपराध हेतु उल्लेखित दण्ड में ''कारावास से दण्डनीय होगा और अर्थदण्ड से भी'' वाक्य का सामान्यतः प्रयोग किया जाता है वहां अर्थदण्ड अधिरोपित किया जाना आज्ञापक है।

2. जहां मृत्यु दण्ड अथवा आजीवन कारावास जैसा दण्ड दिया जा रहा हो वहां अर्थदण्ड अधिरोपित करने में अधिक कठोर रूख नहीं अपनाना चाहिए और अधिक अर्थदण्ड अधिरोपित नहीं करना चाहिए। यहां पीड़ित प्रतिकर योजना के अन्तर्गत पीड़ित को प्रतिकर दिलाया जाना एक अच्छा विकल्प हो सकता है।

3. अर्थदण्ड जमा करने में व्यतिक्रम का कारावास दिया गया हो अथवा नहीं दिया गया हो वहां नियम 360 के अनुसार विविध आपराधिक प्रकरण पंजीबद्ध किया जा सकता है। जहां व्यतिक्रम में कारावास का दण्ड नहीं दिया गया है वहां अर्थदण्ड जमा नहीं होने पर तुरंत वसूली की कार्यवाही की जाना चाहिए लेकिन जहां अर्थदण्ड जमा करने में व्यतिक्रम पर कारावास का दण्ड दिया गया है वहां विविध आपराधिक प्रकरण पंजीबद्ध करने में रोक नहीं है लेकिन अर्थदण्ड वसूली हेतु वारंट तुरंत जारी नहीं करना चाहिए। ऐसा उसी दशा में किया जा सकता है जबकि धारा 421 द.प्र.सं. के परन्तुक के अनुसार प्रतिकर का आदेश हो अथवा वसूली की आवश्यकता के लिए विशेष कारण उल्लेख किए गए हैं।

4. जहां अभियुक्त द्वारा अर्थदण्ड जमा करने में व्यतिक्रम का कारावास भुगत लिया गया है वहां प्रतिकर के आदेश नहीं होने अथवा विशेष कारण के अभाव में वसूली की कार्यवाही नहीं की जानी चाहिए।

5. जहां न्यायालय द्वारा अधिरोपित अर्थदण्ड धारा 421 द.प्र.सं. के परन्तुक के अन्तर्गत प्रतिकर के आदेश के कारण या विशेष कारण लेखबद्ध करते हुए वसूलनीय है और इस हेतु नियम तथा आदेश (आपराधिक) के नियम 575 के खण्ड (8) के अनुसार वसूली की कार्यवाही हेतु विविध आपराधिक प्रक्रण पंजीबद्ध कर कार्यवाही प्रारंभ कर दी गई है और समस्त प्रयास करने के उपरांत भी वसूली संभव नहीं हो पा रही है वहां नियम तथा आदेश (आपराधिक) के नियम 363 के अनुसार बट्टे–खाते में डालने की कार्यवाही की जा सकती है।

6. नियम 363 तथा धारा 421 द.प्र.सं. के परन्तुक का क्षेत्र भिन्न है। यदि धारा 421 द.प्र.सं. के परन्तुक तथा मध्य प्रदेश उच्च न्यायालय के ज्ञापन के आलोक में वसूली नहीं की जा रही है तो इस हेतु वसूली प्रकरण समाप्त करने के लिए नियम 363 के अधीन सत्र न्यायाधीश की पूर्व अनुमति आवश्यक नहीं है।

7. विचारण न्यायालय को केवल मूल कारावास के दण्डादेश को ही निलंबित करने का अधिकार है। इसके साथ ही यदि अर्थदण्ड का दण्डादेश भी दिया गया है तो उसे निलंबित नहीं किया जा सकता है। ऐसी स्थिति में यदि अभियुक्त द्वारा अर्थदण्ड की राशि तत्काल जमा नहीं करायी जाती है तो विचारण न्यायालय को उसके व्यतिक्रम में दी गई कारावास की सजा भुगताये जाने हेतु ऐसे अभियुक्त को कारावास भेजना होगा। अपील न्यायालय सम्पूर्ण दण्डादेश को स्थगित कर सकता है।

8. जब अभियुक्त को केवल अर्थदण्ड का ही दण्डादेश दिया गया हो तो ही उसके निलंबन के लिए धारा 424 द.प्र.सं. के प्रावधान लागू होंगे।

9. धारा 357(3) द.प्र.सं. के अंतर्गत प्रतिकर अदायगी के आदेश के साथ उसके व्यतिक्रम के कारावास का आदेश भी दिया जा सकता है। लेकिन धारा 357(3) द.प्र.सं. के अंतर्गत आदेशित प्रतिकर राशि को तत्काल जमा करने की अपेक्षा प्रकरण की परिस्थिति को देखते हुए कुछ शर्तों सहित उसकी अदायगी को अपीलीय न्यायालय से योग्य आदेश प्राप्त करने तक स्थगित किया जा सकता है।

10. व्यतिक्रम का कारावास तथा मूल कारावास एक साथ नहीं भुगताया जा सकता है और न ही एक से अधिक अपराधों के लिए अर्थदण्ड के व्यतिक्रम में दिए गए कारावास एक साथ भुगताए जा सकते हैं।

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A SUPPLEMENTARY NOTE ON:
EXTENSION OF PERIOD OF LIMITATION DURING LOCKDOWN

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Supreme Court took *suo motu* cognizance of the situation arising out of the challenges faced by the country on account of COVID-19 pandemic and resultant difficulties to the litigants across the country. Consequently, vide order dated 23.03.2020 passed in ***Suo Motu*** **Writ Petition (Civil) No. 3 of 2020 In Re: Cognizance for Extension of Limitation, it was directed that the period of limitation** in filing petitions, applications, suits, appeals and all other proceedings, irrespective of the period of limitation prescribed under the general or special laws, shall stand extended with effect from 15.03.2020 till further orders.

Thereafter on 08.03.2021, noticing that the country was returning to normalcy and that all the Courts and Tribunals had started functioning either physically or by virtual mode, extension of period of limitation was brought to an end by final order.

An article was published in February 2021 issue of the JOTI Journal on this topic under the title – "Extension of Period of Limitation During Lockdown – An Analysis." This write-up is a supplementary not on above article.

Order dated 27.04.2021

Looking to the extraordinary situation caused by the sudden and second outburst of COVID-19 pandemic, Supreme Court, vide order dated 27.04.2021 restored the order dated 23.03.2020 and in continuation of the order dated 08.03.2021 directed that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders. It was clarified that this order was paased in exercise of powers under Article 142 read with Article 141 of the Constitution of India. Hence it shall be a binding order within the meaning of Article 141 on all Courts/Tribunals and Authorities.

Final order dated 23.09.2021

Although there are uncertainties about another wave of the COVID-19 pandemic, but since the restrictions on gathering and movement have been removed, cinema halls and educational institutions have been opened and country is moving towards normalcy, Supreme Court considered that it is imminent that the order dated 08.03.2021 passed in above *suo motu* petition is restored as the situation is near normal.

The following final directions have been issued by the Supreme Court in its final order dated 23.09.2021 –

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

IV. The Government of India shall amend the guidelines for containment zones, to state:

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."

EXAMPLE

The effect of the aforesaid order of Hon'ble Supreme Court may be understood by following instances –

(i) A entered into an agreement of sale on 01.01.2017 to purchase an immovable property belonging to B. Date 31.12.2017 was fixed for execution of sale deed. As per Article 54 of the Schedule appended to Limitation Act, 1963, period of limitation to file a suit for specific performance of contract is three years, which would begin in this case from 31.12.2017, i.e., date fixed for the performance of contract.

Excluding 31.12.2017, i.e., the day from which period of limitation is to be reckoned as per Section 12 of the Limitation Act, 1963, the period of three years would expire on 31.12.2020.

By virtue of point I of the order dated 23.09.2021 of the Supreme Court mentioned above, period from 15.03.2020 till 31.12.2020 i.e., 292 days, would be excluded and by virtue of point II of the above order, A and B would have a period of 292 days available from 03.10.2021 to file the suit for specific performance of contract.

(ii) In the above example, if date 31.03.2017 was fixed for execution of sale deed, the period of limitation would expire on 31.03.2020. In such case, by virtue of point I of order dated 23.09.2021 of the Supreme Court, period from 15.03.2020 to 31.03.2020 i.e., only 17 days would be excluded. However, by virtue of point II, period of 90 days from 03.10.2021 would be available to A and B to file suit for specific performance of contract.

(iii) In the same example, if 31.12.2018 was fixed for execution of the sale deed, the period of limitation would expire on 31.12.2021. In such case, by virtue of point I of order dated 23.09.2021 of the Supreme Court, period from 15.03.2020 to 02.10.2021, i.e., 1 year 202 days would be excluded. By virtue of point II, period of limitation to file suit for specific performance of contract available to A and B would be 1 year 202 days from 31.12.2021, i.e., till 21.07.2023.

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"Craftsmanship on the judicial side cannot transgress into the legislative domain by re-writing the words of a statute"

– D.Y. Chandrachud, J.
***Saregama India Limited v. Next Radio Limited and ors.*, 2021 SCC Online SC 817**

PARADIGM SHIFT IN ROLE OF COURTS IN ARBITRATION PROCEEDINGS

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The Arbitration and Conciliation Act, 1996 was introduced with the object to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards. For almost two decades it remained pristine. But in the last five years, a flurry of successive amendment Acts and ordinances were passed to change the law for faster resolution of commercial disputes. Streamlining arbitration procedure is also critical if India wants to improve its ranking in ease of doing business index. Through the recent Amendment Act of 2015, 2019 and 2021 various new provisions have been inserted which alter the role of Courts while referring parties to arbitration, granting interim relief, executing arbitral awards and setting aside awards to a great extent. This article is an attempt to briefly study the checkered matrix of legislative history and the judicial pronouncements which initiated them along with some germane and contentious issues which may arise before the Court while dealing with an application filed under the Act.

AMENDMENT ACT OF 2015

1. Interim Order

Supreme Court, to reduce interference of courts in arbitration proceedings, in the matter of ***Bharat Aluminium and Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552*** held that Section 9 empowering the court to grant interim order was applicable only when the seat of arbitration was in India. This meant that parties to any foreign seated arbitration could not claim any remedy via interim measures by a court even when the property was situated in India. Interim orders made by arbitral tribunals outside India were also not enforceable in India. A party would obtain an award in its favor only to realize that there was no way to enforce the award as the other party had sold its assets in absence of any interim order by the court having jurisdiction over the property.

To address this issue and some other difficulties arising in the applicability of the Act, Amendment Act of 2015 was introduced by the Parliament. A proviso to Section 2(2) was added which provides that subject to the agreement to the contrary, Section 9 dealing with interim measures by the court shall also apply to international commercial arbitration, even if the seat of arbitration is outside India.

U/s 9, Court has still the power to pass interim order before, during arbitral proceedings, or at any time after the making of the arbitral award but before it is enforced u/s 36. Now a new clause has been added to provide that once the

arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1) unless the Court finds that circumstances exist which may render the power of the arbitral tribunal to award interim award inefficient. Sub-section (2) has also been inserted which provides that in case the court passes an interim order arbitration proceedings must commence within ninety days from the date of such order or within such time as may be prescribed by the court. This amendment has been brought in to check the practice of strategically obtaining interim orders and not proceeding with arbitration.

2. Referring parties to arbitration

Section 8, which mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is the subject matter of arbitration agreement, sub-section (1) has been amended which now states that notwithstanding any judgment, decree, or order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists. A provision has also been made enabling the party, who applies for reference of the matter to arbitration, to apply to the Court for a direction of production of the arbitration agreement or certified copy thereof in the event the parties applying for reference of the disputes to arbitration is not in the possession of the arbitration agreement and the opposite party has the same.

Recently in the matter of ***Vidya Drolia and ors. v. Durga Trading Corporation, (2021) 2 SCC 1***, Supreme Court has conclusively outlined the scope of judicial inquiry to determine the existence and validity of the arbitration agreement. The Court propounded a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

> (1) When it relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.
>
> (2) Affects third party rights; have *erga omnes* effect.
>
> (3) Requires centralized adjudication, and mutual adjudication would not be appropriate and enforceable.
>
> (4) Relates to an inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.
>
> (5) When the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

Applying above mentioned test it was held that insolvency or intra-company disputes, grant and issue of patents and registration of trademarks, criminal cases, matrimonial disputes, probate, and testamentary matters are not arbitrable. It was also held that landlord-tenant disputes are arbitrable if governed

by provisions of the Transfer of Property Act. But where such disputes are governed by rent control legislation, the dispute is not arbitrable.

It was further explained that the issue of non-arbitrability of a dispute may be raised at three distinct stages. First, before a court or judicial authority u/s 8 or 11 of the Arbitration Act i.e. referral stage; second, before the arbitral tribunal i.e. during arbitration; and third, before a Court when an arbitral award is being challenged i.e. at challenge stage.

The Apex Court further held that jurisdiction of the court u/s 8 was extremely limited and the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. The Arbitral Tribunal is the preferred first authority to determine all questions of non-arbitrability. The Court may interfere when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable.

3. Expeditious Proceeding

Section 29A has been inserted to provide for time-bound arbitration. Now every arbitral award must be made within twelve months from the date the arbitrator receives a written notice of appointment. An option has been given to the parties to mutually decide to extend the time limit by not more than six months. If the award is not made within eighteen months, the mandate of the arbitrator will terminate unless the Court extends the period upon an application filed by any of the parties. An extension can be granted only based on sufficient cause.

While extending the time for making the award, power has been vested in the Court to order a reduction in the arbitrator's fee by not exceeding five percent for each month of such delay if the court finds that the delay was attributable to the Arbitral Tribunal. However, the arbitrator shall be given an opportunity of being heard before the fees are reduced. The court has been also vested with the right to change the arbitrator while extending the time limit. An application to the court, as stated above would be endeavored to be disposed of by the court within sixty days from the date the opposite party receives the notice. It is also open to the Court to impose actual or exemplary costs upon any of the parties under this section.

4. Public Policy Conundrum

An arbitral award may be set aside by the Court if it conflicts with the public policy of India. However, it was difficult to interpret the meaning of public policy as it was not defined in the Act. In ***Renusagar Power Company Ltd. v. General Electric Company, (1984) 4 SCC 679***, Supreme Court explained that the term 'public policy' has been used in a narrow sense, and to attract the bar of public policy, the enforcement of the award must involve something more than the violation of

the Indian law. It was further laid down that enforcement of a foreign award would be refused on the ground of public policy if such enforcement would be contrary to the fundamental policy of Indian law, or the interests of India; or justice or morality.

In ***Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd, (2003) 5 SCC 705***, the scope of interpretation of the public policy was significantly broadened and it was held that in case of an application u/s 34 to set an award aside, the role of the Court was deemed to be that of an appellate/revision court. Further, the Court also added a new ground – 'patent illegality' to the grounds enumerated in the matter of ***Renusagar Power Company*** (supra). In ***Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300***, the Hon'ble Supreme Court while deciding the meaning of public policy u/s 48 of the Act, held that the test laid down in ***SAW Pipes*** (supra) must be followed in case of foreign awards as well, thereby allowing Indian Courts to deny enforcement of a foreign award on additional grounds of 'patent illegality'. This opened a floodgate of litigation as every award could now be challenged based on an alleged error of application of statutory provisions.

Explanations 1, 2 and Section 2A have been inserted to restrict Courts from interfering with arbitral awards on the ground of 'public policy'. Explanation 1 clarifies that an award conflicts with the public policy of India, only if,—

> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it conflicts with the most basic notions of morality or justice.

Explanation 2 states that for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Section 2A envisages that an arbitral award arising out of arbitration other than international commercial arbitration may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award, provided that an award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

Similarly, Section 2A further curtails the scope of interpretation of the term 'patently illegal'. Thus, the Courts are no longer permitted to re-appreciate evidence, record new evidence, or minutely examine the arbitral award only to take a differing view or set aside awards merely because the Arbitral Tribunal has made errors when dealing with it.

The Supreme Court in ***Venture Global Engineering LLC and anr. v. Tech Mahindra Ltd. and anr., (2018) 1 SCC 656*** observed that the award of an arbitral tribunal can only be set aside on the grounds specified in Section 34 of the Act and the Court cannot act as an appellate Court to examine the legality of Award, nor it can examine the merits of the claim by entering in the factual arena like an appellate Court. In ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131*** interpretation was given to the respective species of public policy under "fundamental policy of Indian law" was construed to mean contravention of a law protecting national interest; disregarding orders of superior courts in India; principles of natural justice such as *audi alteram partem*. "Most basic notions of morality or justice" was defined to mean an award shocking the conscience and morality of the court based on prevailing mores of the day. 'Patent illegality' was construed as illegality that goes to the root of the matter, but excluding the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court.

Recently in the matter of ***Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd., (2020) 7 SCC 167*** it was explained by the Apex Court that if the decision of the arbitrator is found to be perverse, or, so the construction of the contract is such that no fair or reasonable person would take: or, that the view of the arbitrator is not even a possible view, then the ground of patent illegality will be attracted. In ***Vidya Drolia*** (supra), it has been held that a dispute would only be non-arbitrable on the grounds of a violation of the public policy if a statute granted exclusive jurisdiction for the courts, or a specialised tribunal; thus, barring a reference to arbitration under such a statute.

5. Stay on Enforcement of Award

Earlier if a party filed an application for setting aside an arbitral award before a Court u/s 34, the other party could not seek enforcement of the award until the application was refused. It did not grant discretion to the Court and mere filing of an application led to an automatic stay on the enforcement of the award. Now sub-section (5) has been inserted in Section 34 which states that an application for setting aside an award can be filed only after issuing a prior notice to the other party. Sub-section (6) has also been inserted which prescribes one year for disposal of an application for setting aside an arbitral award. Therefore, along with time frame for deciding the application prior issuance of notice to the other party before filing the application has been made mandatory. Section 36, which deals with the enforcement of arbitral awards, has also been amended. Now mere filing of an application for setting aside an arbitral would not render that award unenforceable unless the court orders to stay on the operation of the said award on a separate application made for that purpose.

6. Retrospective: The Bone of Contention

Section 26 of the Amendment Act provides that the Act shall not apply to the arbitral proceedings commenced before the commencement of the Amendment Act unless the parties otherwise agree but the amendment shall apply in relation to arbitral proceedings commenced on or after its date of commencement. This provision was the source of divergent interpretations by various High Courts and created confusion as to whether the amendment will have a retrospective or prospective effect.

The confusion was laid to rest by Supreme Court in ***BCCI v. Kochi Cricket Private Limited and ors, (2018) 6 SCC 287***. The Court held that the execution of a decree or award was a matter within the realm of procedure and did not give rise to any substantive right vested in a party to resist the enforcement of the award. It was held that the Act as a whole was to apply prospectively on which date the Act came into force i.e. October 23, 2015, but with respect to enforcement of domestic award, section 34 was to be applied retrospectively. It was clarified that there would be no automatic stay of an award unless a separate application was successfully made for such a stay.

This judgment was meant to conclude the debate. However, the 2019 Amendment to the Arbitration and Conciliation Act, 2019 brought the discussion back to the forefront by deleting Section 26 and introducing a new Section 87.

AMENDMENT ACT OF 2019

Newly added section 87 nullifies the position laid down by the Apex Court in the matter of ***BCCI v. Kochi*** (supra) and provides that unless the parties agree otherwise, the 2015 Amendment Act would apply prospectively to all arbitral and court proceedings commenced after October 23, 2015.

The ***Supreme Court in Hindustan Construction Company Ltd. v. NHPC Ltd., (2020) 4 SCC 310*** struck down Section 87 as unconstitutional for being arbitrary and revived section 26 of the Amendment Act, 2015. The Court noted that despite the arbitral award being in their favor, the creditors were not able to enjoy the fruits of the same, as the principal amount would be automatically stayed due to a section 34 petition which in turn takes years for final disposal. The Court noted that, on average, about six years are spent in defending these challenges. This delay defeats the very objective of the alternate dispute resolution system. The Supreme Court, therefore, brought back the position laid down in ***BCCI v. Kochi*** (supra).

Before the amendment, both forums of arbitral tribunal and Court could be approached for interim measures once the final award had been made and was awaiting enforcement. Now, under amended section 17, for seeking interim reliefs post the arbitral award, the parties can only approach the Court.

Furthermore, in Section 34 the words “furnishes proof that”, has been replaced with “establishes based on the record of the arbitral tribunal that”, to

clarify that the parties must rely on the record before the arbitral tribunal alone at the time of challenge of an award. Now, parties cannot introduce any new document or record while challenging the award and they must stick to record already available to the tribunal. This move is meant to prohibit parties from adopting the delaying techniques of introducing new voluminous evidence while challenging awards before the court.

AMENDMENT ACT OF 2021

The Amendment Act of 2021 is the most recent intervention. Through this Amendment Act a new proviso to section 36(3) has been added which reads as follows:

> "Provided further that where the Court is satisfied that a prima facie case is made out,-—
>
> (a) that the arbitration agreement or contract which is the basis of the award; or
>
> (b) the making of the award,
>
> was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

For the first time ground for an unconditional stay of the award till the disposal of the application has been introduced. Now, an unconditional stay can be granted by the court on the ground of fraud if there is an application pending to stay the operation of an arbitral award and an application challenging the award u/s 34.

In conformity with the decision in ***BCCI v. Kochi*** (supra) it has also been explained that the above mentioned proviso would apply to all court proceedings, irrespective of whether the court or underlying arbitral proceedings commenced before or after 23 October 2015 i.e. date of enforcement of Amendment Act of 2015. This means that an application for stay of enforcement on the ground of fraud is maintainable irrespective of when it was filed.

TO BE OR NOT TO BE STAMPED

The issue that whether a contract containing an arbitration clause is not duly stamped or registered has been widely debated and judicial pronouncements of different High Courts varied widely. Supreme Court in the matter of ***SMS Tea Estate Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd., (2011) 14 SCC 66***, had an occation to deal with two questions of law – first, whether an arbitration agreement contained in an unregistered, but compulsorily registrable instrument, was valid and enforceable; and second, whether an arbitration agreement in an unregistered instrument which was not duly stamped, was valid and enforceable. On the first question, the Court held that an arbitration agreement was severable from the main agreement and was also saved by the proviso to Section 49 of

the Registration Act. Accordingly, it was held that the arbitration agreement in an unregistered, but compulsorily registrable instrument was valid. While dealing with the second question, the Supreme Court held that the arbitration clause in an unstamped agreement was invalid in light of Section 35 of the Stamp Act. In ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg. Ltd., (2019) 9 SCC 209*** reiterating the above mentioned ratio the Apex Court rejected the argument that an arbitration clause in an agreement ought to be considered an agreement independent of the agreement. This view was approved by a three Judge Bench in ***Vidya Drolia*** (supra).

However, recently in ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379***, another three Judge Bench of Supreme Court opined that an arbitration agreement is independent of the substantive commercial contract in which it is embedded and that the autonomy of the arbitration agreement is based on the doctrine of severability. Further, Section 3 of the Stamp Act does not subject an arbitration agreement to payment of stamp duty. Therefore, an arbitration agreement would survive independent of the substantive contract and it will not be rendered invalid, unenforceable, or non-existent even if the substantive agreement was not admissible in evidence. It was further held that the authority impounding the insufficiently stamped contract shall be the arbitrator in the case of an appointment by mutual consent; the appointing Court, where u/s 11 Court makes an appointment; and the court, where an objection is raised in a pending proceeding to give effect to a contract containing an arbitration agreement.

Finally, Apex Court also opined that the finding in ***SMS Tea Estates*** (supra) and ***Garware*** (supra) as approved in ***Vidya Drolia*** (supra) that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law, and un-enforceable, is not the correct position in law. The issue has been referred to be authoritatively settled by a Constitution Bench.

Till then, ***SMS Tea Estates*** (supra) and ***Garware*** (supra) as approved in ***Vidya Drolia*** (supra) holds the field and non-payment of stamp duty on the instrument containing arbitration agreement would invalidate it and render it unenforceable.

CONCLUSION

- Section 9 dealing with interim measures by the Court shall also apply to international commercial arbitration, even if the seat of arbitration is outside India.
- Parties can only approach the court for seeking interim reliefs post the arbitral award.
- The Arbitral Tribunal is the preferred first authority to determine all questions of non-arbitrability of dispute.

- Jurisdiction of the Court is extremely limited and the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings.
- Once the arbitral tribunal has been constituted, the Court shall not entertain any application to grant interim relief unless it finds that circumstances exist which may render the power of the arbitral tribunal to award interim award inefficient.
- An award conflicts with the public policy of India only if the making of the award was induced or affected by fraud or corruption or it is in contravention with the fundamental policy of Indian law or it is in conflict with the most basic notions of morality or justice.
- Arbitral award arising out of arbitration other than international commercial arbitration may also be set aside by the Court, if the award is vitiated by patent illegality appearing on the face of the award, provided that an award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.
- An application for setting aside an award can be filed only after issuing a prior notice to the other party. Such an application shall be disposed of within one year.
- The mere filing of an application for setting aside an arbitral award would not render that award unenforceable unless the court orders to stay on the operation of the said award on a separate application made for that purpose.
- Parties must rely on the record before the arbitral tribunal alone at the time of the challenge of an award.
- Unconditional stay on enforcement of an arbitral award can be granted by the court on the ground of fraud.
- Till the decision of Constitution Bench, non-payment of stamp duty on the instrument containing arbitration agreement would invalidate it and render it unenforceable.

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LAW OF ADVERSE POSSESSION: CONTEMPORARY DEVELOPMENTS

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I. INTRODUCTION

In India, the law respects possession and relief can be sought merely based on the possessory title. One of the facets of possessory title is the concept of adverse possession. The term "adverse possession" is not defined by any statute in India. It is derived from the common law. However, the concept dates back to approximately 2000 years ago in the Code of Hammurabi. The essence of adverse possession is based on the understanding that a person who takes care of the land, nurtures it, makes the highest use of it is considered to have greater ownership of the land than the title owner. The concept favors the utilitarian principle.

The law relating to the adverse possession is contained in Article 65, Schedule I r/w/s 27 of the Limitation Act, 1963 (hereinafter referred as the Limitation Act). Recently, Supreme Court in ***Ravinder Kaur Grewal v. Manjit Kaur, (2019) 8 SCC 729*** while overruling ***Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014) 1 SCC 669*** has held that adverse possession can be used as a sword by the plaintiff as well as a shield by the defendant within the ken of Article 65 of the Limitation Act. Any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession.

Law of adverse possession has significantly developed due to several recent judicial pronouncements. Hence, this article discusses the law of adverse possession along with its necessary ingredients in light of recent developments that took place by series of judgments.

II. ADVERSE POSSESSION IN THE LIMITATION ACT

Article 65, Schedule I of the Limitation Act prescribes a limitation of 12 years for filing a suit for possession of immovable property or any interest therein based on the title. The limitation period of 12 years is counted from the point of time "when the possession of the defendants becomes adverse to the plaintiff". Section 27 of the Limitation Act reads as:

> "**27. Extinguishment of right to property –** At the determination of the period hereby limited to any person for instituting the suit for possession of any property, his right to such property shall be extinguished."

Section 27 is an exception to the well accepted rule that limitation bars only the remedy and does not extinguish the right. Thus, when a title owner having a right to possess an immovable property, fails to institute a suit within the limitation period prescribed by Article 65 of the Limitation Act, a person in

adverse possession can institute a suit for declaration of title. This is because the ownership right accrues to the adverse possessor on extinguishment of the right of the real owner. The adverse possessor is said to have acquired prescriptive title by adverse possession on the expiry of 12 years.

As far as the Government (Central or State) property is concerned, the period of limitation for any suit (except a suit before the Supreme Court) is 30 years and the starting point of limitation is the same as in the case of a suit by a private person vide Article 112, Schedule I.

III. INGREDIENTS CONSTITUTING ADVERSE POSSESSION

A simple application of limitation shall not be enough by itself for the success of the claim of adverse possession. The three classic requirements of adverse possession can be understood through the Latin maxim- *nec vi, nec clam and nec precario*, i.e. adverse possessor must show that his possession is adequate in continuity, adequate in publicity and adverse/in denial of the other's title. All the ingredients must co-exist in order to constitute adverse possession. The ingredients of adverse possession are developed through several judicial pronouncements, which are as follows:

1. *Animus Possidendi* (Intention to possess), Actual Possession and Intention to Dispossess

Animus possidendi simply means an intention to possess an immovable property adverse to the interest of real owner. The intention must be shown to exist at the commencement of the possession. The intention to possess must be present with the actual possession of the immovable property. The possession is attributed by acts like looking after the property, protecting it, occupying it or having control over the property, etc. In case of agricultural property, possession can be attributed to a tiller who makes the land cultivable. Thus, adverse possession cannot commence until a person has intention to possess and he is in actual possession of the immovable property.

However, it has been settled in several judicial pronouncements that the trespasser's possession is not synonymous with adverse possession. Mere temporary use of the property does not qualify as adverse possession. In ***Ravinder Kaur Grewal*** (supra), the Supreme Court reiterated that a trespasser's possession is construed to be on behalf of the owner and a casual user does not constitute adverse possession.

Animus Possidendi also includes an intention to dispossess others including the true owner from the possession of the property. In adverse possession, there is dispossession/discontinuance of the original owner. Blacks' Law dictionary defines "dispossession" as "ouster." In other words, an adverse possessor comes in possession of the property to dispossess true owner. Hence there is no dispossession of the original owner unless someone else takes possession [***P.T. Munichikkanna Reddy v. Revamma, (2007) 6 SCC 59***]. However neither

permissive possession nor occassional interferences constittute dispossession [*Thakur Kishan Singh v. Arvind Kumar, (1994) 6 SCC 591*].

2. Possession must be open

Adverse Possession must be open. In other words, the possession must be to the knowledge of original owner of the immovable property. "Open possession" is well explained by Hon'ble Supreme Court in ***Ram Nagina Rai v. Deo Kumar Rai, (2019) 13 SCC 324*** in following terms:

> "Thus, it is important to assess whether such intention to dispossess is apparent to the actual owner or not. The intention of the adverse user must be communicated atleast impliedly to the actual owner of the property. His hostile attitude should be open to the knowledge of the real owner. It follows that the intention and possession of the adverse possessor must be hostile enough to give rise to a reasonable notice to the actual owner."

Adverse possessor need not inform the real owner of the former's hostile action. However, any secret hostile intention on his part in denial of the owner's title will not constitute his possession as adverse. Thus, the plea of adverse possession must clearly state that the true owner is conscious of the fact of possession by the adverse possessor. This position draws strength from the recent decision of the Supreme Court in ***Narasamma v. A. Krishnappa (Dead) Thr. Lrs., (2020) 15 SCC 218***.

4. Possession must be continuous

The period of adverse possession must be continuous and uninterrupted for 12 years in the case of private property and 30 years in the case of government property. The pleadings must establish the continuous nature of possession. An inquiry is required to be made into the starting point of such adverse possession. The period is calculated from the date when the title owner is dispossessed. Adverse possession does not involve occasional interruptions or intermittent possession. However, mere long possession is not adverse possession [***Uttam Chand v. Nathu Ram, (2020) 11 SCC 263***].

There are instances where Apex Court decided on the running of limitation. Pendency of a suit does not stop running of limitation [***Des Raj v. Bhagat Ram, (2007) 9 SCC 641***]. In this case, despite the pendency of other suits relating to the same property, adverse possessor continued to possess the property exclusively with the knowledge of others interested in the property. Therefore, his period of the possession throughout the pendency of the other suits was counted in the period of 12 years. A decree that remains unexecuted for many years, also does not stop the period of limitation.

Recently, in ***M. Siddiq v. Mahant Suresh Das & Ors., (2020) 1 SCC 1***, famously known as Ayodhya land dispute case, Sunni Waqf Board had set up an alternative relief of the possession of disputed land by adverse possession. The Apex Court held that the Waqf cannot set up a case of being in peaceful, open, and continuous possession of the entire property as their advocates had asserted the obstructions by Hindus during 1856-57, 1934 and 1949. Such obstructions and interferences did not meet the requirement of continuous nature of adverse possession.

5. Possession must be hostile

"Hostile possession" is a possession which is expressly or impliedly in denial of the title of the true owner. A person in hostile possession does not acknowledge the right of others but denies it. An adverse possessor is conscious of his dominion over the immovable property and exercises it. Such possessor denies all claims set up by original owner or any other person interested in the property. Thus in adverse possession, possessor requires *animus possidendi* to hold the land adverse to the title of the true owner.

Let us understand an instance of "hostile possession" through the facts of the case in the ***State of Orissa v. Abu Bakkar Habib, AIR 2017 Ori 36***. 'A' instituted a suit against 'B' government for declaration of ownership and permanent injunction on the grounds of adverse possession. 'A' admitted that he has paid a penalty when the encroachment case before Tahsildar was initiated by 'B', the government. Here, payment of penalty by 'A' did not constitute denial of title of 'B'. The Court held that the element of hostile *animus* of 'A' is absent. Hence, there was no adverse possession by 'A'.

The Supreme Court in ***Mallikarjunaiah v. Nanjaiah, (2019) 15 SCC 756*** rejected plea of respondents seeking declaration of adverse possession. The Court agreed that respondents were in continuous possession of the disputed property. However, Court clarified that merely possessing a property continuously for 12 years is not sufficient in demonstrating adverse possession. In fact, it is only 9 years prior to filing the suit, respondents became aware of their adverse possession. It is imperative that possessor must possess the property hostile to the knowledge of true owner.

IV. NATURE OF ADVERSE POSSESSION

1. Pleadings

A plea of adverse possession is a mixed question of fact and law. The burden to prove adverse possession shall lie on a party who sets up the plea. A person who claims adverse possession must show:

(a) on what date he came into possession,

(b) what was the nature of his possession,

(c) whether the *factum* of possession was known to the other party,

(d) how long his possession has continued, and

(e) his possession was open and undisturbed.

An alternate plea of adverse possession set up in the prayer clause without specifying the details is not a substitute for a plea (***S.M. Karim v. Mst. Bibi Sakina, AIR 1964 SC 1254***).

Let us understand through an example. Where 'A' institutes a suit for declaration of title and possession on the basis of adverse possession, the burden of proof lies on 'A' to prove his adverse possession. Contrary, where 'A' institutes suit against 'B' for declaration of title and possession on the basis of his title deeds while 'B' in his written statement sets up a plea of adverse possession. The plaintiff in this case, is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. In other words, the contesting defendant will have to prove that the bar of limitation prescribed under Article 65 of Schedule of the Limitation Act viz. 12 years is applicable in the matter.

The Supreme Court in ***M. Siddiq*** (supra) case has explained that adverse possession has to be duly established first by adequate pleadings and second by leading sufficient evidence. It further reiterates that evidence can only be adduced concerning matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case.

2. Parties to the suit

The common law doctrine of finder's keepers (*one who finds an abondoned item keeps it*) is not recognized in India. The true owner must be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants. In this respect, ***Nair Service Society Ltd v. K.C. Alexander, AIR 1968 SC 1165*** may be referred, where neither adverse possession of the plaintiff nor the title of the defendants was proved. So, the Court held that the government being the true owner must have been made party to the suit. Thus in the above case, the relief of recovery of possession on the basis of adverse possession was not granted to either parties.

3. Inheritable and Transferable

Adverse Possession is inheritable and transferable. There can be tacking of adverse possession. Tacking is possession by a person other than adverse possessor where former's period of possession is counted with the latter's for adverse possession. Tacking may be done by the purchaser, legatee or assignee, etc. so that there is continuity of possession. Two distinct trespassers

cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period.

V. INSTANCES OF ADVERSE POSSESSION

1. Adverse Possession *vis-a-vis* Real Owner

Q. Whether plea of adverse possession involves acknowledgment of the title of the true owner?

Yes. In pleading adverse possession, the claimant must necessarily carry the burden of acknowledging the title of the person or the entity against whom the plea of adverse possession has been set up. So, any claim of adverse possession against 'A' would amount to an acceptance of a title of 'A'. [***M. Siddiq*** (supra), ***Dagadabai (Dead) By LRs. v. Abbas @ Gulab Rustum Pinjari, (2017) 13 SCC 705***].

Q. What if the person claiming adverse possession does not know who the true owner is?

Adverse possession must be open and the intention to dispossess must be at least impliedly communicated to the original owner [***Ram Nagina Rai*** (supra)]. To constitute hostile possession, knowledge of the true owner is essential. Where a person holds the property with a mistaken belief that he is the owner or if a party who pleads adverse possession is not sure of the true owner, the question of his hostile possession does not arise. This is because there is no denial of the title of the true owner. [***T. Anjanappa v. Somalingappa, (2006) 7 SCC 570***].

Q. Can adverse possession be pleaded with the independent title?

Recently in ***Narsamma v. A. Krishnappa, (2020) 15 SCC 218***, a three Judge Bench of Supreme Court reiterated that a plea of title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. This inconsistency pertains to an accepted policy of law that possession is never considered adverse if it is referable to a lawful title. The position will be the same if adverse possession is pleaded with part performance, that is Section 53-A of the Transfer of Property Act, 1882. This is because in part performance, a party comes into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit. The said position finds strength from judgments in ***Mohan Lal (Deceased) Thr. LRs. v. Mirza Abdul Gaffar, (1996) 1 SCC 639, Roop Singh v. Ram Singh, (2000) 3 SCC 708*** and ***Mool Chand Bakhru v. Rohan (2002) 2 SCC 612***.

However, there will not be an inconsistency if a plea of title is claimed through another person (other than the plaintiff owner) with a plea of adverse possession against said plaintiff owner as held by Supreme Court in ***L.N. Ashwathama v. P. Prakash, (2009) 13 SCC 229***.

2. Adverse Possession *vis-a-vis* Permissive Possession

Q. Can permissive possession turn into hostile possession?

Yes. A permissive possession can turn into hostile possession. A permissive possession is where a person possesses the land on behalf of a lawful owner. Let us understand through an example: 'X', being the real title owner of the property, his ancestors were close to Y's ancestors. X's ancestors permitted Y's ancestors to reside in the property. Eventually, 'Y' got the Khata of the property changed in his name. After some time, 'X' insists 'Y' to give back the property but 'Y' did not. 'X' instituted a suit against 'Y' for declaration of title and recovery of possession. These are the facts of ***Ram Nagina Rai*** (supra) that illustrate a typical case of permissive possession. The Supreme Court held that the defendants will not acquire adverse possession by simply remaining in permissive possession for howsoever long it may be.

To prove adverse possession, the claimant must put forth strong and clear material to show when the permissive possession turned into hostile possession. Such party has to prove its necessary *animus* to possess, in exclusion and hostile to the real owner of the property that is apparent to the real owner. Mere production of Khasra entries does not prove the hostile possession. Such documents only tend to prove the *factum* of possession and not adverse possession. The Supreme Court judgments in ***Pt. Shamboo Nath Tikoo v. S. Gian Singh, (1995) Supp 3 SCC 266 and Prem Nath Khanna v. Narinder Nath Kapoor, (2016) 12 SCC 235*** may be referred.

Q. What is the position of the plea of adverse possession by co-sharers, co-heirs, co-owners or relatives?

The position in this regard is similar to permissive possession. A co-sharer, co-owner or co-heir holds property on behalf of other co-sharers, co-owners and co-heirs as trustee. A plea of adverse possession by one co-owner against another has to be proved by a clear ouster of such co-owner. The judgment in ***P. Lakshmi Reddy v. L. Lakshmi Reddy, 1957 SCR 195*** dealt with adverse possession pleaded by one co-heir against another. It was held that:

> "There must be an open assertion of hostile title, exclusive possession and enjoyment by one of them to the knowledge of the other shall constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title."

However, such ouster is not constituted by mere denial of possession or change in revenue entries by mutation or non-payments of the rents and profits of the land. The position is the same for co-shares or co-owners. In this respect, following judgments may be referred to – ***Thakur Kishan Singh v. Arvind Kumar, (1994) 6 SCC 591, Md. Mohammad Ali v. Jagadish Kalita, (2004) 1 SCC 271*** and ***Ram Prasad v. Anna, 2002 SCC Online MP 64***.

Q. Can a caretaker or servant acquire title by adverse possession over property?

The position in this regard is similar to permissive possession. A caretaker or servant holds property as a licencee of true owner. Recently, Supreme Court in ***Himalaya Vintrade Pvt. Ltd. v. Md. Zahid & anr., Civil Appeal No. 5779 of 2021, order dated 16.09.2021*** has held that a caretaker or servant can never acquire interest in property irrespective of their long possession.

Q. Can adverse possession be pleaded with the doctrine of lost grant?

Doctrine of lost grant is a rule of evidence. It means a long-continued use or possession can raise a legal presumption that the right exercised was previously conveyed to the user or possessor and that the instrument of conveyance has been lost. The doctrine only applies where the enjoyment or use of land cannot otherwise be reasonably accounted for. Recently in ***M. Siddiq*** (supra), plaintiff had sought a declaration of title on the basis of lost grant and in the alternative had set up a plea of adverse possession. The Supreme Court has held that such alternative plea is destructive of a valid legal basis to apply the doctrine of lost grant. The Hon'ble Court has explained that adverse possession is vesting of title in one person and the existence of a long continued and uninterrupted possession of another, to the knowledge of and in a manner hostile to, the true title holder. The plea of adverse possession would lead to an inference against the application of the doctrine of lost grant as a plea of adverse possession is premised in title vesting in someone other than the alleged grantee.

Q. What is prescribable under Article 65 of the Schedule appended to Limitation Act?

The prescriptive title acquired by the adverse possessor is limited to the rights of the holder of the property. In other words, the nature of possession of the holder of the property should be inquired into. There may be a situation where limited ownership or limited property right is enjoyed by a holder. Under such circumstances, limited right that is extinguished shall be acquired and not beyond that. For example, a sub-tenant can only acquire a limited right of the tenant by prescription and not ownership. (***Collector of Bombay v. Bombay Municipal Corporation, AIR 1951 SC 469***).

3. Adverse Possession *vis-a-vis* the Government

Q. Can Government take the plea of adverse possession to acquire title over any property?

The Supreme Court in several judicial pronouncements has taken a strict view regarding government, being a welfare State cannot be permitted to take a plea of adverse possession to perfect its title over any citizen's property. Government whether Central or State may acquire property by following due procedure of law. In this regard, ***Vidya Devi v. State of Himachal Pradesh, (2020) 2 SCC 569*** may be referred.

Q. What is the position when a plea of adverse possession is raised to perfect a title of a property belonging to the Government?

To prove adverse possession against government land, all the ingredients that constitute adverse possession must be proved, and that such possession has completed a period of 30 years.

The position may be different in cases of government land granted or allotted to people belonging to a special class or in special circumstances. In such cases, the nature of the grant is to be seen to determine the period of adverse possession.

Nature of Grant	Period of Limitation for extinguishment of the title of Government
In case of absolute transfer of the interest of State Government	Subject to protection provided by provisions of the concerned Act, same period of limitation as is prescribed for other citizens by the provisions of the Limitation Act.
In case of transfer of the possession of the land without conveying the title of the State Government	The period of limitation shall be 30 years.

The Supreme Court judgments in ***K.T Huchegowda v. Deputy Commissioner, (1994) 3 SCC 536*** and ***G. Krishnareddy v. Sajjappa, (2011) 13 SCC 226*** may be referred.

Where a party is in possession of a land by invalid grant or a grant not in a manner required by law, the title may be acquired by adverse possession. The law has been discussed in ***Collector of Bombay v. Municipal Corporation of the city of Bombay, AIR 1951 SC 469*** and ***State of WB v. Dalhousie Institute Society, (1970) 3 SCC 802***.

4. Adverse Possession *vis-a-vis* an Idol

Q. Can Shebait, Manager, Mahant etc. take up a plea of adverse possession over property belonging to an idol?

The possession of Shebait, Manager, Mahant etc. over the property belonging to an idol is in the nature of fiduciary capacity and as such the Shebait,

Manager and Mahant etc. are estopped from setting up a title adverse to that of an idol. In this regard, the observation of a three Judge Bench Supreme Court in case of ***Ishwar Sridhar Jew v. Sushila Bala Dasi, AIR 1954 SC 69*** is relevant which is as under:

> "If a shebait by acting contrary to the terms of his appointment or in breach of his duty is such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interest of the idol, his possession of the dedicated property in the possession of the idol whose sevait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession of the property against the idol. No shebait can, so long as he continues to be the sevait, ever claim adverse possession against the idol."

Therefore, no adverse possession ever be claimed by Shebait, Manager or Mahant etc. over the property owned by an idol.

Q. Can a stranger or third party take the plea of adverse possession over property belonging to an idol?

An idol is recognized as a juristic person which can own properties through its Shebait, Manager, custodian, trustee etc. The property owned by an idol may be acquired, alienated and otherwise dealt with through such Shebait, Manager, custodian, trustee etc.

A three Judge Bench of the Supreme Court in ***Sarangadeva Periya Matam v. Ramaswami Goundar, AIR 1966 SC 1603*** has considered this question in relation to property owned by a math and held that:

> ''The math is the owner of the endowed property. Like in idol, the math is a juristic person having the power of acquiring owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. It may acquire property by prescription and may likewise lose property by adverse possession.''

In this regard, an argument is advanced that an idol is always considered a minor who is under legal disability. Therefore, by virtue of Section 6 and 7 of the Limitation Act, 1963, period of limitation never expires against a minor. Nagpur High Court has had an occasion to deal this issue in the case of ***Seth Narainbhai Ichharam Kurmi v. Narbada Prasad Sheosahai Pande, AIR 1941 Nag. 357,*** wherein it was held that:

> ‘‘Minority does not prevent ouster and does not stop the commencement or running of adverse possession. The only privilege which a minor gets is another three years after attaining majority, if the time expires before the three years. ... Strictly speaking there can be no such thing as possession by a minor qua minor because he is incapable of having an animus possidendi and of exercising legal rights of ownership. They are exercised on his behalf by others and the question always is whether they were so exercised or not. ... But if a stranger enters on the land and physically ousts the minor from occupation as well as from possession and sets up an adverse title in himself, then we have no doubt that time begins to run against the minor from that moment.’’

Therefore, properties belonging to an idol may be subjected to adverse possession by strangers.

Q. Can plea of adverse possession be taken on behalf of an idol?

From the above discussion, it is clear that an idol can acquire, retain and alienate immovable properties through its Shebait, Manager, Mahant, Custodian, Trustee etc. and adverse possession can be claimed against an idol. On the same principle, it can be safely said that an idol can also acquire title by adverse possession over the property belonging to strangers.

VI. CONCLUSION

The right of possession is strengthened to the extent that both plaintiff or defendant can set up a plea of adverse possession. The law of adverse possession is subject to continuous development through judicial pronouncements acknowledging modern-day difficulties about ownership of property. It must be stressed that ***Ravinder Kaur Grewal*** (supra) has cautioned encroachment of land for public utility based on adverse possession as harsh consequences would arise to the public at large. While dealing with the concept, we must be vigilant that all the ingredients of adverse possession co-exist as adverse possession substantially takes away the title of the true owner.

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PROBATIVE VALUE OF LAND RECORDS

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In Courts, in order to prove their ownership or possession over a property parties often rely upon land records like Khasra, Khatauni, Bhu Adhikar Pustika etc. While dealing with such land records, we find ourselves in dilemma with respect to their evidentiary value, facts that can be proved by such records and so forth. This article is an attempt to compile the law on aforesaid issues and to provide a pragmatic solution to such questions.

RELEVANT PROVISION

Section 117 of Madhya Pradesh Land Revenue Code, 1959 (hereinafter to be referred as the "MPLRC") states that –

> **"117. Presumption as to entries in land records.**- All entries made under this chapter in the land records SHALL be presumed to be correct until the contrary is proved."

Section 4 of the Indian Evidence Act, 1872 provides that whenever it is directed that court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. Thus, the phrase "shall presume" connotes that court is bound to take the fact as proved until evidence is given to disprove it. From the above evaluation of the phrase "shall presume", it is clear that section 117 MPLRC raises a rebuttable presumption.

NATURE OF PRESUMPTION

While dealing with the nature of presumption of entries in land records Supreme Court in ***Vishwa Vijai Bharti v. Fakhrul Hasan & Ors., (1976) 3 SCC 642*** held that–

> "The entries in the revenue record ought to be generally accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent entries. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to attack on the ground that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot find a claim to possessory title."

In view of the above discussion it can be said that with the aid of section 117 of MPLRC the court cannot come to the conclusion that the fact stated in the concerning land record is conclusively true. The presumption therein only discharges the party relying on the entries made in the land record to prove its truthfulness and shift the burden on the opposite party to show that the real fact is not as has been presumed. However, the said presumption applies only to

genuine entries. If the entries in land records appear to have been made fraudulently or surreptitiously, say for example without informing the other interested parties, then presumption u/s 117 of the MPLRC will not come into play.

IS ORAL TESTIMONY SUFFICIENT TO REBUT THE PRESUMPTION U/S 117 MPLRC?

The party whose pleading are contrary to the facts stated in land records generally gives testimony to rebut the same and more often we only have that oral testimony on record for the purpose of rebutting the entries made in the land records. But is oral testimony sufficient to the rebut the presumption of the truthfulness of entries made in land record or should they be supported by other documentary evidence?

This question came up before Supreme Court in the case of ***Sita Ram Bhau Patil v. Ramchandra Nago Patil, (1977) 2 SCC 49***. wherein it was held that -

> "There can be no presumption as regards the correctness of entries where the oral evidence is contrary to such entries and where no notice of mutation was given to the concerned party."

However, recently in ***Shri Partap Singh v. Shiv Ram, AIR 2020 SC 1382***, Supreme Court has held that -

> "The presumption of truth attached to the record-of-rights can be rebutted only if there is a fraud in the entry or the entry was surreptitiously made or that prescribed procedure was not followed. It can be rebutted only on the basis of evidence of impeccable integrity and reliability. It will not be proper to rely on the oral evidence to rebut the statutory presumption as the credibility of oral evidence vis-a-vis documentary evidence is at a much weaker level."

From the harmonious interpretation of above precedents it appears that generally oral evidence is not sufficient to rebut the statutory presumption laid down u/s 117 of MPLRC as documentary evidence are considered to have higher evidential value. However, if the oral testimony on record is of impeccable integrity and reliability or if land records *prima facie* appear to be improper then in such case oral testimony may be sufficient to rebut the presumption raised by section 117.

LAND RECORDS TO WHICH PRESUMPTION U/S 117 OF THE ACT IS APPLICABLE

Section 117 of MPLRC provides that the presumption therein shall apply to all entries made under this Chapter i.e. Chapter IX thereof. Chapter IX ranges from sections 104 to 123. Section 114 of MPLRC provides a list of land records which are to be prepared for every village as well as urban area. The presumption u/s 117 shall apply to such land records. Following is the list of those records:

Land Record	Section	Purpose
Maps	107	It shows the boundaries of survey, block and sector.
Record of Rights	108	It shows the name of bhumiswami, occupancy tenant, their respective interest, rent or land revenue and such other particulars as may be prescribed from time to time.
Khasra or field book	110	It is basically an identity card of every property. It shows the details of the individual who have acquired the property. Apart from that it also contains particulars with respect to any form of encumbrance existing on the property as well as the details of crops that is being sown on that property.
Bhoo Adhikar Pustika	114-A	It shall be provided to every person whose name is entered as Bhumiswami in Khasra. It shall contain particulars rights over holding, encumbrances on the holding, recovery of land revenue in respect of holding, such of the entries of khasra or field book pertaining to holding as may be prescribed.
Record of unoccupied land	233	It shall contain the particulars of unoccupied land of every village and urban area.
Nistar Patrak	234	It shall embody a scheme of management of all unoccupied land in the village and all matters incidental thereto.
Wajib-ul-arz	242	It shall contain the record of customs in each village with regards to the right to irrigation or right of way of other easement; right to fishing in any land or water not belonging to or controlled or managed by the State Government or a local authority.
Record of diverted land	As per rules	It shall contain the record of those land whose purpose is diverted as per section 59 of MPLRC.
Such other land records as may be prescribed.		

As per recently introduced Madhya Pradesh Bhu Rajasva (Bhu-Survekshan and Bhu Abhilekh) Rules, 2020 which came into force from 6th July, 2020, apart from above records khatawar Khatoni, village sector wise Bhumiswami Khatoni, register of government leases, register of boundary marks and reference points, Khasra, Masahati Khasra shall be prepared for every village and sector and for entire State, Statewise Bhumiswamiwar Khatoni shall be prepared.

The presumption of genuineness u/s 117 MPLRC shall apply to these records also.

AUTHORIZED ENTRIES IN LAND RECORDS RAISE PRESUMPTION

The presumption u/s 117 of MPLRC shall apply to only those records which are prepared and maintained by the person authorized to so. If it is not so prepared then presumption u/s 117 of MPLRC cannot be raised and in such case person who has prepared it will have to come into the docket for evidence and then prove the entries made by him.

In ***Churamani v. Ramadhar, 1991 R.N. 61*** High Court of Madhya Pradesh has held that-

> "No presumption of correctness can be attached to an entry made by Patwari in the remarks column of khasra or field book showing therein some third party or the trespasser to be in possession of the land held by a Bhumiswami and recorded as such in his name in the said records. Presumption under S. 117 of the Code applies to the entries which are required to be made in Chapter IX and in respect of entries in other land records prepared under the Code. The provisions of Code or the Rules made there under do not require Patwari to make any entry in the remarks column and if such an entry is made, the same cannot have any presumptive value as regards its correctness under S.117 of the Code."

The above position abundantly clarifies that the entries in land records can be presumed to be correct as per section 117 only when it is made in accordance with Chapter IX or as provided elsewhere in the MPLRC or Rules made thereunder. For instance, as per section 110(5) of MPLRC, Khasra is required to prepared by Tahsildar. Similarly, Nistar Patrak and Wajib-ul-Arz are required to be prepared by Sub-Divisional Officer in accordance with sections 234 and 242 of MPLRC respectively. But, if they are not so prepared then in such case the presumption u/s 117 of the MPLRC will not come into operation.

PURPOSES FOR WHICH THE ENTRIES MADE IN THE LAND RECORDS CAN BE TAKEN INTO CONSIDERATION

1. Possession

Khasra entries provide the name of the person in possession of the property. In the case of ***Smt. Chandrakanta Ben v. Vadilal Bapalal Modi, AIR 1989 SC 1269***, there was no registered instrument for the transfer of land in question and the revenue entry was made describing the claimant as occupant. Hon'ble Supreme Court in this case held that the presumption of truthfulness could be raised from such revenue entry, in favor of the claimant for her possession only and not as to title.

In unanimity with the above ratio it can be said that presumption as to possession can be raised on the basis on entry made in land records, provided such entry are made after due compliance of law.

2. Ownership

An individual ordinarily acquires ownership over a property by means of conveyance deed and therefore, no evidence better than a registered sale deed itself can be produced to prove the title over a property. However, on several occasions land records are produced to prove the title over property. To what extent such entries can be relied on for the purpose of proving title of a person over property have been discussed by Supreme Court in several cases.

In ***Union of India v. Vasavi Co-op Housing Society Ltd., (2014) 2 SCC 269*** Supreme Court laid down that revenue records do not confer title on a person. Even if the entries in the record of right carry evidentiary value, that itself would not confer any title on the plaintiff. The plaintiff has to show, independent of those entries, that the plaintiff's predecessor had title over the property in question and it is that property that they have purchased.

In ***Smt. Bhimabai Mahadeo Kambekar v. Arthur Import and Export Company, (2019) 3 SCC 191*** Supreme Court held that the mutation entry of land in the revenue records does not create or extinguish the title over any land nor does such an entry have any presumptive value on the title of such land. Such an entry only enables the person in whose favour the mutation is ordered to pay the land revenue in question. The same view has been reiterated recently in ***Jitendra Singh v. State of Madhya Pradesh, SLP (C) No. 13146 of 2021***, vide order dated 06.09.2021.

Thus, with respect to ownership the position is sufficiently clear that land records do not confer title over a property. However, continuous entries in land records can be used to corroborate the fact of ownership, as possession is nine points in law and as already seen above, presumption of possession can be raised on the basis of entry on land records.

3. Adverse Possession

The theory of adverse possession as incorporated in Articles 64 and 65 of the schedule appended to Limitation Act, 1963, is determined on the basis of pristine presumption of entries in revenue record. However, whether mere entries in land records are sufficient to prove the adverse possession of a person is an issue which remains to be pondered upon.

In ***Vishnu Sharan and Ors. v. Ajuddhibai and Ors., 2004 R.N. 185***, it was held that adverse possession cannot be proved merely on the basis of entry in Khasra. To prove adverse possession, specific pleadings are required to be made and the same is to be proved by substantive evidence.

Thus on the basis of the entries made in land records adverse possession of a person over a property can be presumed provided that other requisites of adverse possession also stands satisfied i.e. the possession must be adequate, in continuity, in publicity and in extent to show that the possession is adverse to the real owner.

CONTINUOUS ENTRIES IN KHASRA

Although entries made in Khasra are rebuttable, but where parties produce continuous entries in Khasra then in such case some extra weightage or value must be given to it. As to this issue it was held in the case of ***Ramapati Bhattacharya v. Collector and Ors., 2000 R.N. 211*** that reliance must be made on continuous entries in Khasra.

VALUE OF LAND RECORD FOR SUCCEEDING OR PRECEDING YEAR

If plaintiff in a suit for simpliciter injunction produced Khasra for the year 2016 to show his possession, then whether in such case presumption can be made with respect to possession of the plaintiff for the year 2015 or 2017?

This question was answered by High Court of Madhya Pradesh in ***Narayan Prasad and Ors. v. Tulsidad and Anr., 2002 R.N. 306***. The court herein held that entries in land records does not confer any right or interest in any person and entries in land records of particular year do not prove the possession of a person before or after that year.

Thus, in light of the above ratio court cannot presume continuation of possession of a person over property on the basis of a land record of a particular year. Therefore, emphasis is always made on producing the continuous land records for the purpose of proving continuous possession.

ELECTRONICALLY GENERATED COPIES OF LAND RECORDS

Land Records come within the purview of public records as defined u/s 74 of Indian Evidence Act, 1872 as the fact contained in such records are of public interest and the entries therein are made by authorized and competent public servants in the course of their official duty. Since, it is very cumbersome to produce original land records as they run into numerous account, certified copies of such records are permissible and are produced in court. Certified copies of land records become admissible as proof of original u/s 65(e) of the Evidence Act. Further, the certified copies which are generated in accordance with provision contained in section 76 of the Indian Evidence Act, 1872 are presumed to be genuine in light of Section 79 thereof.

Now in keeping pace with the advancement of technology in this world, recently the Government of Madhya Pradesh has recently introduced Madhya Pradesh Bhu Rajasva (Bhu-Survekshan and Bhu Abhilekh) Rules, 2020 (hereinafter referred as “Rules of 2020”). Rules 94 to 106 deal with certified

copies of the land records which are kept in the electronic form. Rule 94 provides that:

> "Rule 94. Certified copies of land records which are listed in Schedule IV and are available in electronic form shall be issued through authorized service provider or through authorized web portal as may be directed by Commissioner of Land Records from time to time….."

Schedule IV of the Rules of 2020 provide the list of following land records: Khasra Eksala/ Khasra Panchsala/ Khata Jamabandi (Khatoni)/ Record of Rights/ Khewat, Wajib-ul-Arz, Nistar Patrak, Copy of Map, Copy of Namantaran Register, Copy of an order in a revenue case/ copy of an order sheet in a revenue case/ copy of revenue case register, hand written Khasra panchsala and hand written revenue case register.

Rule 95 further provides that:

> "**Rule 95**. Certified copies of land records other than those covered under Part C (of which Rule 94 is part) shall be issued in accordance with this Part (Part D.)"

Part D of the Rules of 2020 provide that on application being moved by a person for obtaining a copy of land record other that those mentioned in Schedule IV, the Head Copyist shall call for revenue records from the concerned court. He shall then make a copy of the same as per rules, attest them and then deliver the same to applicant.

Perusal of the above rules indicate that land records enlisted under schedule IV of the Rules of 2020 and which are available in electronic form, can be obtained only through authorized service provider or through authorized web portal and not from else where. Commissioner of Land Records, Madhya Pradesh by its order no. 741/11-Bhu.Pra/Lo.Se.Gaa/2013 dated 31.07.2019 and order no. 174/9-Computer/2020 dated 04.02.2020 has authorized following service provider and web portal for issuance of land records – I.T. Centers managed by M/s Bhopal E-Governance Ltd. Bhopal, Lok Seva Kendra, MP Bhulekh Portal and MP Online Kiosks.

Through the above centres and portals, copies of electronic land records can be obtained with or without paying the prescribed fees. The copy obtained without paying the fees bears a water mark and a note at the bottom that the copy can not be used in court for the purpose of evidence. Such copies do not even carry the electronic signature of the Commissioner of Land Records. Whereas, the one obtained after payment of fees neither bears any water mark nor the above note. Further the paid copy carries the electronic signature of Commissioner of Land Record.

In light of the above rules the question that comes before us is whether electronically signed land records can be used as certified copy of such records?

In order to answer the above question we need to first take into consideration the provisions contained in Section 76 of the Indian Evidence Act, 1872 which provides that if a public document is open to inspection, it's copy may be issued to any person who is demanding it by the public officer having the custody of the document. The copy of the public document is issued on payment of legal fees and a certificate shall be attached thereof, containing the following particulars:

(i) That it is a true copy.

(ii) The date of the issue of the copy.

(iii) The name of the officer having custody of the documents and his official title.

(iv) The seal of the officer, if there is any.

When these particulars are mentioned in the copy, only then it can be considered as a certified copy.

The copies of land records made available on the payment of the requisite fees through I.T. Centers managed by M/s Bhopal E-Governance Ltd. Bhopal, MP Bhulekh Portal and MP Online Kiosks though bear the electronic signature of the Commissioner of Land Records, but it does not qualify the requirements of section 76 of the Evidence Act. As a result of which such copies cannot be called as certified copies provided as per the procedure prescribed u/s 76 of the Indian Evidence Act, 1872.

Further, so far as the value of electronic signature is concerned, it carries value only when the document is in electronic form and not on the printout. It is also noteworthy that though government may authorize any public officer to issue certified copies of public documents in light of the explanation to section 76 of the Indian Evidence Act, 1872 but such web portal and service providers can never be treated as "public officers" for the purpose of issuing certified copies.

As far as the copies issued by Lok Seva Kendras are concerned, they usually bear the seal and certificate of the officer presiding at such Kendra. But the officer sitting their do not come within the purview of public officer and mere agent appointed to operate the server. As a result the copy certified by such officer can also not be certified copy. Moreover, the Terms of Use on Lok Seva Kendra Portal itself contains a disclaimer that the content available therein cannot be construed as statement of law and can not be used for any legal purpose.

From the above discussion it is sufficiently clear that copies of land record generated as per Rule 94 of Rules of 2020 through authorized web portal and service providers cannot be treated as certified copies of land records as result of which the presumption of genuineness of such records can not be raised in accordance with section 79 of Evidence Act.

In the case of ***Koushalya Bai and Ors. v. Radha and Anr., 2004 (4) MPLJ 317*** also copy of Khasra issued by Patwari was not treated as certified copy but only a true copy signed by the Patwari as it was not in the form provided as per law. Therefore, in order to attract the presumption u/s 79 of the Evidence Act the certified copy must be in the form as provided by law.

Rule 105 of the Rules of 2020 empoweres Commissioner of Land Records to issue directions with respect to scrutiny, preparation, attestation, delivery of copies of land records. In exercise of the said power if he authorizes any public officer to physically sign, seal and certify the electronically generated copies of land records or if in keeping with the pace of technological advancement there is any amendment in the Indian Evidence Act, 1872 then electronically generated copies of land records can be admitted into evidence. Till then, author humbly opines that copies issued as per rule 94 of Rules of 2020 are not admissible as certified copies of land records.

CONCLUSION

1. The presumption u/s 117 of MPLRC is a rebuttable presumption.
2. The presumption u/s 117 of MPLRC is applicable only to genuine entries and not to entries made fraudulently or surreptitiously.
3. Generally, presumption u/s 117 of MPLRC cannot be rebutted by oral testimony only. Evidence of impeccable integrity and reliability can only rebut such presumption.
4. The presumption u/s 117 of MPLRC is applicable only to entries made under Chapter IX and in accordance with the provisions laid down in MPLRC or Rules made thereunder.
5. On the basis of entries in land records, presumption with respect to possession can be raised.
6. Land records do not confer or extinguish title over a property on any person.
7. Entries made in land records of particular year are relevant only for that year.
8. Electronically generated land records issued by I.T. Centers, MP Bhulekh Portal, MP Online Kiosks and Lok Seva Kendras are not admissible in evidence as they are not issued in accordance with section 76 of the Indian Evidence Act,1872.
9. Presumption u/s 79 of Indian Evidence Act will apply to certified copy of land record only, if the land record is prepared substantially in the form and manner provided by law .
10. Certified copies of land records issued under RTI Act are also admissible in evidence.

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विधिक समस्यायें एवं समाधान

(इस स्तम्भ के अन्तर्गत मध्यप्रदेश के अधीनस्थ न्यायालयों के न्यायाधीशों द्वारा अकादमी के संज्ञान में लाई गई विधिक समस्याओं का उपयुक्त हल प्रस्तुत करने का प्रयास किया जाता है। स्तम्भ के लिये न्यायाधीशगण अपनी विधिक समस्याएं अकादमी को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंको में प्रकाशित किये जाएंगे।)

1. धारा 195(1)(a) दं.प्र.सं. के अन्तर्गत उल्लेखित अपराध के सम्बंध में अभियोजन संस्थित करने की विधिक अपेक्षा क्या है तथा क्या जिला मजिस्ट्रेट द्वारा प्रख्यापित आदेश की अवहेलना पर गठित अपराध के सम्बंध में अपर जिला मजिस्ट्रेट परिवाद प्रस्तुत कर सकता है?

लोक सेवकों के विधिपूर्ण प्राधिकार के अवमान के लिए अभियोजन से सम्बंधित प्रावधान का उल्लेख दण्ड प्रक्रिया संहिता की धारा 195(1)(a) में किया गया है जिसमें भारतीय दण्ड संहिता की धारा 172 से धारा 188 तक की धाराओं के अधीन दण्डनीय अपराध के सम्बंध में अभियोजन संस्थित करने की प्रक्रिया बताई गई है। धारा 195(1)(a) दं.प्र.सं. के अनुसार कोई न्यायालय धारा 172 से धारा 188 भा.दं.सं. के अपराध का संज्ञान सम्बद्ध लोक सेवक या उक्त लोक सेवक के प्रशासनिक रूप से वरिष्ठ लोक सेवक के लिखित परिवाद पर ही कर सकता है।

न्यायदृष्टांत ***सी. मुनियप्पन व अन्य विरुद्ध तमिलनाडू राज्य, एआईआर 2010 एससी 3718*** के अनुसार न्यायालय का धारा 190 दं.प्र.सं. के अन्तर्गत संज्ञान लेने तथा धारा 195(1)(a) के अंतर्गत संज्ञान लेने का क्षेत्र भिन्न है। धारा 195(1)(a) न्यायालय की संज्ञान लेने की धारा 190 में प्रदत्त शक्तियों पर कुछ प्रतिबंध अधिरोपित करती है जिसका सख्ती से पालन किया जाना आवश्यक है।

वर्तमान समय में कोरोना के कारण प्रत्येक वर्ग के लोक सेवकों द्वारा विभिन्न आदेश पारित किए गए और उनके उल्लंघन पर कार्यवाही भी की गई। उदाहरण स्वरूप जिला मजिस्ट्रेट द्वारा धारा 144 दं.प्र.सं. के अन्तर्गत प्रदत्त शक्तियों का प्रयोग करते हुए विभिन्न आदेश पारित किए गए। यह देखने में आया कि जिला मजिस्ट्रेट द्वारा ऐसे आदेश के उल्लंघन के सम्बंध में कार्यवाही करने के लिए अपर जिला मजिस्ट्रेट या उपखण्ड मजिस्ट्रेट को अधिकृत किया गया है जबकि धारा 195(1)(a) दं.प्र.सं. परिवादी के 2 वर्ग बताती है – 1. सम्बद्ध लोक सेवक। 2. वह लोक सेवक जिससे वह सम्बद्ध लोक सेवक प्रशासनिक तौर पर अधीनस्थ है।

'सम्बद्ध लोक सेवक' शब्द का अर्थान्वयन केवल वही लोक सेवक है जिसके आदेश का उल्लंघन किया गया है। इसके अंतर्गत वह लोक सेवक नहीं आता है जो उस लोक सेवक के अधीनस्थ है। इस सम्बंध में न्यायदृष्टांत ***लोकनाथ मिश्रा विरुद्ध म.प्र. राज्य, एआईआर 1964 एमपी 237*** भी अवलोकनीय है। यद्यपि, 'सम्बद्ध लोक सेवक' के अन्तर्गत उसका पद उत्तरवर्ती (successor) सम्मिलित है।

उदाहरण स्वरूप यदि किसी जिला मजिस्ट्रेट द्वारा धारा 144 दं.प्र.सं. के अन्तर्गत कोई आदेश प्रख्यापित किया गया है तब केवल उसी जिला मजिस्ट्रेट के लिखित परिवाद पर उक्त आदेश की अवज्ञा हेतु अपराध का संज्ञान लिया जा सकता है या ऐसे लोक सेवक के परिवाद पर जिसके जिला मजिस्ट्रेट प्रशासनिक रूप से अधीनस्थ है। अतः यह स्पष्ट है कि जिला मजिस्ट्रेट के आदेश की अवज्ञा हेतु 'अपर जिला मजिस्ट्रेट' या 'उपखण्ड मजिस्ट्रेट' परिवाद प्रस्तुत करने हेतु सक्षम प्राधिकारी नहीं हैं।

धारा 23 दं.प्र.सं. के कारण कुछ भ्रम हो सकता है। अपर जिला मजिस्ट्रेट जिले में जिला मजिस्ट्रेट की समानान्तर शक्तियों का प्रयोग कर सकता है किन्तु ऐसी शक्तियाँ न्यायिक शक्तियाँ है जैसे पुनरीक्षण एवं अपील आदि। किन्तु प्रशासनिक रूप से प्रत्येक जिले का एक ही प्रमुख होता है वह है जिला मजिस्ट्रेट जो अपर जिला मजिस्ट्रेट को कार्यों का विभाजन करता है। धारा 195(1)(a) दं.प्र.सं. के संदर्भ में 'सम्बद्ध लोक सेवक' के अन्तर्गत 'अपर जिला मजिस्ट्रेट' नहीं आता है जहां कि आदेश जिला मजिस्ट्रेट द्वारा स्वयं प्रख्यापित किया गया है।

यहां यह भी देखा जाना आवश्यक है कि क्या जिला मजिस्ट्रेट अपनी शक्तियों का प्रत्यायोजन धारा 195(1)(a) के अन्तर्गत परिवाद प्रस्तुत करने हेतु कर सकता है। न्यायदृष्टांत ***पी.डी. लखानी व अन्य विरुद्ध पंजाब राज्य, (2008) 5 एससीसी 150*** में उच्चतम न्यायालय द्वारा अभिमत दिया गया है कि संहिता में लोक सेवक द्वारा परिवाद प्रस्तुत करने की शक्तियों के प्रत्यायोजन का कोई प्रावधान नहीं है जहां धारा 195(1)(a) विनिर्दिष्ट प्रतिबंध अधिरोपित करती है। ऐसी स्थिति में प्रत्यायोजन की शक्तियों की उपधारणा नहीं की जा सकती है। ***पी.डी. लखानी*** (पूर्वोक्त) को विचार में लेते हुए म.प्र. उच्च न्यायालय द्वारा ***दर्शन सिंह विरुद्ध मध्य प्रदेश राज्य, 2017 (3) एमपीजेआर 194*** के मामले में स्पष्ट रूप से अभिनिर्धारित किया गया है कि परिवादी लोक सेवक (सम्बद्ध) परिवाद प्रस्तुत करने की अपनी शक्ति को अन्य लोक सेवक को प्रत्यायोजित नहीं कर सकता है। अतः स्पष्ट है कि ऐसी शक्तियों का प्रत्यायोजन अनुमत नहीं है।

इस प्रकार स्पष्ट है कि धारा 195(1)(a) दं.प्र.सं. के अन्तर्गत परिवाद केवल वही लोक सेवक प्रस्तुत कर सकता है जिसके द्वारा आदेश प्रख्यापित किया गया हो अथवा वह लोक सेवक प्रस्तुत कर सकता है जिसके वह 'सम्बद्ध लोक सेवक' प्रशासनिक रूप से अधीनस्थ है। अतः यदि अवज्ञा जिला मजिस्ट्रेट के प्रख्यापित आदेश की हुई है तब अपर जिला मजिस्ट्रेट अथवा उपखण्ड मजिस्ट्रेट परिवाद प्रस्तुत करने हेतु सक्षम प्राधिकारी नहीं हैं। ऐसी स्थिति में यदि जिला मजिस्ट्रेट द्वारा प्रख्यापित आदेश के उल्लंघन के लिए अपराध के संबंध में अपर जिला मजिस्ट्रेट अथवा उपखण्ड मजिस्ट्रेट द्वारा प्रस्तुत परिवाद पर न्यायालय अपराध का संज्ञान लेता है तो ऐसा संज्ञान विधिपूर्ण नहीं होगा।

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2. खाद्य सुरक्षा तथा मानक अधिनियम 2006 में न्यायनिर्णायक प्राधिकारी द्वारा शास्ति अधिरोपित करने पर अपील की प्रक्रिया क्या होगी ?

खाद्य सुरक्षा तथा मानक अधिनियम, 2006 की धारा 89 खाद्य सम्बंधी सभी विधियों पर अध्यारोही प्रभाव रखती है। धारा 97 स्पष्ट रूप से दूसरी अनुसूची में उल्लेखित अधिनियमों को निरसित करती है।

अधिनियम का अध्याय 9 'अपराध तथा शास्तियों' से सम्बंधित है जिसके अनुसार अपराध को दो वर्गो में विभाजित किया गया है प्रथम वर्ग कारावास से दण्डनीय अपराधों से सम्बंधित है तथा दूसरा वर्ग केवल शास्ति से दण्डनीय अपराधों से सम्बंधित है।

जिन अपराधों के सम्बंध में केवल शास्ति अधिरोपित करने का प्रावधान है उन मामलों में शास्ति का निर्धारण न्यायनिर्णायक अधिकारी करता है जो धारा 68 के अनुसार प्रत्येक जिले में 'अपर जिला मजिस्ट्रेट' से अन्यून पंक्ति का अधिकारी होता है जिन मामलों में कारावास के दण्डादेश का प्रावधान है ऐसे अपराध में से कुछ के विचारण हेतु धारा 74 के अनुसार विशेष न्यायालय का गठन किया जाना होता है तथा कुछ न्यायिक मजिस्ट्रेट प्रथम श्रेणी के न्यायालय द्वारा विचारणीय होते हैं। जहां विशेष न्यायालय का गठन नहीं किया गया है वहां नियमित आपराधिक न्यायालय उन मामलों का विचारण कर सकता है।

जहां तक अपील का सम्बंध है विशेष न्यायालय के निर्णय से अपील उच्च न्यायालय में करने का प्रावधान धारा 76 में किया गया है किन्तु यदि विशेष न्यायालय का गठन नहीं हुआ है या विचारण न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा किया गया है तो ऐसे निर्णय की अपील दण्ड प्रक्रिया संहिता के अपील सम्बंधी प्रावधानों के अन्तर्गत होगी।

न्यायनिर्णायक अधिकारी अर्थात अपर जिला मजिस्ट्रेट द्वारा अधिरोपित शास्ति के सम्बंध में अपील का प्रावधान धारा 70 में किया गया है जिसके अनुसार खाद्य सुरक्षा अपील अधिकरण की स्थापना की गई है। जिसका पीठासीन अधिकारी जिला न्यायाधीश या समकक्ष अधिकारी होता है। भ्रम की स्थिति यहां निर्मित होती है कि न्यायनिर्णायक अधिकारी के विनिश्चय के विरूद्ध अपील क्या आपराधिक अपील होगी या सिविल अपील।

यहां इस भ्रम को दूर करने के लिए न्यायनिर्णायक अधिकारी तथा खाद्य सुरक्षा अपील प्राधिकरण के पीठासीन अधिकारी की शक्तियों पर एक दृष्टि डाली जाना आवश्यक है अधिनियम की धारा 68 के अनुसार न्यायनिर्णायक अधिकारी को सिविल न्यायालय की शक्तियां प्रदान की गई है। तथा खाद्य सुरक्षा अपील प्राधिकरण के पीठासीन अधिकारी के रूप में 'जिला न्यायाधीश' होना उल्लेखित है न कि 'सत्र न्यायाधीश'। ऐसी स्थिति में न्यायनिर्णायक की कार्यवाही सिविल प्रकृति की है। इसके अतिरिक्त न्यायनिर्णायक अधिकारी को केवल शास्ति अधिरोपित करने की अधिकारिता है और शास्ति अधिरोपित किया जाना सिविल दायित्व है ऐसी स्थिति में न्यायनिर्णायक अधिकारी के शास्ति अधिरोपित करने के विनिश्चय की अपील सिविल अपील होगी। इस

सम्बंध में न्यायदृष्टांत ***प्रदीप कुमार गुप्ता विरूद्ध उत्तर प्रदेश राज्य, आपराधिक अपील क्र. 1586/2015 इलाहाबाद उच्च न्यायालय का आदेश दिनांक 02.05.2015*** अवलोकनीय है जिसमें न्यायनिर्णायक अधिकारी के आदेश की अपील को 'आदेशों की अपील' की भांति 'विविध सिविल अपील' के रूप में पंजीबद्ध करने का अभिमत दिया गया है। अपील की प्रक्रिया हेतु खाद्य सुरक्षा और मानक नियम, 2011 के अध्याय 3 का अवलोकन किया जा सकता है।

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3. म.प्र. आबकारी अधिनियम, 1915 की धारा 34(2) के अधीन दण्डनीय अपराध में आबकारी अधिकारी द्वारा प्रस्तुत प्रतिवेदन पर संस्थित मामले में विचारण हेतु प्रयोज्य प्रक्रिया क्या होगी?

म.प्र. आबकारी अधिनियम, 1915 की धारा 34(2) तीन वर्ष तक की अवधि के कारावास से दण्डनीय अपराध के संबंध में उपबंध करती है। अतः इस प्रावधान के अधीन दण्डनीय अपराध वारण्ट प्रक्रिया द्वारा विचारणीय होंगे। जब ऐसे अपराध का अनुसंधान पुलिस से भिन्न ऐजेन्सी अर्थात् आबकारी अधिकारी द्वारा किया जाता है तो उनके प्रतिवेदन/परिवाद पर संज्ञान लेने के उपरांत विचारण किस प्रक्रिया से किया जाए, पुलिस रिपोर्ट पर संस्थित वारण्ट मामलों की प्रक्रिया द्वारा अथवा पुलिस रिपोर्ट से अन्यथा संस्थित वारण्ट मामलों की प्रक्रिया द्वारा, यह प्रश्न न्यायिक मजिस्ट्रेट के समक्ष उत्पन्न होता है।

इस प्रश्न से संबंधित विशेष प्रावधान म.प्र. आबकारी अधिनियम, 1915 की धारा 55 व 56 में किए गए हैं। धारा 55(1) यह प्रावधान करती है कि ऐसे पद से अन्यून पद के आबकारी अधिकारी ऐसे विनिर्दिष्ट क्षेत्र के भीतर जैसे कि राज्य सरकार अधिसूचना द्वारा विहित करे, आबकारी अधिनियम की धारा 34, 35, 36, 36–ए, 39, 40 एवं 40–ए के अधीन दण्डनीय अपराधों के संबंध में उन शक्तियों का प्रयोग कर सकेंगे जो द.प्र.सं. के अध्याय 12 के उपबंधों द्वारा किसी पुलिस थाने के भारसाधक अधिकारी को प्रदत्त की गई हैं।

राज्य सरकार द्वारा म.प्र. आबकारी अधिनियम, 1915 की धारा 7 के अधीन प्रदत्त शक्तियों का प्रयोग करते हुए अधिसूचना क्रमांक B-1-89-85-CT-V, दिनांक 06 अप्रैल, 1992 जारी करते हुए आबकारी उपायुक्त, सहायक आबकारी आयुक्त, जिला आबकारी अधिकारी, आबकारी निरीक्षक एवं आबकारी उप–निरीक्षक को अधिसूचना में उल्लेखित क्षेत्र के लिए धारा 55(1) एवं धारा 55(3) के अधीन सशक्त किया गया है। (उक्त अधिसूचना इस अंक के भाग तीन में प्रकाशित की गई है)

इसी प्रकार म.प्र. आबकारी अधिनियम, 1915 की धारा 56 यह प्रावधान करती है कि धारा 55(1) के अधीन सशक्त आबकारी अधिकारी द्वारा अनुसंधान करने के उपरांत प्रस्तुत रिपोर्ट को दण्ड प्रक्रिया संहिता, 1973 की धारा 190 के प्रयोजनों के लिए न्यायिक मजिस्ट्रेट को प्रस्तुत पुलिस रिपोर्ट माना जाएगा।

उपरोक्त दोनों प्रावधानों का संयुक्त प्रभाव यह है कि म.प्र. आबकारी अधिनियम, 1915 के अधीन राज्य सरकार की उक्त अधिसूचना द्वारा विनिर्दिष्ट आबकारी अधिकारी द्वारा प्रस्तुत प्रतिवेदन को परिवाद न मानते हुए पुलिस रिपोर्ट माना जाएगा और न्यायिक मजिस्ट्रेट जब इस पर दण्ड प्रक्रिया संहिता की धारा 190 के अधीन संज्ञान लेगा तो ऐसा संज्ञान म.प्र. आबकारी अधिनियम की धारा 56 के अनुसार पुलिस प्रतिवेदन पर संज्ञान लिया गया माना जाएगा और तब विचारण भी पुलिस रिपोर्ट पर संस्थित वारण्ट मामलों की प्रक्रिया के अनुसार ही होगा।

अतः म.प्र. आबकारी अधिनियम, 1915 की धारा 34(2) के अधीन दण्डनीय अपराध में आबकारी अधिकारी द्वारा प्रस्तुत प्रतिवेदन पर संस्थित मामले में विचारण हेतु प्रयोज्य प्रक्रिया ''पुलिस रिपोर्ट पर संस्थित वारण्ट मामलों की प्रक्रिया'' होगी।

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"A judgment must be read as a whole, so that conflicting parts may be harmonised to reveal the true ratio of the judgment. However, if this is not possible, and it is found that the internal conflicts within the judgment cannot be resolved, then the first endeavour that must be made is to see whether a ratio decidendi can be culled out without the conflicting portion. If not, then, the binding nature of the precedent on the point on which there is a conflict in a judgment, comes under cloud."

Rohinton Fali Nariman, J.
in ***BGS SGS SOMA JV v. NHPC*, (2020) 4 SCC 234,** para 43

PART - II

NOTES ON IMPORTANT JUDGMENTS

216. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12
TRANSFER OF PROPERTY ACT, 1882 – Section 105
APPRECIATION OF EVIDENCE:
CIVIL PRACTICE:

(i) Landlord-tenant relationship; proof of – In case of oral agreement of tenancy, Court has to look into circumstances, intention of parties and other material – Conduct of parties before and after creation of relationship is relevant to gather their intention – Instantly, there was no evidence of taking premises on rent, defendant maintained no record of account of payment of rent and parties earlier entered into partnership deed – Held, tenancy is not proved.

(ii) Signing of a document; effect of – When the parties sign a document, they cannot wish away the consequences which flow from the signing of document.

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

संपत्ति अंतरण अधिनियम, 1882 – धारा 105

साक्ष्य का मूल्यांकनः

सिविल प्रथाः

(i) भवनस्वामी–किराएदार के संबंध साबित किया जाना – मौखिक किराएदारी के करार के मामले में न्यायालय को परिस्थितियों, पक्षकारों के आशय एवं अन्य सामग्री को देखना चाहिए – किराएदारी प्रारंभ होने के पूर्व व पश्चात् पक्षकारों का आचरण उनका आशय ज्ञात करने के लिए प्रासंगिक होता है – हस्तगत मामले में किराए पर परिसर लेने की कोई साक्ष्य नहीं थी, प्रतिवादी ने किराए के भुगतान का कोई खाता नहीं रखा और पक्षकारों ने पूर्व में साझेदारी विलेख निष्पादित किया था – अवधारित, किरायेदारी साबित नहीं हुई।

(ii) किसी दस्तावेज़ पर हस्ताक्षर करने का प्रभाव – जब पक्षकार किसी दस्तावेज़ पर हस्ताक्षर करते हैं, तो वे उन परिणामों को अस्वीकार नहीं कर सकते जो दस्तावेज़ पर हस्ताक्षर करने से उत्पन्न होते हैं।

Madan Mohan Singh v. Ved Prakash Arya
Judgment dated 05.03.2021 passed by the Supreme Court in Civil Appeal No. 814 of 2021, reported in (2021) 5 SCC 456

Relevant extracts from the judgment:

The tenancy is a relationship which is created between two parties. The agreement of tenancy can be both by writing or oral. Even if there is oral agreement of tenancy, the court has to look into the circumstances and intention

of the parties and other material to conclude as to whether there was any tenancy or not. The present is not a case where the defendant claimed any rent agreement. The defendant has come up with a case that he is paying rent at the rate of ₹ 450 per month. The defendant in his written statement has stated that the plaintiff has never issued any rent receipt. Thus, present is not a case where there was any rent receipt filed by the defendant in support of his claim of tenancy.

This Court had laid down in ***C.M. Beena v. P.N. Ramachandra Rao, (2004) 3 SCC 595***, that conduct of the parties before and after the creation of relationship is relevant for finding out their intention.

When there is no evidence of taking premises on rent and it is admitted by DW 2 that he had not maintained any record of accounts of payment of rent, there is no base for holding that relationship of landlord and tenant is proved. The trial court itself has held that the defendant had failed to prove any documents pertaining to tenancy. The first appellate court, thus, has rightly come to the conclusion that findings of the trial court that the defendant is a tenant is based on the surmises and conjectures.

One more fact to be noticed is that the defendant claimed his tenancy with effect from 18-12-1976. On 18-12-1976, admittedly partnership deed was signed both by the plaintiff and the defendant which was before the Court. The defendant had not denied the execution of partnership deed but he wanted to wish away the partnership deed saying that it was a sham document to save the hirer from rigours of Clause 12 of the allotment order. When the parties signed a document and entered into a partnership deed, they cannot wish away the consequences which flow from the signing of deed. The plaintiff having categorically denied the tenancy and there being no evidence with regard to the tenancy, we do not find any error in the judgment of the first appellate court that the defendant was not a tenant of the premises. We do not find any error in the judgment of the first appellate court holding that the defendant was not a tenant of the premises.

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***217. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 8 and 11**
STAMP ACT, 1899 – Section 35
Arbitration agreement – Enforceability – Whether an arbitration agreement containing in an instrument which is unstamped be enforced when the instrument itself cannot proceed unless the deficit stamp duty is paid? Correctness of judgment passed in *Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1* affirming *Garware Wall Ropes Ltd. v. Coastal Marine Construction & Engg. Ltd., (2019) 9 SCC 209* doubted – Matter referred to Constitution Bench.

माध्यस्थम एवं सुलह अधिनियम, 1996 – धाराएं 8 एवं 11
स्टाम्प अधिनियम, 1899 – धारा 35
माध्यस्थम अनुबंध – प्रवर्तनीयता – क्या एक अस्टांपित लिखत में अंतर्विष्ट माध्यस्थम अनुबंध प्रवर्तनीय होगा, जब कि ऐसा लिखत ही उचित स्टाम्प शुल्क का भुगतान किए

बिना अनुसरित नहीं किया जा सकता है? *विद्या ड्रोलिया वि. दुर्गा ट्रेडिंग कार्पोरेशन, (2021) 2 एससीसी 1* में पारित निर्णय जो *गरवारे वॉल रोप्स लिमिटेड वि. कोस्टल मरीन कंस्ट्रक्शन एंड इंजीनियरिंग लिमिटेड, (2019) 9 एससीसी 209* को पुष्ट करता है, की शुद्धता पर संशय किया गया – मामला संविधान पीठ को प्रेषित।

N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. and ors.
Judgment dated 11.01.2021 passed by the Supreme Court in Civil Appeal No. 3802 of 2020, reported in (2021) 4 SCC 379 (Three Judge Bench)

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218. ARBITRAITION AND CONCILIATION ACT, 1996 – Section 11
LIMITATION ACT, 1963 – Article 137
Limitation – The limitation for filing an application for appointment of arbitrator is three years from the date when the right to apply accrues.

माध्यस्थम एवं सुलह अधिनियम, 1996 – धारा 11
परिसीमा अधिनियम, 1963 – अनुच्छेद 137

परिसीमा – मध्यस्थ की नियुक्ति हेतु आवेदन प्रस्तुत करने की परिसीमा ऐसा आवेदन करने का अधिकार उत्पन्न होने के दिनांक से तीन वर्ष है।

Bharat Sanchar Nigam Ltd. and anr. v. M/s. Nortel Networks India Pvt. Ltd.
Judgment dated 10.03.2021 passed by the Supreme Court in Civil Appeal No. 843 of 2021, reported in AIR 2021 SC 2849

Relevant extracts from the judgment:

Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues.

Conclusion Accordingly, we hold that:

(i) The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator;

It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;

(ii) In rare and exceptional cases, where the claims are *ex facie* time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

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*219. **CEILING ON AGRICULTURAL HOLDINGS ACT, 1960 (M.P.) – Sections 11 and 46**
CIVIL PROCEDURE CODE, 1908 – Section 9
Jurisdiction of Civil Court – Suit against order of Competent Authority can be filed within three months from date of order to have it set aside – Any decision of such Court has been made binding on Competent Authority.

कृषि जोत पर अधिकतम सीमा अधिनियम, 1960 (म.प्र.) – धाराएं 11 एवं 46

सिविल प्रक्रिया संहिता, 1908 – धारा 9

सिविल न्यायालय की अधिकारिता – सक्षम प्राधिकारी के आदेश को अपास्त करने हेतु आदेश के विरूद्ध वाद आदेश की तारीख से तीन माह के भीतर संस्थित किया जा सकता है – ऐसे न्यायालय का कोई भी निर्णय सक्षम प्राधिकारी पर बाध्यकारी होगा।

Bajranga (dead) by LRs. v. State of M.P. and ors.
Judgment dated 19.01.2021 passed by the Supreme Court in Civil Appeal No. 6209 of 2010, reported in 2021 (2) MPLJ 491 (Three Judge Bench)

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220. **CIVIL PRACTICE:**
CRIMINAL PRACTICE:
Rectification of order sheet (record of court) – Assertion of facts contrary to order sheet is impermissible – Held, record of Court speaks for itself and terms of a judicial order reflect what has been decided.

सिविल प्रथाः

आपराधिक प्रथाः

आदेश पत्रिका (न्यायालय के अभिलेख) का सुधार – आदेश पत्रिका के विपरीत तथ्यों का दावा अनुज्ञेय नहीं है – अभिनिर्धारित, न्यायालय का अभिलेख स्वयमेव बोलता है और न्यायिक आदेश की अंतर्वस्तु दर्शाती है कि क्या निर्णीत किया गया है।

Committee of Creditors of Amtek Auto Ltd. through Corporation Bank v. Dinkar T. Venkatasubramanian and ors.
Judgment dated 23.02.2021 passed by the Supreme Court in Contempt Petition (C) No. 524 of 2020, reported in (2021) 4 SCC 457

Relevant extracts from the judgment:

The record before this Court would, however, belie the critique of the order dated 18-6-2020 and of the submissions made by learned Senior Counsel. The IA filed by DVI was styled as "an application for rectification", as its title indicates, but Para 1 states that it is "an application for clarification/modification of the order dated 08-6-2020". On 08-6-2020, this Court had relegated the matter of approval of the resolution plan to NCLT with a timeline of 15 days. In the IA filed by DVI purportedly for "clarification and modification", it was submitted that "due to COVID-19 Pandemic DVI's resolution plan (as submitted and approved by

the CoC) was unviable and not feasible in the present circumstances". DVI submitted that when the proceedings came up on 8-6-2020 it had urged that its resolution plan was required to be relegated to the adjudicating authority to assess the impact of the Pandemic on the economy, the auto industry and the financial health of the corporate debtor and to enable the parties to renegotiate the terms of the resolution plan. In other words, DVI sought to submit that the purpose of relegating the issue of approval of the resolution plan was to enable a re-negotiation to take place before the resolution plans which have been approved by the CoC could be the subject-matter of an approval of the adjudicating authority.

Now, this submission of DVI cannot be accepted for two reasons: firstly, it is a settled principle of law that the record of the Court speaks for itself and the terms of a judicial order reflect what has been decided. The order of this Court dated 8-6-2020 indicates that since the fresh resolution plan had been passed by the CoC with the majority of 70%, "the matter of IA", namely, IA No. 48906 of 2020 filed by the CoC was being relegated to NCLT for passing "appropriate orders". There is absolutely no indication in the order of the Court dated 08-6-2020 that the purpose of relegating the IA to NCLT was to facilitate a fresh evaluation being made by DVI in regard to the impact of the Pandemic on the economy, the auto industry and the health of the corporate debtor. DVI, in other words, has attempted to read into the order dated 08-6-2020 a basis which does not find expression in the terms of the order. Such an exercise is plainly impermissible.

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221. CIVIL PROCEDURE CODE, 1908 – Sections 2(2), 96 and Order 7 Rule 11

CONSTITUTION OF INDIA – Article 226

(i) Rejection of plaint; remedy against – Order is deemed to be decree – Held, appeal lies against order of rejection of plaint – Writ petition under Article 226 does not lie.

(ii) Rejection of plaint – Applicability of proviso to O.7 R.11 – Order granting time to amend plaint and seek appropriate relief – Held, where plaint is rejected under O.7 R.11 (d), proviso would not apply and time cannot be granted to amend the plaint – Proviso covers only clauses (b) and (c) of O.7 R.11.

सिविल प्रक्रिया संहिता, 1908 – धाराएं 2(2), 96 एवं आदेश 7 नियम 11

भारत का संविधान – अनुच्छेद 226

(i) वादपत्र नामंजूर किए जाने के आदेश के विरुद्ध अनुतोष – आदेश को डिक्री माना गया है – वादपत्र नामंजूर किए जाने के आदेश के विरुद्ध अपील संधारणीय है – अनुच्छेद 226 के अधीन रिट याचिका पोषणीय नहीं है।

(ii) वादपत्र नामंजूर किया जाना – आ. 7 नि. 11 के परंतुक की प्रयोज्यता – वादपत्र में संशोधन कर उचित अनुतोष प्राप्त करने के लिए समय देने का आदेश –

अभिनिर्धारित, जहां आ. 7 नि. 11 (घ) के अधीन वादपत्र नामंजूर किया गया है, वहां परंतुक लागू नहीं होगा और वादपत्र में संशोधन के लिए समय नहीं दिया जा सकता है – परंतुक मात्र आ. 7 नि. 11 के खण्ड (ख) व (ग) पर लागू होता है।

Sayyed Ayaz Ali v. Prakash G. Goyal and ors.

Judgment dated 20.07.2021 passed by the Supreme Court in Civil Appeal No. 2401 of 2021, reported in 2021 (3) MPLJ 302 (SC)

Relevant extracts from the judgment:

The appellant is the plaintiff in a suit instituted before the Civil Judge, Senior Division at Nagpur. The first respondent filed an application at Exhibit-50 for the rejection of the plaint on the ground that it was barred under clauses (b) and (d) of Order 7 Rule 11 of the Code of Civil Procedure 1908 ("CPC"). The Fifth Joint Civil Judge, Junior Division, Nagpur allowed the application. However, while doing so, the appellant was "directed to seek proper relief and pay court fee thereon within 15 days, otherwise appropriate order will be passed". This order of the Trial Judge, insofar as it permitted the appellant to carry out an amendment for seeking appropriate reliefs was assailed before the High Court in a Civil Revision Application No 124 of 2017 by Defendants 1A to D and Defendant No 2 (Respondent Nos 1 to 5 to these proceedings). The appellant instituted a Writ Petition (W.P. No. 45 of 2018) under Article 227 of the Constitution for challenging the order of the Trial Judge allowing the application under Order 7 Rule 11 of the CPC. The High Court decided both the civil revision application and the writ petition by a common judgment. The Single Judge held that since the plaint was rejected under Order 7 Rule 11(d) there was no occasion to direct that an amendment be made to the plaint. The civil revision was allowed on this basis. The writ petition filed by the appellant was held to be an "after thought and belated" and no relief was granted to the appellant in the writ proceedings. That is how the proceedings have reached this Court. The appellant is essentially aggrieved by the decision of the Trial Court and the High Court to allow the application under Order 7 Rule 11(d) of the CPC.

The definition of "decree" in Section 2(2) "shall be deemed to include the rejection of a plaint". Hence, the order of the Trial Court rejecting the plaint is subject to a first appeal under Section 96 of the CPC. The writ petition filed by the appellant was liable to be rejected on that ground. We therefore affirm the judgment of the High Court rejecting the writ petition, though for the above reason leave it open to the appellant to pursue the remedy available in law.

The High Court while exercising its revisional jurisdiction accepted the plea of the first and second defendants that the Trial Judge, having allowed the application under Order 7 Rule 11(d), was not justified in granting to the appellant-plaintiff liberty to amend the plaint by seeking appropriate reliefs and paying the court fee. In this context, it is necessary to advert to Order 7 Rule 11 which provides as follows:

"*11. Rejection of plaint.*- The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9.

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

The proviso quoted above deals with a situation where time has been fixed by the Court for the correction of the valuation or for supplying of the requisite stamp paper. Under the proviso, the time so fixed shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by a cause of an exceptional nature from complying within the time fixed by the court and that a refusal to extend time would cause grave injustice to the plaintiff. The proviso evidently covers the cases falling within the ambit of clauses (b) and (c) and has no application to a rejection of a plaint under Order 7 Rule 11(d). In the circumstances, the High Court was justified in coming to the conclusion that the further direction that was issued by the Trial Judge was not in consonance with law.

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222. CIVIL PROCEDURE CODE, 1908 – Section 9
LAND REVENUE CODE, 1959 (M.P.) – Sections 31, 110 and 178(1)
EVIDENCE ACT, 1872 – Section 68
INDIAN SUCCESSION ACT, 1925 – Section 63

(i) Determination of title – Jurisdiction of Civil Court – Whenever the question of title is raised or is involved, then the matter has to be adjudicated by the Civil Court and not by the revenue authorities – The revenue authorities are not competent to go

to the extent of deciding the disputed question of title by adjudicating the correctness and genuineness of ''Will'' – Tahsildar, has no jurisdiction to entertain an application u/s 110 of MPLRC on the basis of ''Will''.

(ii) Proof of "Will" – Burden is on the propounder of the ''Will'' to prove that the ''Will'' was executed in his favour by the testator – Even if the ''Will'' is not challenged by anybody, but still the propounder of the ''Will'' has to discharge his burden – No decree can be passed even by the Civil Court merely on the ground that the respondents have chosen not to appear before it or have failed to file their written statement.

सिविल प्रक्रिया संहिता, 1908 – धारा 9

भू–राजस्व संहिता, 1959 (म.प्र.) – धाराएं 31, 110 एवं 178(1)

साक्ष्य अधिनियम, 1872 – धारा 68

भारतीय उत्तराधिकार अधिनियम, 1925 – धारा 63

(i) स्वत्व का निर्धारण – सिविल न्यायालय की अधिकारिता – जब कभी स्वत्व का प्रश्न उठाया जाता है या अंतर्ग्रस्त होता है, तब मामले को सिविल न्यायालय द्वारा विनिश्चित किया जाना चाहिए न कि राजस्व प्राधिकारियों द्वारा – तहसीलदार को धारा 110 म.प्र.भू.रा.सं. के अतंर्गत प्रस्तुत आवेदन को वसीयत के आधार पर सुनने का क्षेत्राधिकार नहीं है।

(ii) वसीयत को साबित किया जाना – वसीयत के प्रस्तावक पर भार होता है कि वह साबित करे कि वसीयतकर्ता द्वारा उसके पक्ष में वसीयत निष्पादित की गई थी – यहां तक कि यदि वसीयत को किसी के द्वारा चुनौती न भी दी गई हो तब भी वसीयत के ग्रहीता को अपना भार उन्मोचित करना होगा – यहां तक कि केवल इसी आधार पर कि प्रत्यर्थीगण ने न्यायालय के समक्ष उपस्थित न होने को चुना अथवा वे लिखित कथन प्रस्तुत करने में असफल रहे, सिविल न्यायालय द्वारा कोई आज्ञप्ति पारित नहीं की जा सकती।

Ranjit @ Bhaiyu Mohite v. Smt. Nandiya Singh and ors.
Order dated 16.02.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Petition No. 2692 of 2020, reported in ILR (2020) MP 727

Relevant extracts from the order:

Proviso to Section 178(1) of MPLR Code specifically provides that in a partition proceedings, if any question of title is raised by any of the parties, then the revenue authorities shall stay the proceedings for a period of three months in order to facilitate the parties for institution of a civil suit for determination of question of title. Proviso to Section 178(1) of MPLR Code makes it clear as noon day that question of determination of title is beyond jurisdiction of the revenue authorities, otherwise the Tahsildar was not required to stay the

proceedings so that the party to the partition proceedings may institute a civil suit for determination of question of title. If the words "any proceedings" are read in the light of the proviso to Section 178(1) of MPLR Code, then it is clear that ''any proceedings'' would not include any proceeding involving the question of title of the parties. Whenever the question of title is raised or is involved, then the matter has to be adjudicated by the Civil Court and not by the revenue authorities.

It is well-established principle of law that the burden is on the propounder of the ''Will'' to prove that the ''Will'' was executed in his favour by the testator. Even if the ''Will'' is not challenged by anybody, but still the propounder of the ''Will'' has to discharge his burden and no decree can be passed even by the Civil Court merely on the ground that the respondents have chosen not to appear before it or have failed to file their written statement as provided under Order 8 Rule 10 CPC.

From the order dated 07.12.2018 passed by the SDO, Lashkar, Gwalior, it is clear that the SDO had rejected the application filed under Section 5 of Limitation Act. After rejecting the application, the SDO should have dismissed the appeal as barred by limitation, but instead of dismissing the appeal as barred by limitation, the SDO has also considered the merits of the case, which was not expected because unless and until, the delay is condoned, it cannot be said that there was any appeal in the eyes of law before the SDO, Lashkar District Gwalior. However, since this Court has already held that the Tahsildar, Tahsil Gwalior had no jurisdiction to entertain an application under Section 110 of MPLR Code on the basis of ''Will'' therefore, the order passed by the Tahsildar was without jurisdiction and it was a nullity. Any order which is a nullity can always be challenged even in the collateral proceedings. Thus, even if the petitioner had filed time-barred appeal, still it would not confer any right on the respondent No.1 on the basis of an order which was without jurisdiction.

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223. CIVIL PROCEDURE CODE, 1908 – Section 9, Order 7 Rule 1 and Order 22 Rules 4 and 11
SPECIFIC RELIEF ACT, 1963 – Section 34
CIVIL PRACTICE:

(i) Partition suit; nature of – Explained – Three main issues in partition suit delineated.

(ii) Partition suit; maintainability of – Plaintiff sought partition of suit property between herself and three siblings alleging interference and intermeddling by defendants – Defendants set up agreement to sale and Will executed by propositus – Whether partition suit is maintainable without seeking declaration against such agreement to sale or Will? Held, yes – Plea concerning such documents were taken by defendants in written statement and were subject to proof by them – There was no necessity to seek the relief of declaration.

(iii) Death of respondent-plaintiff during pendency of appeal – Effect of not bringing LRs. on record – Explained – Where the decree is joint and indivisible, appeal against surviving respondent cannot be proceeded with and has to be dismissed as a result of its abatement against the deceased respondent.

सिविल प्रक्रिया संहिता, 1908 – धारा 9, आदेश 7 नियम 1 एवं आदेश 22 नियम 4 व 11

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धारा 34

सिविल प्रथाः

(i) विभाजन के वाद की प्रकृति – व्याख्या की गई – विभाजन के वाद के तीन मुख्य विवाद्यक रेखांकित किए गए।

(ii) विभाजन के वाद की पोषणीयता – वादी ने अपने तीन भाई–बहनों के विरुद्ध वादग्रस्त संपत्ति का विभाजन यह कहते हुए मांगा कि प्रतिवादीगण उसमें हस्तक्षेप और दखलअंदाजी़ करते हैं – प्रतिवादीगण ने विक्रय अनुबंध एवं मूल स्वामी द्वारा निष्पादित वसीयत का बचाव उठाया – क्या ऐसे विक्रय अनुबंध एवं वसीयत के विरुद्ध घोषणा की मांग किए बिना विभाजन का वाद पोषणीय है? अवधारित, हाँ – ऐसे दस्तावेजों से संबंधित अभिवचन प्रतिवादी द्वारा वादोत्तर में लिए गए थे जो उनके द्वारा साबित किए जाने शेष थे – वहां घोषणात्मक अनुतोष की वांछा की आवश्यकता नहीं थी।

(iii) अपील के लंबित रहने के दौरान प्रत्यर्थी–वादी की मृत्यु – विधिक प्रतिनिधिगण को अभिलेख पर नहीं लाने का प्रभाव – स्पष्ट किया गया – जहां आज्ञप्ति संयुक्त एवं अविभाज्य हो, वहां उत्तरजीवि प्रत्यर्थी के विरुद्ध अपील में आगे कार्यवाही नहीं की जा सकती है और मृतक प्रत्यर्थी के विरुद्ध उपशमित होने के परिणामस्वरूप अपील को खारिज किया जाना चाहिए।

Venigalla Koteswaramma v. Malampati Suryamba and ors.

Judgment dated 19.01.2021 passed by the Supreme Court in Civil Appeal No. 9546 of 2013, reported in (2021) 4 SCC 246 (Three Judge Bench)

Relevant extracts from the judgment:

In the backdrop of the facts, circumstances, events and proceedings; and in view of the submissions made before us, three points arise for determination in this appeal:

(1) Whether the suit for partition filed by the appellant-plaintiff was not maintainable for want of relief of declaration against the agreement for sale dated 5-11-1976 (Ext. B-10)?

(2) What is the effect and consequence of the fact that the legal representatives of Defendant 2, who expired during the pendency of appeal in the High Court, have not been brought on record?

(3) Whether the High Court was justified in reversing the findings of the trial court in relation to the said agreement for sale dated 5-11-1976 (Ext. B-10)?

It remains trite that partition is really a process in and by which, a joint enjoyment is transformed into an enjoyment in severalty (***CED v. Kantilal Trikamlal, (1976) 4 SCC 643***). A partition of property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to partition. In a suit for partition, the court is concerned with three main issues:

(i) whether the person seeking division has a share or interest in the suit property/properties;

(ii) whether he is entitled to the relief of division and separate possession; and

(iii) how and in what manner, the property/properties should be divided by metes and bounds? (***Shub Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 689***).

Etymologically, the expression "declaration", for the purpose of a suit for partition, essentially refers to the declaration of plaintiff's share in the suit properties.

x x x

A reference to the relevant background makes it clear that in this suit for partition, separate possession and recovery of mesne profits, the appellant-plaintiff asserted that Defendants 1 to 3 were the co-sharers and alleged that Defendant 4 and other impleaded defendants were creating hindrance/ obstructions in division of properties of Annapurnamma among the siblings. The principal allegations in the plaint were directed against Defendant 4 with reference to his dealings with the properties of Annapurnamma; and his intermeddling with the affairs of the plaintiff and her siblings by obtaining an agreement for mediation in favour of his own persons. In that sequence, it was also alleged that Defendant 4 and his family persons obtained thumb impressions of Annapurnamma on papers, after her death. However, there had not been any reference to any agreement for sale nor there was any allegation of fabrication of any particular document. The plaintiff had not shown awareness about any agreement for sale executed by Annapurnamma or obtained from her by any person; and there was no reference to any agreement like Ext. B-10.

As noticed, the plea regarding execution of the agreement for sale by Annapurnamma on 5-11-1976 and will on 15-6-1978 came up only in the written statement filed by Defendant 4. Examination of the record makes it clear that only after taking of such pleas by Defendant 4 in his written statement that the legatee under the will (Ext. B-9) and the vendee in the agreement (Ext. B-10) were added as Defendants 14 and 15 respectively. Such pleas were refuted by the plaintiff by amendment of the plaint as also by way of further pleadings in

rejoinder. The plaintiff denied the execution of will and agreement by Annapurnamma and submitted that Defendants 14 and 15 were having no right in the property and their claims were liable to be ignored. The plaintiff did not seek any relief of declaration, whether against the will or against the agreement; and in our view, she was not required to seek any such declaration.

As noticed, the pleas concerning will and sale agreement were taken only by Defendant 4 in his written statement (and by such other defendants who adopted his written statement). Obviously, the onus of establishing such pleas was on the contesting defendants. If such pleas, or any of them, stood established, the necessary consequences would have followed and in other event, the plaintiff was to succeed. In any event, the documents of will and sale agreement, as set up by the contesting defendants, were subject to proof by the persons setting them up. On her part and for the purpose of maintaining the suit for partition and other related reliefs, the plaintiff was entitled to ignore them and there was no necessity for the plaintiff to seek the relief of declaration against the agreement set up by the defendants.

x x x

The crucial question in this case is about the effect and consequence of the fact that the legal representatives of Defendant 2, who expired during the pendency of appeal in the High Court, were not brought on record.

Though the provisions in Rule 1 to Rule 10-A of Order 22 primarily refer to the proceedings in a suit but, by virtue of Rule 11, the said provisions apply to the appeals too and, for the purpose of an appeal, the expressions “plaintiff”, “defendant” and “suit” could be read as “appellant”, “respondent” and “appeal” respectively.

However, by virtue of Rule 4 read with Rule 11 of Order 22 of the Code, in case of death of one of the several respondents, where right to sue does not survive against the surviving respondent or respondents as also in the case where the sole respondent dies and the right to sue survives, the contemplated procedure is that the legal representatives of the deceased respondent are to be substituted in his place; and if no application is made for such substitution within the time limited by law, the appeal abates as against the deceased respondent.

Admittedly, steps were not taken for substitution of the legal representatives of Defendant 2, who was Respondent 3 in AS No. 1887 of 1988. Therefore, sub-rule (3) of Rule 4 of Order 22 of the Code directly came into operation and the said appeal filed by Defendants 16 to 18 abated against Defendant 2 (Respondent 3 therein).

In this discussion, it shall also be appropriate to take note of the Constitution Bench decision of this Court in ***Amarjit Singh Kalra v. Pramod Gupta, (2003) 3 SCC 272***. The enunciations of the Constitution Bench could be usefully noticed as follows:

"In the light of the above discussion, we hold:

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of Defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

When we apply the principles aforesaid to the present case, it is not far to seek that the said appeal by Defendants 16 to 18, after having abated against Defendant 2 Malempati Radhakrishnamurthy, could not have been proceeded against the surviving respondents i.e. the plaintiff and Defendants 1 and 3. This is for the simple reason that the trial court had specifically returned the findings that the agreement Ext. B-10 was not valid and Defendants 16 to 18 (appellants of AS No. 1887 of 1988) derived no rights thereunder. The trial court had also ordered that Defendants 13, 14 and 16 were liable for mesne profits in respect of the immovable properties in their possession belonging to Annapurnamma till they deliver possession of those items to plaintiff and Defendants 1 to 3. Such findings in relation to the invalidity of the agreement Ext. B-10 and consequential decree for partition, for delivery of possession and for recovery of mesne profits attained finality *qua* Defendant 2 Malempati Radhakrishnamurthy; and his entitlement to one-fourth share in the suit properties (including the property covered by Ext. B-10) also became final when the appeal filed by Defendants 16 to 18 abated *qua* him. If at all the appeal was proceeded with and the alleged agreement Ext. B-10 was upheld (which the High Court has indeed done), inconsistent decrees were bound to come in existence, and have in fact come in existence.

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224. CIVIL PROCEDURE CODE, 1908 – Section 20

Territorial Jurisdiction – Territorial jurisdiction of Court ordinary lies where cause of action arises but by valid contract the parties may submit themselves to the jurisdiction of any other specific court.

सिविल प्रक्रिया संहिता, 1908 – धारा 20

प्रादेशिक क्षेत्राधिकार – जहां वाद हेतुक उत्पन्न होता है वहां के न्यायालय को सामान्यतः प्रादेशिक क्षेत्राधिकार होता है किन्तु पक्षकार स्वयं को किसी वैधानिक करार (संविदा) के माध्यम से किसी अन्य न्यायालय विशेष के प्रादेशिक क्षेत्राधिकार के अधीन होना स्वीकार कर सकते हैं।

AKC and SIG Joint Venture Firm and ors. v. Western Coalfields Ltd. and ors.

Judgment dated 03.03.2020 passed by the High Court of Madhya Pradesh in Writ Petition No. 10545 of 2019, reported in 2021 (3) MPLJ 185

Relevant extracts from the judgment:

The territorial jurisdiction of Court ordinarily lies where cause of action arisen but it will be subject to terms of a valid contract between the parties. Further, where more than one Court has jurisdiction consequent upon a part of the cause of action arising therewith, but if parties stipulate in the contract to submit to the jurisdiction into a specified Court to try the dispute arising between them and the contract is unambiguous, explicit and clear which is not pleaded to be void and opposed to section 23 of the Contract Act, then suit would lie in the

Court agreed to by the parties and any other Court will have no jurisdiction even though cause of action had arisen partly within the territorial jurisdiction of that Court.

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225. CIVIL PROCEDURE CODE, 1908 – Section 96, Order 21 Rules 90 and 92, Order 23 Rules 3 and 3-A, Order 41 Rule 27 and Order 43 Rule 1-A

(i) Taking additional evidence in appeal; permissibility of – Held, unless procedure under Order 41 Rules 27 to 29 CPC is followed, parties to the appeal cannot be permitted to lead additional evidence – Further, appellate Court cannot direct the trial court or any other subordinate court to take such evidence and to sent it to the appellate court.

(ii) Appeal against consent or compromise decree – Whether maintainable? Held, yes – Appellant can contest such decree on ground that the compromise should or should not have been recorded.

(iii) Auction-sale; setting aside of – Auction-sale may be set aside on the ground of material irregularity or fraud in publishing or conducting it – Once auction-sale in execution of decree is confirmed and sale certificate is issued, the sale shall become final and cannot be challenged.

सिविल प्रक्रिया संहिता, 1908 – धारा 96, आदेश 21 नियम 90 व 92, आदेश 23 नियम 3 व 3–क, आदेश 41 नियम 27 एवं आदेश 43 नियम 1–क

(i) अपील में अतिरिक्त साक्ष्य लेना; अनुज्ञेयता – अवधारित, जब तक आदेश 41 नियम 27 से 29 सि.प्र.सं. की प्रक्रिया का पालन न कर दिया जाए, अपील के पक्षकारों को अतिरिक्त साक्ष्य प्रस्तुत करने की अनुमति नहीं दी जा सकती है – इसके साथ–साथ, अपीलीय न्यायालय विचारण न्यायालय या किसी अन्य अधीनस्थ न्यायालय को ऐसी साक्ष्य लेने और अपीलीय न्यायालय को भेजने का निर्देश नहीं दे सकती है।

(ii) सहमतिपूर्ण या समझौता आज्ञप्ति के विरुद्ध अपील – क्या संधारणीय है? अभिनिर्धारित, हाँ – अपीलार्थी इस आधार पर आज्ञप्ति को चुनौती दे सकता है कि समझौता स्वीकार किया जाना चाहिए अथवा नहीं किया जाना चाहिए था।

(iii) नीलामी–विक्रय को अपास्त करना – नीलामी–विक्रय को इसे प्रकाशित करने या संचालित करने में तात्विक अनियमितता या छल के आधार पर अपास्त किया जा सकता है – एक बार आज्ञप्ति के निष्पादन में नीलामी–विक्रय की पुष्टि हो जाने और विक्रय प्रमाण–पत्र जारी हो जाने के उपरांत विक्रय अंतिम हो जाएगा और इसे चुनौती नहीं दी जा सकती है।

H.S. Goutham v. Rama Murthy and anr.

Judgment dated 12.02.2021 passed by the Supreme Court in Civil Appeal No. 1844 of 2010, reported in (2021) 5 SCC 241 (Three Judge Bench)

Relevant extracts from the judgment:

As per the settled principle of law, when the fraud is alleged the same is required to be pleaded and established by leading evidence. Mere allegation that there was a fraud is not sufficient. Therefore, subsequent order passed by the High Court calling for the report from the learned Principal City Civil Judge on the question whether the decree was obtained by fraud or not, can be said to be giving an opportunity to the judgment-debtors to fill in the lacuna. Therefore, the course adopted by the High Court calling for the report from the learned Principal City Civil Judge cannot be approved.

Even otherwise, it is required to be noted that as per the provisions of Order 41, the appellate court may permit additional evidence to be produced whether oral or documentary, if the conditions mentioned in Order 41 Rule 27 are satisfied after the additional evidence is permitted to be produced in exercise of powers under Order 41 Rule 27. Thereafter, the procedure under Order 41 Rules 28 and 29 is required to be followed. Therefore, unless and until the procedure under Order 41 Rules 27, 28 and 29 is followed, the parties to the appeal cannot be permitted to lead additional evidence and/or the appellate court is not justified to direct the court from whose decree the appeal is preferred or any other subordinate court, to take such evidence and to send it when taken to the appellate court. From the material produced on record, it appears that the said procedure has not been followed by the High Court while calling for the report from the learned Principal City Civil Judge.

x x x

Now, so far as the objection raised on behalf of the appellant herein that the appeal before the High Court against a consent decree was not maintainable is concerned, the same has no substance. The High Court has elaborately dealt with the same in detail and has considered the relevant provisions of the Code of Civil Procedure, namely, Section 96, Order 23 Rule 3, Order 43 Rule 1(m) and Order 43 Rule 1-A(2). It is true that, as per Section 96(3), the appeal against the decree passed with the consent of the parties shall be barred. However, it is also true that as per Order 23 Rule 3-A no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. However, it is required to be noted that when Order 43 Rule 1(m) came to be omitted by Act 104 of 1976, simultaneously, Order 43 Rule 1-A came to be inserted by the very Act 104 of 1976, which provides that in an appeal against the decree passed in a suit for recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should or should not have been recorded. Therefore, the High Court has rightly relied upon the decision of this Court in ***Banwari Lal v.***

Chando Devi, (1993) 1 SCC 581 and has rightly come to the conclusion that the appeal before the High Court against the judgment and decree passed in OS No. 3376 of 1995 was maintainable. No error has been committed by the High Court in holding so.

x x x

Now, so far as the dismissal of IA No. 4 of 1999 by the learned executing court in Execution Petition No. 232 of 1996 which was filed by the judgment-debtors to set aside the court auction-sale dated 11-2-1999 and 18-2-1999 with respect to the subject mortgaged property is concerned, it is not in dispute that the judgment-debtors as such did not deposit the amount of Rs 4,50,000 i.e. sale consideration together with interest in terms of Order 21 Rule 90 CPC. Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. Therefore, as per Order 21 Rule 90, an application to set aside the sale on the ground of irregularity or fraud may be made by the decree-holder on the ground of material irregularity or fraud in publishing or conducting it. It is required to be noted that in the present case, as such, it is not the case of the judgment-debtors that there was any material irregularity or fraud in publishing or conducting the sale. No such submissions have been made before this Court. Their objection is that the decree was obtained by fraud. Therefore also, the application submitted by the original judgment-debtors under Order 21 Rule 90 i.e. IA No. 4 of 1999 was required to be dismissed and was rightly dismissed by the learned executing court.

As observed hereinabove, as per Order 21 Rule 92, where an application is made under Order 21 Rule 89, Order 21 Rule 90 and Order 21 Rule 91 and the same is disallowed, the court shall make an order confirming the sale and thereafter the sale shall become absolute. As per Order 21 Rule 94, where a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date on which the sale became absolute. Therefore, when after the order dated 3-3-1998 overruling the objections raised by the judgment-debtors and thereafter the order was passed in IA No. 4 of 1999 and thereafter when the sale was confirmed and the sale certificate was issued, the High Court ought not to have thereafter set aside the order dated 3-3-1998 overruling the objections raised by the judgment-debtors, which order was not challenged by the judgment-debtors before the High Court till the year 2000. Under the circumstances, the impugned judgment and order passed by the High Court in CRP No. 3297 of 2000 quashing and setting aside the order dated 3-3-1998 cannot be sustained and the same deserves to be quashed and set aside.

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226. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10

Necessary party – Without giving an opportunity to plaintiff for impleadment of a necessary party, suit cannot be dismissed on ground of non-joinder of necessary party.

सिविल प्रक्रिया संहिता, 1908 – आदेश 1 नियम 10

आवश्यक पक्षकार – वादी को आवश्यक पक्षकार के संयोजन का अवसर दिये बिना वाद आवश्यक पक्षकार के असंयोजन के आधार पर खारिज नहीं किया जा सकता है।

Rajkumar Goyal v. Municipal Corporation, Gwalior

Order dated 01.09.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 10368 of 2020, reported in ILR (2021) MP 48

Relevant extracts from the order:

It is well settled principle of law that a suit cannot be dismissed on the ground of non-joinder of necessary party, unless and until an opportunity is given to the plaintiff to implead the necessary party. If the plaintiff refuses or fails to implead the necessary party and decides to move further with the suit, then he do so at his own risk and under this circumstance, he has to face the adverse consequences.

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227. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 4

CRIMINAL PROCEDURE CODE, 1973 – Section 354

Judgment and order writing – Tendency of "cut-copy-paste" deprecated – Held, substantive reasoning is the defining feature of judicial process, it should not be substituted by "cut-copy-paste" – Quality of justice brings legitimacy to the judiciary.

सिविल प्रक्रिया संहिता, 1908 – आदेश 20 नियम 4

दण्ड प्रक्रिया संहिता, 1973 – धारा 354

निर्णय और आदेश लेखन – ''कट–कॉपी–पेस्ट'' की प्रवृत्ति निरूत्साहित की गई – अवधारित, मौलिक कारण का प्रकटीकरण न्यायिक प्रक्रिया की निर्धारक विशेषता है, इसे ''कट–कॉपी–पेस्ट'' द्वारा प्रतिस्थापित नहीं किया जाना चाहिए – न्याय की गुणवत्ता न्यायपालिका के कार्य को वैधता प्रदान करती है।

Union Public Service Commission v. Bibhu Prasad Sarangi and ors.

Judgment dated 05.03.2021 passed by the Supreme Court in Civil Appeal No. 821 of 2021, reported in (2021) 4 SCC 516

Relevant extracts from the judgment:

The size of judicial output does not necessarily correlate to a reasoned analysis of the core issues in a case. Technology enables Judges to bring speed, efficiency and accuracy to judicial work. But a prolific use of the "cut-copy-paste"

function should not become a substitute for substantive reasoning which, in the ultimate analysis, is the defining feature of the judicial process. Judges are indeed hard pressed for time, faced with burgeoning vacancies and large case-loads. Crisp reasoning is perhaps the answer. Reasons constitute the soul of a judicial decision. Without them one is left with a shell. The shell provides neither solace nor satisfaction to the litigant. We are constrained to make these observations since what we have encountered in this case is no longer an isolated aberration. This has become a recurring phenomenon. The National Judicial Academy will do well to take this up. How Judges communicate in their judgments is a defining characteristic of the judicial process. While it is important to keep an eye on the statistics on disposal, there is a higher value involved. The quality of justice brings legitimacy to the judiciary.

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228. COMMERCIAL COURTS ACT, 2015 – Section 2(c)(xvii)

Commercial dispute – Jurisdiction – Disputes pertaining to intellectual property rights relating to designs are included in commercial disputes as defined in section 2(c)(xvii) of the Act and such disputes should be instituted before a Commercial Court constituted u/s 3 of the Act.

वाणिज्यिक न्यायालय अधिनियम, 2015 – धारा 2(ग)(xvii)

वाणिज्यिक विवाद – क्षेत्राधिकार – अभिकल्पन संबंधी बौद्धिक संपदा के अधिकार से संबंधित विवाद अधिनियम की धारा 2(ग)**(xvii)** में उल्लेखित वाणिज्यिक विवाद की परिभाषा में शामिल हैं और ऐसे विवाद अधिनियम की धारा 3 के अंतर्गत गठित वाणिज्यिक न्यायालय के समक्ष संस्थित होने चाहिए।

S. D. Containers Indore v. M/s Mold Tek Packaging Ltd.

Judgment dated 01.12.2020 passed by the Supreme Court in Civil Appeal No. 3695 of 2020, reported in ILR (2021) MP 163 (SC) (Three Judge Bench)

Relevant extracts from the judgment:

The 2015 Act deals with two situations i.e. the High Courts which have ordinary original civil jurisdiction and the High Courts which do not have such jurisdiction. The High Court of Madhya Pradesh does not have the ordinary original civil jurisdiction. In areas where the High Courts do not have ordinary original civil jurisdiction, the Commercial Courts at the District Level are to be constituted under Section 3 of the 2015 Act. The State Government is also empowered to fix the pecuniary limit of the Commercial Courts at the District Level in consultation with the concerned High Court. In terms of Section 3 (2) of the Act, the Court of District Judge at Indore is notified to be a Commercial Court. "Commercial Dispute" within the meaning of Section 2(c)(xvii) of the Act, 2015 includes the dispute pertaining to "intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits."

Therefore, disputes related to design are required to be instituted before a Commercial Court constituted under Section 3 of the said Act.

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229. CONSTITUTION OF INDIA – Article 142
CRIMINAL PROCEDURE CODE, 1973 – Sections 438 and 482

(i) Anticipatory bail; grant of – For a limited period of time is permissible – However, recording of reasons therefor is mandatory.

(ii) Anticipatory bail; rejection of – Whether after rejecting application u/s 438 CrPC, Court can grant relief of protection from arrest to the accused? Held, High Court u/s 482 CrPC and Supreme Court under Article 142 of the Constitution of India may pass such an order – However, such an order may be passed only in exceptional circumstances while taking into consideration of concerns of investigation agency.

भारत का संविधान – अनुच्छेद 142
दण्ड प्रक्रिया संहिता, 1973 – धाराएं 438 एवं 482

(i) अग्रिम जमानत स्वीकार किया जाना – सीमित अवधि के लिए अनुज्ञेय है – तथापि, इसके लिए कारणों का लेखबद्ध किया जाना अनिवार्य है।

(ii) अग्रिम जमानत अस्वीकार किया जाना – क्या धारा 438 द.प्र.सं. का आवेदन अस्वीकार करने के बाद, न्यायालय अभियुक्त को गिरफ्तारी से सुरक्षा की सहायता प्रदान कर सकती है? अभिनिर्धारित, द.प्र.सं. की धारा 482 के अधीन उच्च न्यायालय और भारत के संविधान के अनुच्छेद 142 के अधीन सर्वोच्च न्यायालय ऐसा आदेश पारित कर सकते हैं – यद्यपि, ऐसा आदेश अनुसंधान एजेंसी के पक्ष को ध्यान में रखते हुए मात्र असाधारण परिस्थितियों में ही पारित किया जा सकता है।

Nathu Singh v. State of Uttar Pradesh and ors.
Judgment dated 28.05.2021 passed by the Supreme Court in Criminal Appeal No. 522 of 2021, reported in (2021) 6 SCC 64 (Three Judge Bench)

Relevant extracts from the Judgment:

The Constitution Bench in ***Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1*** has authoritatively held that when a court grants anticipatory bail under Section 438 CrPC, the same is ordinarily not limited to a fixed period and would subsist till the end of the trial. However, it was clarified by the court that if the facts and circumstances so warranted, the court could impose special conditions, including limiting the relief to a certain period.

It is therefore clear that a court, be it a Sessions Court or a High Court, in certain special facts and circumstances may decide to grant anticipatory bail for a limited period of time. The court must indicate its reasons for doing so, which

would be assailable before a superior court. To do so without giving reasons, would be contrary to the pronouncement of this Court in ***Sushila Aggarwal*** (supra).

However, in the present appeals, the High Court, after considering the facts and circumstances of the case, particularly the gravity and severity of the accusations against the respondents, rejected the application of the respondent-accused. It is after rejecting the application that the High Court chose fit to grant some relief to the respondents while directing them to surrender before the trial court to file a regular bail application within 90 days, by protecting them from any coercive action during that period. The appellant complainants are aggrieved by the same and are challenging the power of the court to pass such a protective order after the dismissal of the anticipatory bail application.

If the proviso to Section 438(1) CrPC does not act as a bar to the grant of additional protection to the applicant, the question still remains as to under what provision of law the court may issue relief to an applicant after dismissing their anticipatory bail application.

Without going into the question of whether Section 438 CrPC itself allows for such a power, as it is not necessary to undertake such an exercise in the present case, it is clear that when it comes to the High Court, such a power does exist. Section 482 CrPC explicitly recognises the High Court's inherent power to pass orders to secure the ends of justice. This provision reflects the reality that no law or rule can possibly account for the complexities of life, and the infinite range of circumstances that may arise in the future.

We cannot be oblivious to the circumstances that courts are faced with day in and day out, while dealing with anticipatory bail applications. Even when the court is not inclined to grant anticipatory bail to an accused, there may be circumstances where the High Court is of the opinion that it is necessary to protect the person apprehending arrest for some time, due to exceptional circumstances, until they surrender before the trial court. For example, the applicant may plead protection for some time as he/she is the primary caregiver or breadwinner of his/her family members, and needs to make arrangements for them. In such extraordinary circumstances, when a strict case for grant of anticipatory bail is not made out, and rather the investigating authority has made out a case for custodial investigation, it cannot be stated that the High Court has no power to ensure justice. It needs no mentioning, but this Court may also exercise its powers under Article 142 of the Constitution to pass such an order.

However, such discretionary power cannot be exercised in an untrammelled manner. The court must take into account the statutory scheme under Section 438 CrPC, particularly, the proviso to Section 438(1) CrPC, and balance the concerns of the investigating agency, the complainant and the society at large with the concerns/interest of the applicant. Therefore, such an order must necessarily be narrowly tailored to protect the interests of the applicant while taking into consideration the concerns of the investigating authority. Such an order must be a reasoned one.

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*230. **CONTEMPT OF COURTS ACT, 1971 – Section 2(a)**
CRIMINAL PROCEDURE CODE, 1973 – Section 439
Contempt of Court – Application for bail – After dismissal of fourth application for bail, applicant filed SLP before Supreme Court but was dismissed – Inspite of the specific clause in the format of bail application, applicant deliberately suppressed the fact of dismissal of SLP by the Supreme Court – Even after pointing out to the Counsel for the applicant, he did not show any remorse – It is a clear case of contempt by misleading the Court.

न्यायालय अवमान अधिनियम, 1971 – धारा 2(क)

दण्ड प्रक्रिया संहिता, 1973 – धारा 439

न्यायालय की अवमानना – जमानत के लिए आवेदन – चतुर्थ जमानत आवेदन खारिज होने के बाद आवेदक ने उच्चतम न्यायालय के समक्ष विशेष अनुमति याचिका प्रस्तुत की जो खारिज हुई – जमानत आवेदन के प्रारूप में विनिर्दिष्ट खण्ड होने के वावजूद आवेदक ने उच्चतम न्यायालय से विशेष अनुमति याचिका खारिज होने का तथ्य जानबूझकर छुपाया – यहां तक कि आवेदक के अभिभाषक का ध्यान इस ओर आकर्षित कराये जाने पर भी उनके द्वारा कोई अफसोस व्यक्त नहीं किया गया – यह न्यायालय को भ्रमित करके अवमानना का स्पष्ट मामला है।

Kamla @ Sarla Yadav v. State of M.P.
Order dated 25.02.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in MCRC No. 10898 of 2021, reported in 2021 (2) MPLJ 305

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231. **CRIMINAL PRACTICE:**
Delay in trial – Compensation – Trial of under trial accused must be speedy because speedy trial is a fundamental right of accused and if his trial is delayed because of continuous non-appearance of police witnesses then such accused should be compensated from the State.

आपराधिक प्रथा:

विचारण में विलंब – क्षतिपूर्ति – विचाराधीन अभियुक्त का विचारण तीव्र गति से होना चाहिए क्योंकि शीघ्र विचारण अभियुक्त का मूलभूत अधिकार होता है और यदि उसका विचारण पुलिस साक्षियों की लगातार अनुपस्थिति के कारण विलंबित होता है तो राज्य से ऐसे अभियुक्त को क्षतिपूर्ति दिलवाना चाहिए।

Asfaq Khan v. State of M.P.
Judgment dated 04.11.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Criminal Case No. 37969 of 2020, reported in ILR (2021) MP 343

Relevant extracts from the judgment:

It is well established principle of law that speedy trial is the fundamental

right of an accused and the police witnesses cannot stay away from the Trial Court thereby resulting in an unwarranted incarceration of the under-trial without there being any progress in the trial. An under-trial cannot be kept in jail at the mercy of the police witnesses.

It is directed that the State shall pay a compensation of ₹ 30,000/- to the applicant for failing in its duty to keep even the police witnesses present before the Trial Court and the trial has suffered a lightning stroke because of non-appearance of Mr. D.P.S. Chauhan, Town Inspector.

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232. CRIMINAL PROCEDURE CODE, 1973 – Section 31

(i) Awarding multiple sentences of imprisonment at one trial – Obligation of trial court reiterated – Held, trial court is under obligation to specify in clear terms as to whether the sentences would run concurrently or consecutively – Omission to carry out this obligation causes unnecessary and avoidable prejudice to the parties.

(ii) Concurrent or consecutive running of sentences – Omission to specify; effect of – Such sentences would run consecutively against accused – Whether omission to state the order in which consecutive sentences are to be carried out would lead to assumption that sentences are directed to run concurrently? Held, no.

दण्ड प्रक्रिया संहिता, 1973 – धारा 31

(i) एक विचारण में कारावास के कई दण्ड अधिरोपित किया जाना – विचारण न्यायालय का दायित्व पुनरोद्धरित – अवधारित, विचारण न्यायालय स्पष्ट शब्दों में यह निर्दिष्ट करने के लिए आबद्ध है कि दण्ड समवर्ती अथवा क्रमानुगत, किस रीति से भुगताए जाएंगे – इस दायित्व के निर्वहन में लोप से पक्षकारों पर अनावश्यक और परिहार्य प्रतिकूल प्रभाव पड़ता है।

(ii) दण्डादेशों का समवर्ती या क्रमानुगत रीति से भुगताया जाना – निर्दिष्ट करने में लोप का प्रभाव – ऐसे दण्डादेश अभियुक्त को एक के बाद एक भुगताए जाएंगे – क्या उस क्रम को निर्दिष्ट करने में लोप जिसके अनुसार क्रमवर्ती दण्ड भुगताए जाने हैं, यह उपधारणा करने का आधार होगा कि दण्डादेशों को समवर्ती रीति से भुगताए जाने के लिए निर्देशित किया गया है? अवधारित, नहीं।

Sunil Kumar alias Sudhir Kumar and anr. v. State of Uttar Pradesh

Judgment dated 25.05.2021 passed by the Supreme Court in Criminal Appeal No. 526 of 2021, reported in (2021) 5 SCC 560

Relevant extracts from the judgment:

If the court of first instance does not specify the concurrent running of sentences, the inference, primarily, is that the court intended such sentences to

run consecutively, the court of first instance ought not to leave this matter for deduction at the later stage. Moreover, if the court of first instance is intending consecutive running of sentences, there is yet another obligation on it to state the order (i.e. the sequence) in which they are to be executed. The disturbing part of the matter herein is that not only the trial court omitted to state the requisite specifications, even the High Court missed out such flaws in the order of the trial court.

Even when we find the aforementioned shortcomings in the orders passed by the trial court as also by the High Court, the question is as to whether the sentences awarded to the appellants could be considered as running concurrently? As noticed, the omission to state whether the sentences awarded to the accused would run concurrently or would run consecutively essentially operates against the accused because, unless stated so by the court, multiple sentences run consecutively, as per the plain language of Section 31(1) CrPC read with the expositions in ***Muthuramalingam v. State, (2016) 8 SCC 313 and O.M. Cherian v. State of Kerala, (2015) 2 SCC 501***. The other omission to state the order of consecutive running cannot ipso facto lead to concurrent running of sentences.

While closing on the matter, we deem it appropriate to reiterate what was expounded in ***Nagaraja Rao v. CBI, (2015) 4 SCC 302***, that it is legally obligatory upon the court of first instance, while awarding multiple punishments of imprisonment, to specify in clear terms as to whether the sentences would run concurrently or consecutively. It needs hardly an emphasis that any omission to carry out this obligation by the court of first instance causes unnecessary and avoidable prejudice to the parties, be it the accused or be it the prosecution.

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233. CRIMINAL PROCEDURE COED, 1973 – Section 98

Jurisdiction – Provisions of section 98 deal only with a woman or a female child under the age of 18 years and so an order for the restoration of any male child to his mother cannot be passed u/s 98.

दण्ड प्रक्रिया संहिता, 1973 – धारा 98

क्षेत्राधिकार – धारा 98 के प्रावधान केवल किसी महिला अथवा 18 वर्ष से कम आयु की बालिका के संबंध में प्रभावशील होते हैं और इस कारण इस प्रावधान के अंतर्गत किसी बालक को उसकी मां को वापस किये जाने का आदेश पारित नहीं किया जा सकता है।

Jaya Chakravarti v. State of M.P. & ors.

Order dated 12.03.2021 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No. 17603 of 2020, reported in ILR (2021) MP 901

Relevant extracts from the order:

Section 98 Cr.P.C. gives power to the Magistrate for the restoration of liberty of a woman or a female child under the age of 18 years who is under abduction

or unlawful detention and the female child under the age of 18 years to her husband, parent, guardian or other person having the lawful charge of such child, therefore, admittedly, in this case, the provision of section 98 Cr.P.C. does not apply because it deals with a woman or female child below the age of 18 years and the respondents No.5 & 6 are male children.

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234. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 156(3) and 210 Registration of FIR during pendency of application u/s 156(3) CrPC or complaint – Permissibility of – Held, there is no bar to lodge such an FIR – Section 210 CrPC provides the procedure in this regard.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 154, 156(3) एवं 210

द.प्र.सं. की धारा 156(3) के अधीन आवेदन अथवा परिवाद के लंबित रहने के दौरान प्रथम सूचना प्रतिवेदन पंजीबद्ध किया जाना – अनुज्ञेयता – अवधारित, इस तरह के प्रथम सूचना प्रतिवेदन पंजीबद्ध करने पर कोई रोक नहीं है – द.प्र.सं. की धारा 210 इस संबंध में प्रक्रिया प्राविधित करती है।

Kapil Agarwal and ors. v. Sanjay Sharma and ors.

Judgment dated 01.03.2021 passed by the Supreme Court in Criminal Appeal No. 142 of 2021, reported in (2021) 5 SCC 524

Relevant extracts from the judgment:

As per Section 210 CrPC, when in a case instituted otherwise than on a police report i.e. in a complaint case, during the course of the inquiry or trial held by the Magistrate, it appears to the Magistrate that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation. It also provides that if a report is made by the investigating police officer under Section 173 CrPC and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. It also further provides that if the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of CrPC.

Thus, merely because on the same set of facts with the same allegations and averments earlier the complaint is filed, there is no bar to lodge the FIR with the police station with the same allegations and averments.

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235. CRIMINAL PROCEDURE CODE, 1973 – Sections 156(3) and 173
Delay in investigation – Investigation of any cognizable offence should be completed without any delay and final report should be submitted before concerned Magistrate – Investigation officer is duty bound to follow the above procedure – In case of undue delay, petitioner may approach the concerned Magistrate u/s 156(3) of CrPC.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 156(3) एवं 173

अनुसंधान में विलंब – किसी भी संज्ञेय अपराध का अनुसंधान अनावश्यक विलंब के बिना पूर्ण किया जाना चाहिए और संबंधित मजिस्ट्रेट के समक्ष अंतिम प्रतिवेदन प्रस्तुत किया जाना चाहिए – अनुसंधान अधिकारी इस प्रक्रिया का पालन करने के लिये कर्तव्यबाध्य है – अनावश्यक विलंब की स्थिति में याचिकाकर्ता धारा 156(3) द.प्र.सं. के अंतर्गत संबंधित मजिस्ट्रेट के समक्ष जा सकता है।

Indal Singh v. State of M.P. & ors.
Order dated 10.03.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 5590 of 2021, reported in ILR (2021) MP 890

Relevant extracts from the order:

From perusal of sections 156, 157 and 173 of CrPC it is apparently clear that the police authorities on receipt of the information with respect to cognizable offence has to take up the matter and investigate the same and conclude the investigation without any delay and submit the report to the concerning Magistrate. They are duty bound to follow such procedure prescribed in the aforesaid sections without any undue delay.

As far as the relief claimed by the petitioner with respect to the manner in which investigation is being carried out by the Police authorities, the petitioner is having remedy to approach before the concerning Magistrate under Section 156(3) of Cr.P.C. by filing an appropriate application.

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236. CRIMINAL PROCEDURE CODE, 1973 – Section 167
CONSTITUTION OF INDIA – Article 21

(i) Further remand – Whether formal application is necessary? Held, no – Even in the absence of an application or request by the investigating officer seeking further remand, the Magistrate can grant further remand of the accused u/s 167 of the CrPC.

(ii) Extension of further remand – Whether order of Magistrate is compulsory? Held, yes – Since there was no order by the Magistrate for extending the judicial remand till next date, the intervening period of custody of the applicant amounts to be illegal and unauthorised detention.

(iii) Illegal detention – Appropriate remedy – Though the right to be released accrues in favour of the applicant if he is found to be in illegal detention but the application u/s 167 of CrPC is not the proper remedy for claiming the relief for grant of bail from the Magistrate.

दण्ड प्रक्रिया संहिता, 1973 – धारा 167

भारत का संविधान – अनुच्छेद 21

(i) पश्चात्वर्ती अभिरक्षा – क्या औपचारिक आवेदन आवश्यक है? अवधारित, नहीं – यहां तक कि अन्वेषण अधिकारी द्वारा पश्चात्वर्ती निरोध के संबंध में किए गए निवेदन अथवा आवेदन के अभाव में भी मजिस्ट्रेट द.प्र.सं. की धारा 167 के अंतर्गत अभियुक्त का निरोध प्राधिकृत कर सकता है।

(ii) पश्चात्वर्ती अभिरक्षा का बढ़ाया जाना – क्या मजिस्ट्रेट का आदेश अनिवार्य है? अवधारित, हाँ – चूंकि मजिस्ट्रेट द्वारा आगामी तिथि तक न्यायिक अभिरक्षा विस्तारित किए जाने का कोई आदेश नहीं था, अतः इस अंतराल में अपीलार्थी की अभिरक्षा अवैध और अनाधिकृत होगी।

(iii) अवैध निरोध – उचित उपचार – यदि अपीलार्थी का अवैध निरोध में होना पाया जाता है, तब यद्यपि उसके पक्ष में छोड़े जाने का अधिकार उत्पन्न होता है परन्तु धारा 167 द.प्र.सं. के अधीन मजिस्ट्रेट के समक्ष आवेदन प्रस्तुत कर जमानत पर छोड़े जाने का दावा करना उचित उपचार नहीं है।

Manoj Yadav v. State of M.P.

Order dated 15.07.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 16197 of 2020, reported in ILR (2021) MP 777

Relevant extracts from the order:

There is no hesitation in saying that even in the absence of an application or request by the Investigating officer seeking further remand, the Magistrate can grant further remand of the accused under section 167 of the Code. As per the learned counsel for the State in the present case it was a discretion of the Magistrate to extend the remand for a maximum period of 90 days considering the respective crime in which remand was sought but here in this case said discretion has not been exercised by the Court after 17.04.2020. Since there was no order after 17.04.2020 by the Magistrate for extending the judicial remand till 27.05.2020 the intervening period of custody of the applicant alleged to be illegal and unauthorised detention.

In view of the aforesaid discussion and considering the enunciation of law, I am of the considered opinion that though the right to be released accrues in favour of the applicant if he is found to be in illegal detention but the application under Section 167 of the Code is not the proper remedy for claiming the relief for grant of bail from the Magistrate. That power can be exercised by the Magistrate only under sub-section (2) of Section 167 of the Code in case of default of not filing

the charge-sheet within the prescribed period of 90 days. If the applicant was so advised that he was illegally detained then proper remedy had to be availed for his release. The writ of habeas corpus could be filed not before the Magistrate but before the High Court or the Supreme Court. Accordingly, without making any observation as to whether the Court below has considered this aspect or not; whether in the order passed by the Court below it has rightly dealt with the situation or not, present petition deserves to be dismissed on the ground that granting bail under Section 167 of the code is not the power of the Magistrate and the applicant has availed improper remedy by moving such application instead of availing appropriate remedy as discussed hereinabove.

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237. CRIMINAL PROCEDURE CODE, 1973 – Sections 167(2) and 397
Revision – Maintainability – Revision is maintainable against an order passed upon the application for default bail as such order is not an interlocutory order.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 167(2) एवं 397
पुनरीक्षण – पोषणीयता – व्यतिक्रम जमानत आवेदन पर पारित आदेश के विरूद्ध पुनरीक्षण प्रचलन योग्य होता है क्योंकि ऐसा आदेश अंतर्वती आदेश नहीं है।

Raja Bhaiya Singh v. State of M.P.
Order dated 08.01.2021 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1813 of 2020, reported in ILR (2021) MP 119

Relevant extracts from the order:

In ***Madhu Limaye v. State of Maharashtra, AIR 1978 SC 47***, a Three Judge Bench of Apex Court has held an order rejecting the plea of the accused on a point which when accepted will conclude the particular proceeding cannot be held to be an interlocutory order. In ***V. C. Shukla v. State, AIR 1980 SC 962***, this Court has held that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial and the revisional power of the High court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi final.

Therefore, as per aforesaid law, the order upon the application filed for default bail under section 167(2) of Cr.P.C. is not an interlocutory order because it decided the valuable right of default bail finally at that stage. Hence, the revision is tenable against the aforesaid order.

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238. CRIMINAL PROCEDURE CODE, 1973 – Section 228
INDIAN PENAL CODE, 1860 – Section 306
Abetment to suicide – Framing of charge – If the applicant was continuous threatening that he would disclose the relationship of the applicant with that of the deceased, then it would certainly *prima*

facie **amount to abetment of suicide – Thus,** *prima facie* **there is sufficient material against the applicant, warranting his prosecution u/s 306 of IPC.**

दण्ड प्रक्रिया संहिता, 1973 – धारा 228

भारतीय दण्ड संहिता, 1860 – धारा 306

आत्महत्या का दुष्प्रेरण – आरोप की विरचना – यदि अपीलार्थी निरंतर धमकी दे रहा था कि वह उसके और मृतक के संबंधों का प्रकटन कर देगा तब यह निश्चित रूप से प्रथम दृष्टया आत्महत्या के दुष्प्रेरण के तुल्य होगा – अतः प्रथम दृष्टया अपीलार्थी के विरुद्ध धारा 306 भा.दं.सं. के अंतर्गत अभियोजन हेतु पर्याप्त सामग्री उपलब्ध है।

Ashok Ahirwar v. State of M.P. and anr.

Order dated 08.04.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 932 of 2021, reported in 2021 CriLJ 2945

Relevant extracts from the order:

If the facts of the case are considered, in the light of the judgment passed by the Supreme Court, then it is clear that continuous harassment of the deceased in spite of objection by the deceased as well as by her husband may amount to abetment of suicide. If the applicant was threatening that he would disclose the relationship of the applicant with that of the deceased, then it would certainly *prima facie* amount to abetment of suicide. Thus, *prima facie* there is sufficient material against the applicant, warranting his prosecution under section 306 of IPC. Further, a charge can be framed even if the Court is of the view that the accused might have committed an offence. The possibility of conviction cannot be a consideration for the purpose of framing of charges. Under these circumstances, this Court is of the considered opinion that no jurisdictional error was committed by the trial court by framing the charge under section 306 of IPC. Accordingly, order dated 9/2/2021 passed by First Additional Sessions Judge, Ganjbasoda, District Vidisha in ST No.77/2020 is hereby affirmed.

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239. CRIMINAL PROCEDURE CODE, 1973 – Section 378

Appeal against acquittal – Interference when not warranted – Unless the view taken by the trial court is not a possible view, normally appellate court should not interfere with the acquittal recorded by the trial court.

दण्ड प्रक्रिया संहिता, 1973 – धारा 378

दोषमुक्ति के विरूद्ध अपील – कब हस्तक्षेप उचित नहीं – जब तक विचारण न्यायालय द्वारा अपनाया गया दृष्टिकोण संभावित दृष्टिकोण न हो, तब तक सामान्यतः अपीलीय न्यायालय को विचारण न्यायालय द्वारा अभिलिखित दोषमुक्ति में हस्तक्षेप नहीं करना चाहिए।

Rajendra @ Rajappa and ors. v. State of Karnataka
Judgment dated 26.03.2021 passed by the Supreme Court in Criminal Appeal No. 1438 of 2011, reported in 2021 CriLJ 3063

Relevant extracts from the judgment:

It is true that in various authoritative pronouncements, this Court has circumscribed the scope of appeal under Section 378 of the CrPC, in cases where appeal is preferred against acquittal recorded by the trial court. Further, it is also settled proposition that unless the view taken by the trial court is not a possible view, normally the High Court should not interfere with the acquittal recorded by the trial court. There cannot be any straight-jacket formula to apply readily for the cases in appeals arising out of acquittal recorded by the trial court. Whether the view taken by the trial court is a possible view or not; whether the findings recorded by the trial court are in conformity with the evidence or not; are the matters which depend upon facts and circumstances of each case and the evidence on record. By re-appreciating evidence on record if appellate court comes to conclusion that findings recorded by the trial court are erroneous and contrary to law, it is always open for the appellate court, by recording good and compelling reasons for interference and overturn the judgment of acquittal by converting the same to that of conviction.

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240. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Rule of parity; applicability of – Cancellation of bail – Whether bail granted to co-accused persons subsequently on ground of parity will also be cancelled where bail of original accused stands cancelled? Held, yes – Cancellation of bail must have similar consequence in so far as grant of bail to co-accused on parity is concerned.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 437 एवं 439
समता के नियम की प्रयोज्यता – जमानत रद्द किया जाना – क्या सह–अभियुक्तगण को बाद में समता के आधार पर दी गई जमानत भी रद्द कर दी जाएगी जहां मूल अभियुक्त की जमानत रद्द हो गई हो? अभिनिर्धारित, हाँ – जमानत रद्द करने का परिणाम, जहाँ तक सह–अभियुक्तगण को समता के आधार पर दी गई जमानत का संबंध है, एक समान होना चाहिए।

Girraj v. Kiranpal and anr.
Judgment dated 08.03.2021 passed by the Supreme Court in Criminal Appeal No. 286 of 2021, reported in (2021) 6 SCC 205

Relevant extracts from the judgment:

It is abundantly clear that the first order granting bail dated 5-8-2020 was in the case of co-accused Narendra. All the other accused while claiming the grant of bail had specifically relied upon the order passed in the case of Narendra and sought bail on the basis of parity. Following the principle of parity, the High Court enlarged them on bail.

Now, the order granting bail to Narendra was the subject-matter of Criminal Appeal No. 852 of 2020 before this Court, arising out of Special Leave Petition (Criminal) No. 5537 of 2020. By the judgment and order of this Court dated 11-12-2020, the order granting bail to Narendra was set aside.

Since bail has been granted to all the respondent-accused who have claimed parity on the basis of the order granting bail to Narendra, there can be no manner of doubt that the cancellation of bail that was granted to Narendra must have a similar consequence insofar as the grant of bail to the remaining five accused is concerned.

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241. CRIMINAL PROCEDURE CODE, 1973 – Section 439

Bail – Imposing of onerous conditions – Application preferred u/s 439 of CrPC seeking release on bail was allowed by the High Court – However, a condition imposed to the effect that the appellant would deposit National Saving Certificates in the sum of ₹ 50 lakhs with the Trial Court – Supreme Court held that the condition imposed by the High Court while releasing the appellant on bail is definitely onerous – Condition relieved.

दण्ड प्रक्रिया संहिता, 1973 – धारा 439

जमानत – दुर्भर शर्तों का अधिरोपण – धारा 439 द.प्र.सं. के अधीन जमानत पर रिहा किए जाने हेतु प्रस्तुत आवेदन को उच्च न्यायालय द्वारा स्वीकार किया गया – यद्यपि, यह शर्त अधिरोपित की गई कि अपीलार्थी 50 लाख रुपये के राष्ट्रीय बचत पत्र विचारण न्यायालय में जमा करे – उच्चतम न्यायालय द्वारा अभिनिर्धारित किया गया कि उच्च न्यायालय द्वारा अभियुक्त को जमानत पर रिहा किए जाते समय अधिरोपित शर्त निश्चित रूप से दुर्भर है – शर्त शिथिल की गई।

Suresh Kukreja v. State of M.P. and anr.

Judgment dated 04.05.2021 passed by the Supreme Court in Criminal Appeal No. 465 of 2021, reported in 2021 CriLJ 2998 (Three Judge Bench)

Relevant extracts from the judgment:

In connection with crime registered pursuant to FIR No. 0012 of 2020 dated 15.01.2020 lodged with S.T.F. Police Station, Bhopal, Madhya Pradesh in respect of offences punishable under Section 406, 420, 448 read with 120B, the appellant was taken in custody on 21.01.2020. His application preferred under Section 439 of the Code of Criminal Procedure seeking release on bail was allowed by the High Court vide order dated 28.05.2020. However, the High Court imposed a condition to the effect that the appellant would deposit National Saving Certificates in the sum of Rs. 50 lakhs with the Trial Court.

Considering the entirety of the matter, in our view, the condition imposed by the High Court while releasing the appellant on bail is definitely onerous and the appellant deserves to be relieved of the condition.

●

242. CRIMINAL PROCEDURE CODE, 1973 – Section 439
N.D.P.S. ACT, 1985 – Sections 8, 15, 29, 53 and 67
EVIDENCE ACT, 1872 – Section 25
NDPS Act – Granting of Bail – Statement made by the co-accused as also the confessional statement of an accused are not admissible in law and cannot be taken into account to convict an accused under the NDPS Act – The applicant, who is arrested solely on the basis of the statement made by the co-accused and his own confessional statement, is entitled to be released on bail.

दण्ड प्रक्रिया संहिता, 1973 – धारा 439

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम, 1985 – धाराएं 8, 15, 29, 53 एवं 67

साक्ष्य अधिनियम, 1872 – धारा 25

एनडीपीएस अधिनियम – जमानत प्रदान किया जाना – सह–अभियुक्त द्वारा दिया गया कथन एवं अभियुक्त द्वारा दिया गया संस्वीकृति कथन विधि अनुसार ग्राह्य नहीं है और एनडीपीएस अधिनियम के अंतर्गत अभियुक्त को दोषसिद्ध किए जाने में विचार में नहीं लिया जा सकता – अपीलार्थी जिसे केवल सह–अपराधी द्वारा किए गए कथन एवं उसके स्वयं के संस्वीकृति कथन के आधार पर गिरफ्तार किया गया है, जमानत पर छोड़े जाने का अधिकारी है।

Ramniwas v. State of M.P.
Order dated 08.02.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Criminal Case No. 45017 of 2020, reported in ILR (2021) MP 757

Relevant extracts from the order:

A perusal of the same clearly reveals that the statement made by the co-accused as also the confessional statement of an accused are not admissible in law and cannot be taken into account to convict an accused under the NDPS Act. In view of the same, this court has no hesitation to hold that the applicant, who is arrested solely on the basis of the statement made by the co-accused and his own confessional statement, is entitled to be released on bail.

●

243. EVIDENCE ACT, 1872 – Sections 3 and 134

APPRECIATION OF EVIDENCE:

(i) Requirement of examination of all witnesses – It is not necessary for the prosecution to examine all the witnesses who might have witnessed the occurrence – It is the quality of evidence which is relevant in criminal trial and not the quantity.

(ii) Credibility of witness – Merely because a prosecution witness was not believed in respect of one accused, the testimony of the said witness cannot be disregarded in case of another accused.

साक्ष्य अधिनियम, 1872 – धाराएं 3 एवं 134

साक्ष्य का मूल्यांकनः

(i) समस्त साक्षियों के परीक्षण की आवश्यकता – अभियोजन के लिए यह आवश्यक नहीं है कि वह उन समस्त साक्षियों का परीक्षण कराये जिन्होंने घटना देखी है – आपराधिक विचारण में साक्ष्य की गुणवत्ता सुसंगत है न कि संख्या।

(ii) साक्षी की विश्वसनीयता – केवल इस कारण कि एक अभियुक्त के संदर्भ में साक्षी विश्वसनीय नहीं है ऐसे साक्षी की विश्वसनीयता अन्य अभियुक्त के संदर्भ में अमान्य नहीं हो जाती है।

Ram Vijay Singh v. State of Uttar Pradesh

Judgment dated 25.02.2021 passed by the Supreme Court in Criminal Appeal No. 175 of 2021, reported in 2021 CriLJ 2805

Relevant extracts from the judgment:

Therefore, merely because a prosecution witness was not believed in respect of another accused, the testimony of the said witness cannot be disregarded *qua* the present appellant. Still further, it is not necessary for the prosecution to examine all the witnesses who might have witnessed the occurrence. It is the quality of evidence which is relevant in criminal trial and not the quantity. Therefore, non-examination of Girendra Singh cannot be said to be of any consequence.

●

244. EVIDENCE ACT, 1872 – Section 106

CRIMINAL PROCEDURE CODE, 1973 – Section 313

APPRECIATION OF EVIDENCE:

(i) Burden of proving facts especially within knowledge – When arises; explained – Held, it is only when the prosecution has led evidence which make out a *prima facia* case, the question arises of considering facts of which the burden of proof would lie upon the accused.

(ii) Circumstantial evidence; chain of – Failure of accused to give explanation u/s 313 CrPC – Whether can be used as a link to complete the chain of circumstances? Held, no – False

explanation or non-explanation by accused can be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused.

साक्ष्य अधिनियम, 1872 – धारा 106

दण्ड प्रक्रिया संहिता, 1973 – धारा 313

साक्ष्य का मूल्यांकनः

(i) विशेष ज्ञान के तथ्यों को साबित करने का भार – कब उत्पन्न होता है; समझाया गया – अवधारित, मात्र तब जबकि अभियोजन ऐसी साक्ष्य प्रस्तुत करे जो प्रथम दृष्टया मामला स्थापित करती हो, उन तथ्यों पर विचार करने का प्रश्न उत्पन्न होता है जिन्हें साबित करने का भार अभियुक्त पर होगा।

(ii) परिस्थितिजन्य साक्ष्य की कड़ियां – धारा 313 द.प्र.सं. के अधीन स्पष्टीकरण देने में अभियुक्त की विफलता – क्या परिस्थितियों की श्रृंखला को पूरा करने के लिए एक कड़ी के रूप में उपयोग की जा सकती है? अभिनिर्धारित, नहीं – अभियुक्त द्वारा गलत स्पष्टीकरण देने या स्पष्टीकरण न देने के तथ्य का उपयोग एक अतिरिक्त परिस्थिति के रूप में किया जा सकता है, जबकि अभियोजन द्वारा परिस्थितियों की ऐसी कड़ियां साबित कर दी गई हों जिससे अभियुक्त की दोषिता के अतिरिक्त कोई अन्य निष्कर्ष न निकाला जा सकता हो।

Shivaji Chintappa Patil v. State of Maharashtra

Judgment dated 02.03.2021 passed by the Supreme Court in Criminal Appeal No. 1348 of 2013, reported in (2021) 5 SCC 626

Relevant extracts from the judgment:

It is well-settled that section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof would lie upon the accused.

In the present case, as discussed hereinabove, the prosecution has even failed to prove beyond reasonable doubt, that the death was homicidal.

Another circumstance relied upon by the prosecution is that the appellant failed to give any explanation in his statement under Section 313 CrPC. By now it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain. Reference in this respect could be made to the judgment of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.***

Insofar as the reliance placed by the learned counsel for the State on the judgment of ***State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254*** is concerned, it would reveal that this Court had used the factor of non-explanation under Section 313 CrPC only as an additional link to fortify the finding, that the prosecution had established chain of events unquestionably leading to the guilt of the accused and not as a link to complete the chain.

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245. FAMILY COURTS ACT, 1884 – Section 10
CIVIL PRACTICE:
Family Court – Trial – In the normal circumstances the Family Courts cannot use Video Conferencing in respect of matrimonial matters but in the time of ongoing pandemic the Family Courts are directed to conduct the trials through video conferencing.

कुटुम्ब न्यायालय अधिनियम, 1884 – धारा 10
सिविल प्रथाः
कुटुम्ब न्यायालय – विचारण – सामान्य परिस्थितियों में वैवाहिक प्रकरणों के संबंध में कुटुम्ब न्यायालयों द्वारा वीडियो कान्फ्रेंसिग का उपयोग नहीं किया जा सकता किंतु वर्तमान महामारी के समय में कुटुम्ब न्यायालयों को वीडियो कान्फ्रेंसिग के माध्यम से विचारण संचालित करने हेतु निर्देशित किया गया है।

Anjali Brahmawar Chauhan v. Navin Chauhan
Judgment dated 22.01.2021 passed by the Supreme Court in Review Petition (C) No. 472 of 2018, reported in AIR 2021 SC 2880

Relevant extracts from the judgment:

Due to the ongoing pandemic, physical functioning of the Courts has been stopped since March, 2020. Proceedings in all Courts are being conducted only through video conferencing. In the normal course we would not have directed video conferencing in respect of matrimonial matters as per the judgment of this Court mentioned above (***Santhini v. Vijaya Venketesh, AIR 2017 SC 5745***). However, in the present situation where all proceedings are conducted through video conferencing, we direct the Family Court, District Gautambudh Nagar, U.P. to conduct the trial through video conferencing.

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246. GUARDIANS AND WARDS ACT, 1890 – Section 15
HINDU MARRIAGE ACT, 1955 – Section 26

(i) Custody of child – Visitation rights; grant of – Visitation rights should be granted in such a way that visiting parent and child can meet like parent and child – Such place may be home of the parent or park or a restaurant or any other place where child and parent are comfortable.

(ii) Visitation rights – Place of visit – Whether office of District Legal Services Authority is a suitable place for visit of parent with child? Held, no.

संरक्षकता एवं प्रतिपाल्य अधिनियम, 1890 – धारा 15

हिन्दू विवाह अधिनियम, 1955 – धारा 26

(i) बालक की अभिरक्षा – मुलाकात का अधिकार प्रदान किया जाना – मुलाकात का अधिकार इस तरह से दिया जाना चाहिए कि माता–पिता और बच्चे की मुलाकात माता–पिता और बच्चे की तरह हो सके – ऐसा स्थान माता–पिता का घर या उद्यान या रेस्तरां या कोई अन्य स्थान हो सकता है जो बच्चे और माता–पिता के लिए सुविधाजनक हो।

(ii) मुलाकात का अधिकार – मुलाकात का स्थान – क्या जिला विधिक सेवा प्राधिकरण का कार्यालय बच्चे के साथ माता–पिता की मुलाकात के लिए उपयुक्त स्थान है? अवधारित, नहीं।

Amyra Dwivedi (Minor) Through Her Mother Pooja Sharma Dwivedi v. Abhinav Dwivedi and anr.

Judgment dated 06.03.2020 passed by the Supreme Court in Civil Appeal No. 2067 of 2020, reported in (2021) 4 SCC 698

Relevant extracts from the judgment:

When a court grants visitation rights, these rights should be granted in such a way that the child and the parent who is granted visitation right, can meet in an atmosphere where they can be like parent and child and this atmosphere can definitely not be found in the office of District Legal Services Authority. That atmosphere may be found in the home of the parent or in a park or a restaurant or any other place where the child and the parent are comfortable.

●

247. HINDU MARRIAGE ACT, 1955 – Section 13

NOTARIES ACT, 1952 – Sections 2(d) and 8

(i) Marriage performed by way of affidavit – Validity of – In Hindu Law, marriage is not a contract – Marriage cannot be performed by execution of a marriage affidavit.

(ii) Notaries have never been appointed as Marriage Officer – They cannot notarize affidavit of marriage or divorce.

हिन्दू विवाह अधिनियम, 1955 – धारा 13

नोटरी अधिनियम, 1952 – धाराएं 2(घ) एवं 8

(i) शपथ–पत्र के द्वारा विवाह सम्पन्न किया गया – वैद्यता – हिन्दू विधि में विवाह कोई संविदा नहीं है – विवाह शपथ–पत्र का निष्पादन करके विवाह नहीं किया जा सकता।

(ii) नोटरी कभी भी विवाह अधिकारी के रूप में नियुक्त नहीं किए गए हैं – वे विवाह अथवा विवाह विच्छेद के शपथ–पत्र को नोटराइज नहीं कर सकते।

Bundel Singh Lodhi v. State of M.P.

Order dated 30.04.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in MCRC No. 15168 of 2021, reported in 2021 (2) MPLJ 323

Relevant extracts from the order:

In Hindu Law, marriage is not a contract. The marriages cannot be performed by execution of a marriage affidavit. Either, the marriage is to be performed by performing Saptpadi, or in accordance with custom. Marriage can also be performed as per the provisions of Special Marriage Act or as per the provisions of other Statutes like Anand Marriage Act, 1909 etc.

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

Divorce – Cooling off period – If the agony of the parties is going to prolong by the waiting period then in certain circumstances cooling off period may be waived.

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

विवाह विच्छेद – उपशमन अवधि – यदि प्रतीक्षा अवधि से पक्षकारों की यंत्रणा विस्तारित हो रही हो तो कुछ विशेष परिस्थितियों में उपशमन अवधि में छूट दी जा सकती है ।

Madhuri Kumawat v. Abhinav Kumawat

Judgment dated 09.09.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Petition No. 2355 of 2020, reported in 2021 (3) MPLJ 156

Relevant extracts from the judgment:

Where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following :

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties; .

(iv) the waiting period will only prolong their agony."

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249. INDIAN PENAL CODE, 1860 – Section 302

Non-recovery of weapon used – Effect of – For convicting an accused recovery of the weapon used in commission of offence is not a *sine qua non* if credible medical and ocular evidence is available on record.

भारतीय दण्ड संहिता, 1860 – धारा 302

प्रयुक्त हथियार का जप्त न होना – प्रभाव – किसी अभियुक्त को दोषसिद्ध करने के लिए अपराध में प्रयुक्त किए गए हथियार का जप्त किया जाना कोई अनिवार्य शर्त नहीं है यदि अभिलेख पर विश्वसनीय चिकित्सा एवं मौखिक साक्ष्य उपलब्ध है।

Rakesh and anr. v. State of U.P. and anr.

Judgment dated 06.07.2021 passed by the Supreme Court in Criminal Appeal No. 556 of 2021, reported in AIR 2021 SC 3233

Relevant extracts from the judgment:

So far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the fire arm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a *sine qua non*. PW1 & PW2, as observed hereinabove, are reliable and trustworthy eye-witnesses to the incident and they have specifically stated that A1-Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr. Santosh Kumar, PW5. Injury no.1 is by gun shot. Therefore, it is not possible to reject the credible ocular evidence of PW1 & PW2 – eye witnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW1 & PW2 that A1 shot deceased with a gun, particularly as it is corroborated by bullet in the body and also stands corroborated by the testimony of PW2 & PW5. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW1 & PW2.

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250. INDIAN PENAL CODE, 1860 – Section 304-B

EVIDENCE ACT, 1872 – Section 113-B

CRIMINAL PROCEDURE CODE, 1973 – Sections 232 and 233

(i) Dowry death – Presumption when arises? The prosecution must at first establish the existence of the necessary ingredients for constituting an offence u/s 304-B IPC – Once these ingredients are satisfied, the rebuttable presumption of causality, provided u/s 113-B Evidence Act operates against the accused.

(ii) Soon before death – The phrase "soon before" as appearing in section 304-B IPC cannot be construed to mean 'immediately before' – The prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives.

(iii) Regarding law u/s 304-B IPC r/w/s 113-B Evidence Act guiding principles issued.

भारतीय दण्ड संहिता, 1860 – धारा 304–ख

साक्ष्य अधिनियम, 1872 – धारा 113–ख

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 232 एवं 233

(i) दहेज मृत्यु – उपधारणा कब उत्पन्न होती है? – अभियोजन के लिए ये अत्यावश्यक है कि वह सर्वप्रथम धारा 304–ख भा.द.सं. के अपराध को गठित करने वाले आवश्यक संघटकों के अस्तित्व को स्थापित करे – एक बार ऐसे संघटक तुष्ट हो जाते हैं तब साक्ष्य अधिनियम की धारा 113–ख में उपबंधित कार्य व प्रभाव की खण्डनीय उपधारणा अभियुक्त के विरुद्ध प्रवर्तित हो जाती है।

(ii) मृत्यु से ठीक पूर्व – वाक्यांश ''ठीक पूर्व'' जैसा कि धारा 304–ख भा.दं.सं. में दर्शित होता है का अर्थान्वयन 'तुरन्त पहले' के रूप में नहीं किया जा सकता – अभियोजन के लिए आवश्यक है कि वह पति एवं उसके नातेदारों द्वारा दहेज की मांग के लिए की गई क्रूरता अथवा प्रताड़ना की ''निकट एवं सजीव श्रृंखला'' के अस्तित्व को स्थापित करे।

(iii) धारा 304–ख भा.द.सं. सहपठित धारा 113–ख साक्ष्य अधिनियम के संबंध में मार्गदर्शी सिद्धांत जारी किए गए।

Satbir Singh and anr. v. State of Haryana

Judgment dated 28.05.2021 passed by the Supreme Court in Criminal Appeal No. 1735 of 2010, reported in 2021 CriLJ 2609

Relevant extracts from the judgment:

At the cost of repetition, the law under Section 304-B, IPC read with Section 113-B, Evidence Act can be summarized below:

i. Section 304-B, IPC must be interpreted keeping in mind the legislative intent to curb the social evil of bride burning and dowry demand.

ii. The prosecution must at first establish the existence of the necessary ingredients for constituting an offence under Section 304-B, IPC. Once these ingredients are satisfied, the rebuttable presumption of causality, provided under Section 113-B, Evidence Act operates against the accused.

iii. The phrase "soon before" as appearing in Section 304¬B, IPC cannot be construed to mean 'immediately before'. The prosecution must establish existence of "proximate and live link" between the dowry

death and cruelty or harassment for dowry demand by the husband or his relatives.

iv. Section 304-B, IPC does not take a pigeonhole approach in categorizing death as homicidal or suicidal or accidental. The reason for such non categorization is due to the fact that death occurring "otherwise than under normal circumstances" can, in cases, be homicidal or suicidal or accidental.

v. Due to the precarious nature of Section 304-B, IPC read with 113-B, Evidence Act, Judges, prosecution and defence should be careful during conduction of trial.

vi. It is a matter of grave concern that, often, Trial Courts record the statement under Section 313, CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defense. It ought to be noted that the examination of an accused under Section 313, CrPC cannot be treated as a mere procedural formality, as it based on the fundamental principle of fairness. This aforesaid provision incorporates the valuable principle of natural justice *"audi alteram partem"* as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the court to question the accused fairly, with care and caution.

vii. The Court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defense since the inception of the Trial with due caution, keeping in consideration the peculiarities of Section 304-B, IPC read with Section 113-B, Evidence Act.

viii. Section 232, CrPC provides that, "If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal". Such discretion must be utilized by the Trial Courts as an obligation of best efforts.

ix. Once the Trial Court decides that the accused is not eligible to be acquitted as per the provisions of Section 232, CrPC, it must move on and fix hearings specifically for 'defence evidence', calling upon the accused to present his defense as per the procedure provided u/s. 233, CrPC, which is also an invaluable right provided to the accused.

x. In the same breath, Trial Courts need to balance other important considerations such as the right to a speedy trial. In this regard, we may caution that the above provisions should not be allowed to be misused as delay tactics.

xi. Apart from the above, the presiding Judge should follow the guidelines laid down by this Court while sentencing and imposing appropriate punishment.

xii. Undoubtedly, as discussed above, the menace of dowry death is increasing day by day. However, it is also observed that sometimes family members of the husband are roped in, even though they have no active role in commission of the offence and are residing at distant places. In these cases, the Court need to be cautious in its approach.

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251. INDIAN PENAL CODE, 1860 – Sections 304-B and 498-A

Dowry death and cruelty – Common thread of cruelty exists in both the offences but ingredients of both the offences are not common and must be proved seperately by the prosecution.

भारतीय दण्ड संहिता, 1860 – धाराएं 304–ख एवं 498–क

दहेज मृत्यु एवं क्रूरता – दोनों अपराधों में क्रूरता के सामान्य सूत्र का अस्तित्व होता है किंतु दोनों अपराधों के तत्व एक समान नहीं होते हैं और अभियोजन द्वारा पृथक से साबित किए जाने चाहिए।

Gurmeet Singh v. State of Punjab

Judgment dated 28.05.2021 passed by the Supreme Court in Criminal Appeal No. 1731 of 2010, reported in AIR 2021 SC 2616

Relevant extracts from the judgment:

Therefore, the argument raised by the counsel on behalf of the appellant cannot be accepted as the offences under Section 498-A and Section 304-B, IPC are distinct in nature. Although cruelty is a common thread existing in both the offences, however the ingredients of each offence are distinct and must be proved separately by the prosecution. If a case is made out, there can be a conviction under both the sections.

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***252. INDIAN PENAL CODE, 1860 – Section 306**

EVIDENCE ACT, 1872 – Section 113-A

Abetment to suicide – Only because of married woman committing suicide within seven years of her marriage, presumption u/s 113-A would not be attracted, unless it is shown that her husband or any relative of her husband had subjected her to cruelty, which became a cause of abetment of suicide.

भारतीय दण्ड संहिता, 1860 – धारा 306

साक्ष्य अधिनियम, 1872 – धारा 113–क

आत्महत्या के लिए दुष्प्रेरण – केवल इस कारण कि विवाहित महिला ने अपनी विवाह के सात वर्ष के भीतर आत्महत्या की है, धारा 113–ए की उपधारणा आकर्षित नहीं

होगी, जब तक यह दर्शित नहीं किया जाता कि उसके पति अथवा पति के नातेदार द्वारा उसके साथ क्रूरता कारित की गई थी, जो आत्महत्या के दुष्प्रेरण का कारण बनी।

Tara Chandra v. State of U.P.
Judgment dated 08.03.2021 passed by the Allahabad High Court in Criminal Appeal No. 6043 of 2019, reported in 2021 CriLJ 3267

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253. INDIAN PENAL CODE, 1860 – Section 364-A
Kidnapping for ransom – Essential ingredients explained.
भारतीय दण्ड संहिता, 1860 – धारा 364–क
फिरौती के लिए अपहरण – आवश्यक तत्व समझाए गए।

Shaik Ahmed v. State of Telangana
Judgment dated 26.06.2021 passed by the Supreme Court in Criminal Appeal No. 533 of 2021, reported in 2021 CriLJ 3028

Relevant extracts from the judgment:

The essential ingredients to convict an accused u/s 364-A which are required to be proved by prosecution are as follows:

(i) Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and

(ii) threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or;

(iii) causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organization or any other person to do or abstain from doing any act or to pay a ransom.

Thus, after establishing first condition, one more condition has to be fulfilled since after first condition, word used is "and". Thus, in addition to first condition either condition (ii) or (iii) has to be proved, failing which conviction u/s 364-A cannot be sustained.

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254. INDIAN PENAL CODE, 1860 – Sections 396 and 412
EVIDENCE ACT, 1872 – Sections 3 and 45
APPRECIATION OF EVIDENCE:

(i) Child witness – Credibility of – Incident occurred inside the house where child witness would naturally be available – But there were glaring inconsistencies on the record that he had witnessed the incident – Held, he is not reliable.

(ii) Fingerprint – Clarity in process of collection – If the fingerprints were picked from the glasses allegedly used by the accused, there is nothing to indicate what method was applied and whether such method is a trusted and tested one – The

concerned person was not examined, who could have thrown light on these issues – There is, thus, no clarity in the process adopted by the investigating machinery – Held, fingerprint report cannot be relied upon.

(iii) Fringprint report – Nature of – Held, evidence of fingerprint expert is not substantive evidence and can only be used to corroborate the items of substantive evidence which are otherwise on record.

भारतीय दण्ड संहिता, 1860 – धाराएं 396 एवं 412

साक्ष्य अधिनियम, 1872 – धाराएं 3 एवं 45

साक्ष्य का मूल्यांकनः

(i) बाल साक्षी की विश्वसनीयता – घटना घर के अंदर घटित हुई जहां बालक साक्षी की उपलब्धता स्वाभाविक होगी – परन्तु अभिलेख पर उसके द्वारा घटना देखे जाने के विरूद्ध स्पष्ट विरोधाभास उपलब्ध थे – अवधारित, वह विश्वासनीय नहीं है।

(ii) अंगुली चिन्ह – एकत्रित करने की प्रक्रिया में स्पष्टता – यदि अंगुली चिन्ह कांच के ग्लासों से लिए गए थे जो अभियुक्त द्वारा कथित रूप से उपयोग में लाये गये थे, तो ऐसा दर्शित करने के लिए कोई सामग्री नहीं है कि कौन सी प्रक्रिया अपनाई गई और ऐसी प्रक्रिया विश्वसनीय एवं परीक्षित थी – संबंधित व्यक्ति का परीक्षण नहीं किया गया जो इन बिन्दुओं पर प्रकाश डाल सकता था – इस प्रकार, अन्वेषण अभिकरण द्वारा अपनाई गई प्रक्रिया में कोई स्पष्टता नहीं है – अवधारित, अंगुली चिन्ह प्रतिवेदन पर विश्वास नहीं किया जा सकता है।

(iii) अंगुली चिन्ह प्रतिवेदन की प्रकृति – अवधारित, अंगुली चिन्ह विशेषज्ञ की साक्ष्य तात्विक साक्ष्य नहीं है और इसका उपयोग मात्र अभिलेख पर अन्यथा उपलब्ध सरवान् साक्ष्य के घटकों की पुष्टि के लिए किया जा सकता है।

Hari Om alias Hero v. State of Uttar Pradesh

Judgment dated 05.01.2021 passed by the Supreme Court in Criminal Appeal No. 1256 of 2017, reported in 2021 CriLJ 1062 (Three Judge Bench)

Relevant extracts from the judgment:

It is true that the assertion made by him that Hari Om used to be a tenant in their house was supported by PW2 Ompal Singh. Even if we accept that accused Hari Om was a known face to PW5 Ujjwal, and the fact that the incident occurred inside the house where PW5 Ujjwal would naturally be available, but on the issue whether he had witnessed the incident, the glaring inconsistencies on record cannot be discarded. In ***Suryanarayana v. State of Karnataka, (2001) 9 SCC 129*** after setting out the guiding principles for appreciation and consideration of the evidence of a child witness, this Court had found in paragraph 9, that there were no doubts at all with regard to the veracity to the testimony of the

child witness, nor were there any inherent defects. The name of the child witness figured in that case in the FIR and Inquest; and right from the initial stages, her presence was adverted to, which is why no doubts could be entertained. However, such doubts and defects are quite evident in the present matter.

If the fingerprints were picked from the glasses there is nothing to indicate what method was applied to lift the fingerprints from the glasses allegedly used by the Accused when they were offered water. What the record indicates is that some photographs were sent to the office of the Director, Fingerprint Bureau, Lucknow and nothing more. It does not show the procedure adopted for taking such photographs, and whether such method is a trusted and tested one. The concerned person was not examined, who could have thrown light on these issues. The record also does not show whether those glasses by themselves were made available for appropriate analysis. There is, thus, no clarity in the process adopted by the investigating machinery.

In any case, apart from the fingerprints, there was nothing else on record against these two accused. It was observed by this Court in ***Musheer Khan alias Badshah Khan and anr. v. State of Madhya Pradesh, (2010) 2 SCC 748***:

> "34. It will be noticed that under the Evidence Act, the word "admissibility" has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Evidence Act. But one thing is clear that evidence of fingerprint expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record."

It must be stated that both Sanjay @ Sonu and Saurabh @ Sanju were unknown faces to PW5 Ujjwal, and were not subjected to any Test Identification. Apart from identification by PW5 Ujjwal in Court for the first time, there is no other material to establish their presence. Thus, even if we accept that fingerprints lifted from the house of the deceased could be associated with the said two accused, that by itself, in the absence of any substantive piece of evidence, cannot be made the basis of their conviction. These accused are therefore entitled to the benefit of doubt.

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255. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Section 12

Bail – A juvenile in conflict with law cannot claim bail as a matter of right in a heinous crime u/s 12 of the Act – If the release is going to defeat "ends of justice" then such juvenile should not be released on bail.

किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम, 2015 – धारा 12

जमानत – अधिनियम की धारा 12 के अंतर्गत कोई विधि का उल्लंघन करने वाला किशोर जघन्य अपराध के संबंध में जमानत का दावा एक अधिकार के रूप में नहीं कर सकता है – यदि रिहाई से न्याय का उद्देश्य विफल होने की आशंका है तो ऐसे किशोर को जमानत पर नहीं छोड़ना चाहिए।

X v. State of M.P.

Order dated 22.10.2020 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1800 of 2020, reported in ILR (2021) MP 966 [Note : Name of child is withheld]

Relevant extracts from the order:

In my opinion, the words 'ends of justice' should be confined to the fact which shows that grant of bail itself is likely to a result in injustice and as per the exception provided under Section 12 (1) of the Act, 2015 if the Court finds that release would defeat the 'ends of justice' then bail can be denied to a juvenile.

I am not convinced that the bail can be claimed by a juvenile as a matter of right and can be granted to the juvenile without considering the gravity of offence and nature of crime committed by him. As per the provisions of Section 12 of the Act, 2015, it is clear that there was no intent of the legislature to consider the grant of bail to a juvenile as his absolute right and that is why it carved out an exception under which bail can be denied, otherwise there was no occasion to attach proviso with Section 12(1) of the Act, 2015.

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***256. LAND REVENUE CODE, 1959 (M.P.) – Sections 109 and 110**
CIVIL PROCEDURE CODE, 1908 – Section 5

(i) Mutation proceedings – Tahsildar dismissed the application for mutation on the ground of delay – Held, Revenue Officer doing mutation beyond period of 6 months has to be more circumspect in passing the order of mutation, but only on ground of delay, he cannot refuse to do mutation of undisputed cases.

(ii) Revenue Courts – Procedure to be followed – When there is no express provision made in MPLRC or rules made thereunder, CPC is to be followed by Revenue Courts for smooth functioning – CPC is not to be followed when there is express provision under MPLRC or rules made thereunder.

भू–राजस्व संहिता, 1959 (म.प्र.) – धाराएं 109 एवं 110

सिविल प्रक्रिया संहिता, 1908 – धारा 5

(i) नामांतरण कार्यवाही – तहसीलदार ने विलम्ब के आधार पर नामांतरण आवेदन खारिज कर दिया – अभिनिर्धारित, राजस्व अधिकारी को छः माह की अवधि के पश्चात् नामांतरण करने में अधिक सतर्क रहना चाहिए किन्तु अविवादित मामलों

में केवल विलम्ब के आधार पर नामांतरण करने से इंकार नहीं किया जा सकता है।

(ii) राजस्व न्यायालय – पालन की जाने वाली प्रक्रिया – जब म.प्र. भू–राजस्व संहिता में अथवा उसके अधीन निगमित नियमों में अभिव्यक्त उपबंध नहीं हैं, तब राजस्व न्यायालयों को सुविधा से कार्य करने के लिए सिविल प्रक्रिया संहिता का अवलंब लेना चाहिए – जब म.प्र. भू–राजस्व संहिता या उसके अधीन बनाए गए नियमों में स्पष्ट उपबंध हों तब सिविल प्रक्रिया संहिता का अवलंब नहीं लिया जा सकता है।

Dr. Rajdeep Kapoor v. Mohd. Sarwar Khan and anr.
Order dated 06.01.2021 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 6597 of 2019, reported in 2021 (2) MPLJ 452

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257. LAND REVENUE CODE, 1959 (M.P.) – Section 165(7-b)
Leased property – Sale – A lessee has no right to sell the property which was leased by State in his favour because transfer of ownership rights is not included in lease.

भू–राजस्व संहिता, 1959 (म.प्र.) – धारा 165(7–ख)
पट्टाकृत संपत्ति – विक्रय – एक पट्टाधारी के पक्ष में राज्य द्वारा पट्टा की गई संपत्ति का पट्टाधारी को विक्रय करने का अधिकार नहीं होता है क्योंकि पट्टे में स्वत्व संबंधी अधिकार का अंतरण सम्मिलित नहीं होता है।

Saroj Chand v. Premwati and anr.
Judgment dated 11.05.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Appeal No. 345 of 2020, reported in 2021 (3) MPLJ 103

Relevant extracts from the judgment:

It is clear that the lease is the transfer of a right to enjoy such property made for a certain time only but it does not include transfer of ownership right. Lease is granted to the landless persons by the State so that they may earn their livelihood by cultivating the land. That means, the ultimate object of grant of lease is to facilitate a person to earn livelihood by cultivating the land. If the lease property is sold out or transferred in any manner by the lessee, that is against the provision of Section 165 (7-b) of the M.P. Land Revenue Code. This *modus operandi* of the lessee frustrates the object and intent of Section 165 (7-b) of M.P. Land Revenue Code.

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258. LIMITATION ACT, 1963 – Section 5

Condonation of delay – Filing of an application u/s 5 for condonation of delay before the Court in writing is not mandatory – The Court after using its discretion may condone delay even without written application.

परिसीमा अधिनियम, 1963 – धारा 5

विलंब क्षमा किया जाना – विलंब क्षमा किये जाने हेतु न्यायालय के समक्ष धारा 5 के अंतर्गत लिखित आवेदन प्रस्तुत किया जाना आज्ञापक नहीं है – न्यायालय द्वारा अपने विवेकाधिकार का उपयोग करते हुए लिखित आवेदन के बिना भी विलंब क्षमा किया जा सकता है।

Sesh Nath Singh and anr. v Baidyabati Sheoraphuli Co-operative Bank Ltd and anr.

Judgment dated 22.03.2021 passed by the Supreme Court in Civil Appeal No. 9198 of 2019, reported in AIR 2021 SC 2637

Relevant extracts from the judgment:

Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/ applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so.

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259. LIMITATION ACT, 1963 – Section 5

Condonation of delay – Inordinate delay in filing appeal by the State should not be condoned merely on the ground of transfer of OIC or illness of dealing clerk – For filing such cases of inordinate delay, costs should be imposed on the State for wasting judicial time.

परिसीमा अधिनियम, 1963 – धारा 5

विलंब क्षमा किया जाना – राज्य द्वारा अपील प्रस्तुत करने में किये गये अत्यधिक विलंब को मात्र प्रभारी अधिकारी के स्थानांतरण या संबंधित लिपिक की बीमारी जैसे आधारों पर क्षमा नहीं किया जाना चाहिए – ऐसे अत्यधिक विलंबित प्रकरण प्रस्तुत कर न्यायालय का समय नष्ट किये जाने के कारण राज्य पर परिव्यय भी अधिरोपित किया जाना चाहिए।

M.P. Housing Board, Gwalior v. Shanti Devi & ors.

Order dated 23.03.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Second Appeal No. 348 of 2017, reported in ILR (2021) MP 938

Relevant extracts from the order:

Considering the pronouncement of the Apex Court in the case of ***State of M.P. and ors. v. Bherulal, (2020) 10 SCC 654***, period of huge delay of 6972 days, no case for condonation of delay is made out. Accordingly, I.A.No.3154/2017, an application for condonation of delay is hereby dismissed. As a consequence, Second Appeal is also dismissed as time barred.

Taking into consideration the inordinate delay, the appellant being the instrumentality of the State must pay for the wastage of judicial time. This Court considers it appropriate to impose cost on the appellant-Board of ₹ 20,000/- (Rupees Twenty Thousand) to be deposited with the M.P. Legal Services Authority.

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260. LIMITATION ACT, 1963 – Article 58

Limitation – Starting point – Without specific denial by the other shareholders to the plaintiff/shareholder for giving their share, limitation for filing suit for partition does not start.

परिसीमा अधिनियम, 1963 – अनुच्छेद 58

परिसीमा – प्रारंभ बिंदु – वादी/अंशधारियों को अन्य अंशधारियों द्वारा उनका अंश देने से विनिर्दिष्ट रूप से इंकार किये बिना विभाजन के लिये वाद प्रस्तुत किये जाने की परिसीमा प्रारंभ नहीं होती है।

Kamla Bai and ors. v. Prem Bai and ors.

Judgment dated 18.03.2020 passed by the High Court of Madhya Pradesh in Second Appeal No. 713 of 2001, reported in 2021 (3) MPLJ 143

Relevant extracts from the judgment:

Since there was no specific denial by mother and brother of the plaintiff to give her share in the property, that demand cannot be considered to be the starting point of limitation for filing suit for declaration. On the contrary, as per the statement made by the plaintiff in para-4 it is clear that her brother had assured her to give her share in future.

The first appellate court has rightly observed that there was no denial by the defendants to the plaintiff for giving her share and, therefore, in view of the decisions of the Supreme Court, as quoted hereinabove, there was no infringement of right and the cause of action did not accrue to the plaintiff by that point of time.

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261. MOTOR VEHICLES ACT, 1988 – Section 128

Contributory negligence – Tripling on motorcycle – A presumption of contributory negligence cannot be raised against the driver of motorcycle only on the basis of driving along with two pillion riders.

मोटरयान अधिनियम, 1988 – धारा 128

योगदायी उपेक्षा – मोटरसायकल पर तीन सवारी – मोटरसायकल चालक के विरूद्ध मात्र इस आधार पर अंशदायी उपेक्षा की उपधारणा नहीं की जा सकती कि वह अपने पीछे दो सवारियों को बैठाकर वाहन चला रहा था।

Devendra Gupta v. Manoj Kumar Yogi and anr.

Judgment dated 27.02.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 2483 of 2019, reported in 2021 ACJ 2046

Relevant extracts from the judgment:

It is clear that violation of section 128 of the Motor Vehicles Act *per se* by a motorcyclist does not raise a presumption of contributory negligence on his part. Therefore, whether the driver of the motorcycle was guilty of contributory negligence or not, is to be adjudicated on the basis of facts and circumstances of each case.

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262. MOTOR VEHICLES ACT, 1988 – Sections 147(1) and 157

Theft of vehicle – Liability of insurance company – After theft of any motor vehicle, if insurance company compensate the owner for theft and does not cancel the insurance policy then after seizure of the stolen vehicle, by virtue of section 157 of the Motor Vehicles Act, the insurance company itself becomes owner of the vehicle and is liable to pay compensation to the injured/legal representatives of the deceased under Motor Vehicles Act, 1988.

मोटरयान अधिनियम, 1988 – धाराएं 147(1) एवं 157

वाहन की चोरी – बीमा कंपनी का दायित्व – किसी मोटरयान के चोरी हो जाने के पश्चात् यदि बीमा कंपनी वाहन स्वामी को चोरी के लिए प्रतिकर प्रदान कर देती है और बीमा पालिसी को निरस्त नहीं करती है तब चोरी हुए वाहन की जप्ती के पश्चात् मोटरयान अधिनियम की धारा 157 के प्रावधान के अनुसार बीमा कंपनी स्वयं उस वाहन की स्वामी हो जाती है और मोटरयान अधिनियम, 1988 के अंतर्गत किसी आहत/मृतक के विधिक प्रतिनिधियों को प्रतिकर का भुगतान करने के लिये उत्तरदायी है।

Reliance General Insurance Co. Ltd. v. Karibai and ors.

Judgment dated 05.11.2020 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Appeal No. 3815 of 2017, reported in 2021 ACJ 1818

Relevant extracts from the judgment:

As deposition of DW-1, the appellant insurance company has got the papers of the vehicle signed by the owner with an undertaking that if the vehicle is recovered, then the insurance company would be the owner of the vehicle. Therefore, by virtue of Section 157 of the Motor Vehicles Act, the appellant Insurance Company has become the owner of the vehicle as well as insurer of the vehicle. The vehicle in question has been recovered in Crime Nos. 506/2010 and 507/2010 and nothing is on record to believe that respondent No.5 has ever claimed the said vehicle on 'Supurdiginama' being the owner of the vehicle. The insurance policy was very much effective on the date of the accident which has never been cancelled by the appellant insurance company. The insurance policy remained valid even after the transfer of the owner by virtue of section 157 of the Motor Vehicles Act, 1988. Therefore, the appellant insurance company is not only liable to pay the compensation as an insurer of the vehicle but also as the owner of the vehicle.

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263. MOTOR VEHICLES ACT, 1988 – Section 166

Contributory negligence – Pillion rider – Only sleeping by pillion rider itself does not come under the purview of contributory negligence.

मोटरयान अधिनियम, 1988 – धारा 166

योगदायी उपेक्षा – पीछे बैठा सवार – दोपहिया वाहन पर पीछे बैठे सवार का सो जाना मात्र योगदायी उपेक्षा की श्रेणी में नहीं आता है।

Branch Manager, National Insurance Co. Ltd. v. Laxmi Bai and ors.

Judgment dated 01.05.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Appeal No. 2078 of 2016, reported in 2021 ACJ 1398

Relevant extracts from the judgment:

It is clear that the vehicle was driven by Jamna Vishwakarma. He was driving the vehicle at high speed therefore he was not able to control the vehicle as buffaloes came in front of motorcycle. Had driver been careful then he would have been able to stop the vehicle. Even if we assume for a moment that pillion rider had slept then also if vehicle was driven in controlled speed driver could have taken control of the vehicle and it could have been stopped after applying break. Since motorcycle could not be stopped and it fell into the trench by the side of the road makes it clear that vehicle was not under control of driver and driven negligently. Therefore, it cannot be said that accident has occurred due to negligence of deceased himself and the claimants are not entitled to get compensation amount.

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264. MOTOR VEHICLES ACT, 1988 – Section 166
CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 3
Substitution of legal representatives – Application filed under Order 22 Rule 3 of CPC in a claim petition should not be dismissed on hyper technical ground of non-filing of delay condonation application – Such technical objections should not come in the way of doing full and complete justice between the parties.

मोटरयान अधिनियम, 1988 – धारा 166

सिविल प्रक्रिया संहिता, 1908 – आदेश 22 नियम 3

विधिक प्रतिनिधियों का प्रतिस्थापन – एक दावा याचिका में प्रस्तुत आवेदन अंतर्गत आदेश 22 नियम 3 सि.प्र.सं. को विलंब क्षमा किये जाने हेतु आवेदन प्रस्तुत नहीं किये जाने जैसे अति–तकनीकी आधार पर अस्वीकार नहीं किया जाना चाहिए – ऐसी तकनीकी आपत्तियों को पक्षकारों के संदर्भ में पूर्ण एवं उचित न्याय करने के मध्य नहीं आना चाहिए।

Radha Dahiya v. Rajesh Kesharwani and ors.
Judgment dated 10.02.2020 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 2675 of 2019, reported in 2021 ACJ 1490

Relevant extracts from the judgment:

This Court is of the considered opinion that the learned Member of the Claims Tribunal has wrongly dismissed the petitioner's application filed under Order 22 Rule 3 of CPC on hyper technical ground for not filing the application for condonation of delay.

In our opinion, such technical objections should not come in doing full and complete justice between the parties.

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265. MOTOR VEHICLES ACT, 1988 – Section 166(1)(c)
Claim petition – Legal representative – Major son of deceased is also included in the term of legal representative and he is also entitled for compensation.

मोटरयान अधिनियम, 1988 – धारा 166(1)(ग)

दावा याचिका – विधिक प्रतिनिधि – मृतक का वयस्क पुत्र भी विधिक प्रतिनिधि की श्रेणी में आता है और वह भी प्रतिकर पाने का अधिकारी है।

Shriram General Insurance Co. Ltd. v. Asha Devi and ors.
Judgment dated 07.09.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 2 of 2014, reported in 2021 ACJ 1649

Relevant extracts from the judgment:

It is not the case of the appellant that the respondent Nos. 2 to 4 had independent income. Accordingly, the first contention of the counsel for the appellant that the respondent Nos. 2 to 4 were not entitled for compensation for the reason that the respondent Nos. 2 to 4 are major sons of the deceased cannot be accepted and, therefore, the personal expenses of the deceased were rightly taken as 1/4th.

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266. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
CRIMINAL PROCEDURE CODE, 1973 – Section 311
CONSTITUTION OF INDIA – Article 141

(i) Binding precedent – Where the Supreme Court takes into consideration a statutory provision and thereafter gives a finding with reasons, or in other words, interprets a statutory provision, though the same may not have been necessary for the decision of the core issue of the case before it, the same being an *obiter dicta* of the Supreme Court, would still be a binding precedent under Article 141 on all Courts judicially subordinate to the Supreme Court.

(ii) Examination of sanctioning authority through video conferencing – Sanctioning authority is not a material witness but only a witness to a fact of procedural fulfilment – Thus, there can be no objection from the accused to the examination and cross-examination of the sanctioning authority through the medium of video conferencing.

भ्रष्टाचार निवारण अधिनियम, 1988 – धारा 19

दण्ड प्रक्रिया संहिता, 1973 – धारा 311

भारत का संविधान – अनुच्छेद 141

(i) बाध्यकारी पूर्व न्याय – जहाँ उच्चतम न्यायालय विधिक उपबंध को विचार में लेता है और उसके बाद सकारण अभिनिश्चय देता है या दूसरे शब्दों में विधिक उपबंध का निवर्चन करता है, यद्यपि ऐसा उनके समक्ष उस प्रकरण में निर्णय के लिए महत्वपूर्ण बिन्दु के रूप में आवश्यक न हो, वह उच्चतम न्यायालय के इतरोक्ति के रूप में अधीनस्थ समस्त न्यायालयों पर अनुच्छेद 141 के अंतर्गत पूर्व निर्णय के रूप में बाध्यकारी बना रहेगा।

(ii) मंजूरी प्राधिकारी का वीडियो कॉन्फ्रेंसिंग के माध्यम से परीक्षण – मंजूरी प्राधिकारी तात्विक साक्षी नहीं है परन्तु मात्र प्रक्रिया के तथ्यों को पूर्ण करने हेतु एक साक्षी है – अतः अभियुक्त की ओर से मंजूरी प्राधिकारी का वीडियो कॉन्फ्रेंसिंग माध्यम से परीक्षण एवं प्रतिपरीक्षण किए जाने में कोई आपत्ति नहीं हो सकती।

State of M.P. SPE Lokayukta, Jabalpur v. Ravi Shankar Singh and ors.

Order dated 02.11.2020 passed by the High Court of Madhya Pradesh in Review Petition No. 1010 of 2020, reported in ILR (2020) MP 2663 (DB)

Relevant extracts from the order:

Judgments are not to be interpreted as statutes and they must be read in the context in which they are passed. In ***Haryana Financial Corporation v. Jagdamba Oil Mills and anr., AIR 2002 SC 834*** the Supreme Court held that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. The Supreme Court strongly emphasises that judgements should not be read and applied pedantically. It would lie upon the Court applying the judgement of the Supreme Court to cull the *ratio decedendi* and distinguish it from the *obiter dicta* of the Court.

As regards the inconvenience that pre-trail (*sic trial*) examination of the sanctioning authority may cause to senior civil servants, who are invariably the sanctioning authority, the present global crisis due to the corona virus, has uncovered solutions which were existing from before, but never explored. The State is blessed with one of the best IT infrastructures existing in the country. This Court has held in paragraph 25 of the impugned order that the sanctioning authority is not a material witness but only a witness to a fact of procedural fulfilment. Thus, there can be no objection from the accused to the examination and cross-examination of the sanctioning authority through the medium of video conferencing. The sanctioning authority would not have to leave the comfort of his home or office, and yet testify before the Trial Court about the validity of the sanction order. No time would be wasted in travelling and no expenditure incurred and so, in view of what has been discussed, the impracticality in implementation of guideline (a), is negated by this Court and the prayer of the Petitioner to review the impugned order on this ground is also rejected.

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267. RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016 – Sections 2(r), 2(s) and 20

CONSTITUTION OF INDIA – Articles 14, 19 and 21

(i) Scheme of disability under 2016 Act – Explained – Held, 2016 Act has more inclusive definition of "person with disability" evidencing shift from medical model of disability to social

model of disability which recognized societal and physical constraint at heart of exclusion of persons with disabilities from full and effective participation in society.

(ii) Right of persons with disabilities – Principle of reasonable accommodation – Discussed.

(iii) Grant of facility of scribe in competitive examination – Requirement of benchmark disability – Held, is not sustainable – Appellant was suffering from chronic neurological condition "writer's cramp" making it difficult for him to write a conventional examination granted facility of scribe – Directions issued to Ministry of Social Justice and Empowerment to frame appropriate policy.

दिव्यांगजन अधिकार अधिनियम, 2016 – धाराएं 2(द), 2(ध) एवं 20
भारत का संविधान – अनुच्छेद 14, 19 व 21

(i) 2016 के अधिनियम के अधीन विकलांगता की योजना – स्पष्ट की गई – अवधारित, 2016 के अधिनियम में ''दिव्यांगजन'' की अधिक समावेशी परिभाषा है, जो विकलांगता के चिकित्सा मॉडल से विकलांगता के सामाजिक मॉडल में परिवर्तन का द्योतक है, जो सामाजिक और शारीरिक बाधाओं के कारण दिव्यांगजनों की समाज में पूर्ण और प्रभावी भागीदारी से निवारित करने को स्वीकार करती है।

(ii) दिव्यांगजनों के अधिकार – युक्तियुक्त आवासन का सिद्धांत – चर्चा की गई।

(iii) प्रतियोगी परीक्षा में लेखक की सुविधा प्रदान किया जाना – संदर्भित विकलांगता की आवश्यकता – अवधारित, धारणीय नहीं है – अपीलार्थी पुरानी न्यूरोलॉजिकल स्थिति ''राइटर्स क्रैम्प'' से पीड़ित था और उसके लिए एक पारंपरिक परीक्षा में लिखना मुश्किल हो गया था, अतः उसे लेखक की सुविधा दी गई – सामाजिक न्याय और अधिकारिता मंत्रालय को उचित नीति तैयार करने के लिए निर्देश जारी किए गए।

Vikash Kumar v. Union Public Service Commission and ors.
Judgment dated 11.02.2021 passed by the Supreme Court in Civil Appeal No. 273 of 2021, reported in (2021) 5 SCC 370 (Three Judge Bench)

Relevant extracts from the judgment:

The principle of reasonable accommodation captures the positive obligation of the State and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society. The concept of reasonable accommodation is developed in section (H) below. For the present, suffice it to say that, for a person with disability, the constitutionally guaranteed fundamental rights to equality, the six freedoms and the right to life under Article 21 will ring hollow if they are not given this additional support that helps make these rights real and meaningful for them. Reasonable accommodation is the

instrumentality — are an obligation as a society — to enable the disabled to enjoy the constitutional guarantee of equality and non-discrimination. In this context, it would be apposite to remember R.M. Lodha, J's (as he then was) observation in ***Sunanda Bhandare Foundation v. Union of India, (2014) 14 SCC 383***, where he stated:

> "… In the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief oriented and not obstructive or lethargic."

The 2016 RPwD Act was a landmark legislation which repealed the 1995 Act and brought Indian legislation on disability in line with the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD"). Under the old regime, disability was simply characterised as a medical condition devoid of any understanding of how disability is produced by social structures that cater to able-bodied persons and hamper and deny equal participation of persons with disabilities in the society. Section 2(t) of the 1995 Act defined a "person with disability" in the following terms:

> **"2(t) "person with disability"** means a person suffering from not less than forty per cent of any disability as certified by a medical authority;"

The 2016 RPwD Act has a more inclusive definition of "persons with disability" evidencing a shift from a stigmatising medical model of disability under the 1995 Act to a social model of disability which recognises that it is the societal and physical constraints that are at the heart of exclusion of persons with disabilities from full and effective participation in society. Section 2(s) of the 2016 RPwD Act [which we have analysed in paras 35-37 above] provides:

> **"2(s) "person with disability"** means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;"

The principle of reasonable accommodation has found a more expansive manifestation in the 2016 RPwD Act. Section 3 of the 2016 RPwD Act goes beyond a formal guarantee of non-discrimination by casting affirmative duties and obligations on the Government to protect the rights recognised in Section 3 by taking steps to utilise the capacity of persons with disabilities "by providing appropriate environment". Among the obligations which are cast on the Government is the duty to take necessary steps to ensure reasonable accommodation for persons with disabilities. The concept of reasonable accommodation in Section 2(y) incorporates making "necessary and appropriate modification and adjustments" so long as they do not impose a disproportionate or undue burden in a particular case to ensure to persons with disability the enjoyment or exercise of rights equally with others. Equality, non-discrimination and dignity are the essence of the protective ambit of the 2016 RPwD Act.

x x x

Insofar as the case of the appellant is concerned, his condition has been repeatedly affirmed by several medical authorities including National Institute of Mental Health and Neuro Sciences (NIMHANS), Bangalore and AIIMS. The AIIMS report which was pursuant to the order [***Vikas Kumar v. UPSC, 2020 SCC OnLine SC 1119***] of this Court is clear in opining that the appellant has a specified disability inasmuch as he has a chronic neurological condition. This condition forms part of Entry IV of the Schedule to the 2016 RPwD Act. The writer's cramp has been found successively to be a condition which the appellant has, making it difficult for him to write a conventional examination. To deny the facility of a scribe in a situation such as the present would negate the valuable rights and entitlements which are recognised by the 2016 RPwD Act.

We, therefore, hold and declare that the appellant would be entitled to the facility of a scribe for appearing at the Civil Services Examination and any other competitive selection conducted under the authority of the Government.

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268. SCHEDULED CASTE AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 3(1)(r), 3(1)(s), 3(2)(va), 18 and 18-A

CRIMINAL PROCEDURE CODE, 1973 – Section 41(1)(b)(ii)

INDIAN PENAL CODE, 1860 – Sections 34, 294, 323 and 506

CRIMINAL TRIAL:

(i) Offence under Act of 1989 – Nature of – Whether the offences of IPC which are bailable in nature and allegation thereof if made u/s 3(2)(va) of the Act of 1989 can also be considered as bailable? Held, yes – If the special enactment is silent on the point of punishment, then schedule of CrPC will be applicable.

(ii) Anticipatory bail under the Act of 1989 – Bar – Sections 18 and 18-A of the Act of 1989 restricts the application of Section 438 of CrPC – However, if the offences are bailable in nature, need to get anticipatory bail does not arise.

(iii) Whether direction regarding arrest issued by the Supreme court in *Arnesh Kumar v. State of Bihar and anr., (2014) 8 SCC 273* are applicable to the offences committed under the Act of 1989? Held, yes, where the offences involved in the case are not punishable with more than 7 years of imprisonment.

अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम, 1989 – धाराएं 3(1)(द), 3(1)(ध), 3(2)(v-क), 18 एवं 18–क

दण्ड प्रक्रिया संहिता, 1973 – धारा 41(1)(ख)(ii)

भारतीय दण्ड संहिता, 1860 – धाराएं 34, 294, 323 एवं 506

आपराधिक विचारणः

(i) अधिनियम 1989 के अंतर्गत अपराध की प्रकृति – क्या भा.द.सं. के अपराध जो कि जमानतीय प्रकृति के हैं और उनके आक्षेप अधिनियम 1989 की धारा 3(2)(v-

क) के अंतर्गत लगाए गए हों तब उन्हें भी जमानतीय के रूप में विचार में लिया जाएगा? अवधारित, हाँ – यदि विशेष अधिनियम दण्ड के प्रश्न पर मौन है तब द.प्र.सं. की अनुसूची प्रयोज्य होगी।

(ii) अधिनियम 1989 के अंतर्गत अग्रिम जमानत – प्रतिबंध – अधिनियम 1989 की धारा 18 और 18–क द.प्र.सं. की धारा 438 की प्रयोज्यता को निषेधित करती है – हालांकि, यदि अपराध जमानतीय प्रकृति के होते हैं तो अग्रिम जमानत प्राप्त करने की आवश्यकता उत्पन्न नहीं होती।

(iii) क्या उच्चतम न्यायालय द्वारा गिरफ्तारी के संबंध में *अर्नेश कुमार विरूद्ध बिहार राज्य, (2014) 8 एससीसी 273* के प्रकरण में जारी दिशा–निर्देश अधिनियम 1989 के संबंध में प्रयोज्य हैं? अवधारित, हाँ, जहाँ ऐसे अपराध जो प्रकरण में आलिप्त हैं 7 वर्ष के कारावास से अधिक अवधि से दण्डनीय नहीं है।

Anil Patel and ors. v. State of M.P. and ors.

Judgment dated 01.04.2021 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 5838 of 2020, reported in ILR (2020) MP 746

Relevant extracts from the judgment:

The Act does not contain any provision which states whether the offence of Section 3(2)(va) of SC/ST is bailable or non-bailable. The offence made under Section 3(2)(va) of Act, 1989 is punishable with the same punishment for the offence under the Indian Penal Code. Under the IPC, it is specified in the Schedule that the punishment prescribed for an offence under any law other than IPC is less than 3 years or with fine only, such offence shall be treated as bailable. Here in the case, the appellants are facing allegation of Section 323 and 506 of IPC under Section 3(2)(va) of Act, 1989 which are not having punishment of more than 3 years and thus, same are bailable in nature. It is settled proposition of law that if the special enactment is silent on the above referred point, then Schedule of IPC will be applicable. Section 18 and 18-A of the Act, 1989 restrict the application of Section 438 of Cr.P.C. but when the offences are bailable in nature and need to get anticipatory bail does not arise then Section 18 and 18-A of Act 1989 would not be applicable in the said circumstances. Therefore, this Court is of the opinion that in the present case, the offence of Section 3(2)(va) of Act, 1989 be treated as bailable in nature and the right to bail of a person who is accused of only bailable offence, is absolute and indefeasible as per the Code of Criminal Procedure.

Since, the offences involved in the case are not punishable with more than 7 years of imprisonment and Section 41(1) of Cr.P.C. provides that the offences for which punishment prescribed is imprisonment for a term upto seven years, the accused may be kept in custody only if the condition enumerated in Section 41(1)(b)(ii) of Cr.P.C. exist. In ***Arnesh Kumar v. State of Bihar and anr., (2014) 8 SCC 273***, the Hon'ble Apex Court has held as under:-

".....the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused....."

In view of the observations laid down in the judgment referred above, I deem fit to direct as under :

(i) That, the police may resort to the extreme step of arrest only when the same is necessary and the appellants fail to cooperate in the investigation.

(ii) That, the appellants should first be summoned to cooperate in the investigation. If the appellants cooperate in the investigation then the occasion of their arrest should not arise.

(iii) That, if the appellants-accused are arrested and want to file application for regular bail before trial Court, then they will be produced before the trial Court without any delay subject to prior intimation to the complainant. Trial Court is also directed to consider their bail application as expeditiously as possible, preferably, on the same day after giving an opportunity to the complainant to oppose.

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269. SERVICE LAW:

Adverse remarks against subordinate judicial officer – Expunction of – Held, there cannot be any adverse remark against judicial officer without first giving him an opportunity to explain his conduct – Further, overall criticism should not depart from sobriety, moderation and reserve.

सेवा विधिः

अधीनस्थ न्यायिक अधिकारी के विरुद्ध प्रतिकूल टिप्पणी – विलोपन – अवधारित, न्यायिक अधिकारी के विरुद्ध कोई प्रतिकूल टिप्पणी पहले उसे अपने कृत्य को स्पष्ट करने का अवसर दिए बिना नहीं की जा सकती है – इसके साथ–साथ, समग्र आलोचना को संयम, समभाव और निग्रह से परे नहीं होना चाहिए।

K.G. Shanti v. United India Insurance Company Ltd. and ors.

Order dated 16.03.2021 passed by the Supreme Court in Civil Appeal No. 929 of 2021, reported in (2021) 5 SCC 511

Relevant extracts from the order:

The submission of the learned counsel for the appellant is that the appellant has been condemned unheard and the observations have serious consequences so far as her judicial career is concerned.

We are in agreement with the learned counsel for the appellant that the appellant cannot be condemned unheard. We must notice at the threshold that the language used is extremely strong and the court should be circumspect in

using such language while penning down its order *qua* judicial officers. We really cannot appreciate the use of this language, whatever may have been the conduct of the appellant.

It was in any case open to the Division Bench, if it found that the impugned judgment of the Tribunal had grave errors which casts some doubt on the performance of the officer, to direct the matter to be taken on the administrative side in which case notice would have been issued to the appellant to explain her conduct and she would have got an opportunity to put forth her point of view and then it would have been open on the administrative side, if so advised to whether to take some action or not.

We may note that the aspect of remarks against subordinate judicial officers and the process for expunging such adverse remarks have formed part of more than one opinion of this Court stating that the power to expunge remarks exists for redressal of a kind of grievance for which law does not provide any other remedy in express terms though it is an extraordinary power [***'K', a Judicial Officer, In re, (2001) 3 SCC 54***].

We may also note that what we have said aforesaid on the language to be deployed has also been opined upon as the overall test of any criticism or observations must be judicial in nature and should not formally depart from sobriety, moderation and reserve [***State of U.P. v. Mohd. Naim, AIR 1964 SC 703***]. It has been categorically laid down that there cannot be an adverse remark made against a judicial officer without first giving an opportunity to the judicial officer to explain his conduct [***Awani Kumar Upadhyay v. High Court of Allahabad, (2013) 12 SCC 392***]. In that context, in fact it has been observed that while our legal system acknowledges the fallibility of the Judges and thus, provides for appeals and revisions, the lower judicial officers mostly work under charged atmosphere and are under psychological pressure and do not have the facilities which are available in the High Court. This, in the given facts of the case, is more so when in the impugned judgment itself it has been found that it is not surprising that when there are concerted efforts by the interested witnesses and the devious claimants, it may become difficult for the Court to get to the bottom of the truth.

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270. SERVICE LAW:

M.P. CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 – Rules 2(f) and 10

Departmental enquiry – Punishment – Things should be done as it is prescribed in the statute and therefore under Rule 10 of CCA Rules punishment of censure cannot be imposed on any retired government servant because retired government servant is not included in the definition of Government Servant as defined in Rule 2(f).

सेवा विधिः

म.प्र. सिविल सेवा (वर्गीकरण, नियंत्रण एवं अपील) नियम, 1966 – नियम 2(च) एवं 10

विभागीय जांच – दण्ड – कोई भी कार्य उसी तरह किया जाना चाहिए जैसा कि किसी विधि में उल्लेखित किया गया है और इस कारण सी.सी.ए. नियम के नियम 10 के अंतर्गत परिनिंदा का दण्ड किसी सेवानिवृत्त शासकीय कर्मचारी पर अधिरोपित नहीं किया जा सकता है क्योंकि सेवानिवृत्त शासकीय कर्मचारी नियम–2(च) में परिभाषित शासकीय कर्मचारी की परिभाषा में सम्मिलित नहीं है।

State of M.P. and anr. v. Vishnu Prasad Maran and anr.
Judgment dated 19.01.2021 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Appeal No. 1280 of 2020, reported in 2021 (3) MPLJ 90

Relevant extracts from the judgment:

For an existing government servant, the punishments are prescribed in Rule 10 of the CCA Rules. Pertinently, Rule 10 of CCA Rules makes it clear that the punishments enumerated in Rule 10 can be imposed on a "government servant". "Government servant" is defined in Rule 2(f) which shows that government servant means a servant who is already in employment. The definition of "government servant" does not include a retired government servant. Thus, the statutory punishments listed in Rule 10 of CCA Rules can be imposed on an existing government servant and not on a retired government servant. For imposing punishment to a retired government servant, a different Rule i.e. Pension Rules is applicable. At the cost of repetition, the pension Rules prescribes punishment of withholding or withdrawing pension and by invoking said Rules, the punishment of "Censure" could not have been imposed on the petitioner. This is trite that if a statute prescribes a thing to be done in a particular manner it has to be done in the same manner and other methods are forbidden.

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271. SPECIFIC RELIEF ACT, 1963 – Sections 10, 31 and 34
ARBITRATION AND CONCILIATION ACT, 1996 – Sections 8, 11 and 16
EVIDENCE ACT, 1872 – Sections 41, 42, 43, 65, 74 and 76

(i) Arbitrability of dispute – Whether dispute as to specific performance of contract relating to sale of immovable property is arbitrable? Held, yes – Since specific performance is a justiciable issue triable civilly, it can be referred for arbitration.

(ii) Cancellation of instrument – Action is *in rem* or *in personam*? Held, an action for cancellation of deed u/s 31 of Specific Relief Act, 1963 is an action *in personam* – Whether an action for cancellation of a registered instrument is an action *in rem*? Held, no – Registration of instrument is irrelevant to determine the nature of action.

(iii) **Public documents and public record of private documents – Distinction between; explained – Sale deed is private document and its registration will not make it a public document or public record of private document. [*Rekha Rana v. Ratnashree Jain, 2006 (1) MPLJ 103* approved.]**

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 10, 31 एवं 34
माध्यस्थम एवं सुलह अधिनियम, 1996 – धाराएं 8, 11 एवं 16
साक्ष्य अधिनियम, 1872 – धाराएं 41, 42, 43, 65, 74 एवं 76

(i) विवाद का माध्यस्थम योग्य होना – क्या अचल संपत्ति के विक्रय के अनुबंध के विनिर्दिष्ट अनुपालन का विवाद माध्यस्थम योग्य है? अवधारित, हाँ – चूंकि विनिर्दिष्ट अनुपालन एक सिविल न्यायालय द्वारा विचारणीय विषय है, इसे माध्यस्थम हेतु प्रेषित किया जा सकता है।

(ii) लिखत का रद्दकरण – कार्रवाई सर्वबंधी है अथवा व्यक्तिबंधी? अवधारित, विनिर्दिष्ट अनुतोष अधिनियम, 1963 की धारा 31 के अधीन विलेख को रद्द करने की कार्रवाई व्यक्तिबंधी कार्रवाई है – क्या एक पंजीकृत लिखत को रद्द करने की कार्रवाई सर्वबंधी कार्रवाई है? अवधारित, नहीं – कार्रवाई की प्रकृति का निर्धारण करने के लिए लिखत का पंजीकृत होना अप्रासंगिक है।

(iii) लोक दस्तावेज और निजी दस्तावेजों के लोक अभिलेख का विभेद – समझाया गया – विक्रय विलेख एक निजी दस्तावेज है और इसका पंजीकरण इसे लोक दस्तावेज या निजी दस्तावेज का लोक अभिलेख नहीं बना देगा। [*रेखा राणा विरुद्ध रत्नाश्री जैन, 2006 (1) एमपीएलजे 103* पुष्ट।]

Deccan Paper Mills Company Ltd. v. Regency Mahavir Properties and ors.

Judgment dated 19.08.2020 passed by the Supreme Court in Civil Appeal No. 5147 of 2016, reported in (2021) 4 SCC 786 (Three Judge Bench)

Relevant extracts from the judgment:

A perusal of the judgment in ***Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651*** would show that this Court was faced with differing views taken by the High Courts as to whether specific performance of a contract relating to immovable property is at all arbitrable. The Delhi High Court in ***Sulochana Uppal v. Surinder Sheel Bhakri, AIR 1991 Del 138*** (hereinafter referred to as *"Sulochana Uppal"*) had held that specific performance of an agreement could not be granted by an arbitrator.

An action that is started under Section 31(1) cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled. The suit that is filed for cancellation cannot be in personam only for unregistered instruments by virtue of the fact that the decree for cancellation does not involve its being sent to the registration office

— a ministerial action which is *subsequent* to the decree being passed. In fact, in ***Gopal Das v. Sri Thakurji, AIR 1943 PC 83***, a certified copy of a registered instrument, being a receipt dated 29-3-1881 signed by the owner, was held not to be a public record of a private document under Section 74(2) of the Evidence Act, 1872 for the reason that the original has to be returned to the party under Section 61(2) of the Registration Act, 1908. This judgment has been followed in ***Rekha v. Ratnashree, 2006 (1) MPLJ 103*** by a Division Bench of the Madhya Pradesh High Court, in which it was held:

> "A deed of sale is a conveyance. A deed of conveyance or other document executed by any person is not an act nor record of an act of any sovereign authority or of any official body or tribunal, or of any public officer, legislative, judicial and executive. Nor is it a public record kept in a State of any private documents. A sale deed (or any other deed of conveyance) when presented for registration under the Registration Act, is not retained or kept in any public office of a State after registration, but is returned to the person who presented such document for registration, on completion of the process of registration. An original registered document is not therefore a public record kept by a State of a private document. Consequently, a deed of sale or other registered document will not fall under either of the two classes of documents described in Section 74, as "public documents". Any document which is not a public document is a private document. We therefore have no hesitation in holding that a registered sale deed (or any other registered document) is not a public document but a private document.
>
> This position is made abundantly clear in ***Gopal Das v. Sri Thakurji*** (supra), wherein the Privy Council considering the question whether a registered receipt is a public document observed thus:
>
> > '… It was contended by Sir Thomas Strangman for the respondents that the receipt comes within para 2 of Section 74, Evidence Act, and was a "public document"; hence under Section 65(e) no such foundation is required as in cases coming within clauses (a), (b) and (c) of that section. Their Lordships cannot accept this argument since the original receipt of 1881 is not "a public record of a private document". The original has to be returned to the party.… A similar argument would appear at one time to have had some acceptance in India but it involves a misconstruction

of the Evidence Act and the Registration Act and later decisions have abandoned it.'

We may also refer to the following passage from Ratanlal's Law of Evidence (19th Edn., p. 237):

> *'Public document [Clause (e)]* — This clause is intended to protect the originals of public records from the danger to which they would be exposed by constant production in evidence. Secondary evidence is admissible in the case of public documents mentioned in Section 74. What Section 74 provides is that public records kept in any State of private documents are public documents, but private documents of which public records are kept are not in themselves public documents. A registered document, therefore, does not fall under either clause (e) or (f) [of Section 65 of the Evidence Act, 1872]. The entry in the register book is a public document, but the original is a private document.'"

Thus, the *factum* of registration of what is otherwise a private document inter partes does not clothe the document with any higher legal status by virtue of its registration.

Also, it must be remembered that the Delhi High Court's reasoning in ***Sulochana Uppal*** (supra) that it is the court alone that can, under the Specific Relief Act, enforce specific performance of an agreement, is contra to the reasoning in ***Olympus*** (supra) which overruled it, stating that "the dispute or difference which parties to an arbitration agreement agree to refer must consist of justiciable issues triable civilly". Since specific performance is a justiciable issue triable civilly, obviously, the expression "court" occurring throughout the Specific Relief Act will have to be substituted by "the arbitrator" or "the Arbitral Tribunal".

Also, in an instructive judgment of this Court in ***Suhrid Singh v. Randhir Singh, (2010) 12 SCC 112***, in the context of the Court Fees Act, 1870 this Court held:

> "Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or *non est*, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/ conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is

invalid/void and *non est*/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs 19.50 under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an *ad valorem* court fee as provided under Section 7(iv)(c) of the Act."

The reasoning in the aforesaid judgment would again expose the incongruous result of Section 31 of the Specific Relief Act being held to be an *in rem* provision. When it comes to cancellation of a deed by an executant to the document, such person can approach the court under Section 31, but when it comes to cancellation of a deed by a non-executant, the non-executant must approach the court under Section 34 of the Specific Relief Act, 1963. Cancellation of the very same deed, therefore, by a non-executant would be an action *in personam* since a suit has to be filed under Section 34. However, cancellation of the same deed by an executant of the deed, being under Section 31, would somehow convert the suit into a suit being in rem. All these anomalies only highlight the impossibility of holding that an action instituted under Section 31 of the Specific Relief Act, 1963 is an action *in rem*.

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272. SPECIFIC RELIEF ACT, 1963 – Sections 20 and 21
LAND ACQUISITION ACT, 1894 – Section 3
THE RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Section 3
Specific performance of agreement to sale – Property acquired by State during pendency of suit – Effect of decree in such suit – Held, decree-holder will be deemed to be in the shoes of defendant and will be entitled to entire amount of compensation along with interest and solatium – Defendant shall also be entitled to expenditure incurred in culmination of the award.

विनिर्दिष्ट अनुतोष अधिनियम, 1963 – धाराएं 20 एवं 21
भू–अर्जन अधिनियम, 1894 – धारा 3
भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, 2013 – धारा 3

विक्रय अनुबंध का विनिर्दिष्ट अनुपालन – वाद लंबन के दौरान राज्य द्वारा संपत्ति अधिग्रहित की गई – ऐसे वाद में आज्ञप्ति का प्रभाव – अभिनिर्धारित, आज्ञप्तिधारी प्रतिवादी की प्रास्थिति में माना जाएगा और प्रतिकर की संपूर्ण राशि के साथ–साथ ब्याज एवं तोषण की राशि का भी अधिकारी होगा – प्रतिवादी भी अधिनिर्णय पारित होने में उपगत व्यय का अधिकारी होगा।

Sukhbir v. Ajit Singh

Judgment dated 30.04.2021 passed by the Supreme Court in Civil Appeal No. 1653 of 2021, reported in AIR 2021 SC 2622

Relevant extracts from the judgment:

The plaintiff will be deemed to be in the shoes of the defendant and therefore shall be entitled to the amount of compensation, determined and awarded under the provisions of the Land Acquisition Act.

Now so far as the amount of compensation is concerned, as observed by this Court in the case of ***Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647*** the compensation determined and awarded under the Land Acquisition Act may safely be taken into consideration. Therefore, the High Court has rightly observed and held that the plaintiff shall be entitled to the entire amount of compensation awarded under the Land Acquisition Act together with interest and solatium. However, at the same time, the defendant – original land owner shall also be entitled to the deduction therefrom of money value of the services, time and energy expended in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award.

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***273. STAMP ACT, 1899 – Sections 33, 35 and 38**

Insufficiently stamped document; impounding of – Whether such document may be returned to the party who has chosen not to place reliance upon the document in evidence? Held, no – Court or authority before whom such document is brought is duty bound to impound the same – Such document cannot be returned back to the concerned party without recovery of proper stamp duty.

स्टाम्प अधिनियम, 1899 – धाराएं 33, 35 एवं 38

अपर्याप्त रूप से स्टाम्पित दस्तावेज का परिबद्ध किया जाना – क्या ऐसा दस्तावेज उस पक्षकार को लौटाया जा सकता है जिसने साक्ष्य के रूप में दस्तावेज प्रस्तुत नहीं करने का विकल्प चुना हो? अवधारित, नहीं – न्यायालय या प्राधिकारी जिसके समक्ष ऐसा दस्तावेज लाया गया है, उसे परिबद्ध करने के लिए बाध्य है – उचित स्टाम्प शुल्क की वसूली के बिना ऐसा दस्तावेज संबंधित पक्षकार को वापस नहीं किया जा सकता है।

Mukesh Kumar v. Kulvinder Singh (dead) through LRs. Jaspreet Kaur and ors.

Order dated 10.03.2021 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Petition No. 2045 of 2018, reported in 2021 (3) MPLJ 448

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274. STAMP ACT, 1899 – Section 35 and Schedule 1-A, Article 5(3)(i)

(i) Nature of document – "Agreement to sell" or "sale" – By executing the agreement to sell, the intention of the parties was to terminate the relationship of landlord and tenant – Therefore, the nature of possession also got altered – Possession of the property in dispute was delivered to the respondent in the capacity of transferee under contract – So agreement to sell would be chargeable under article 5(3)(i) of schedule 1-A.

(ii) Registered document – Determination of stamp duty – Whether Court can look into insufficiency of stamp duty? Held, yes – Merely because the agreement to sell is a registered document, it does not mean that the insufficiency of the stamp duty cannot be looked into by the Court.

स्टाम्प अधिनियम, 1899 – धारा 35 एवं अनुसूची 1–ए, अनुच्छेद 5(3)(i)

(i) दस्तावेज का स्वरूप – ''विक्रय का अनुबंध'' या ''विक्रय'' – विक्रय का अनुबंध निष्पादित करते हुए पक्षकारों का आशय मकान मालिक एवं किराएदार के संबंध समाप्त करने का था – परिणामस्वरूप आधिपत्य का स्वरूप भी परिवर्तित हुआ – संविदा के अंतर्गत विवादित संपत्ति प्रत्यर्थी को अंतरिति के रूप में हस्तांतरित की गई – अतः विक्रय का अनुबंध अनुसूची 1–क के अनुच्छेद 5(3)(i) के अंतर्गत प्रभार्य होगा।

(ii) पंजीकृत विलेख – स्टाम्प शुल्क का निर्धारण – क्या न्यायालय स्टाम्प शुल्क की अपर्याप्तता पर विचार कर सकती है? अभिनिर्धारित, हाँ – मात्र इसलिए कि विक्रय का अनुबंध एक पंजीकृत विलेख है, इसका अर्थ यह नहीं है कि न्यायालय द्वारा स्टाम्प शुल्क की अपर्याप्तता को विचार में नहीं लिया जा सकता।

Rajendra Kumar Agrawal v. Anil Kumar and anr.

Order dated 22.01.2020 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Petition No. 80 of 2020, reported in ILR (2020) MP 2462

Relevant extracts from the order:

Thus, by executing the agreement to sell, the intention of the parties was to terminate the relationship of landlord and tenant. Therefore, the nature of possession of the respondent no.1 also got altered because the relationship of landlord and tenant was terminated and it was also observed that the respondent

no.1 shall not be liable to pay rent and the status of the respondent no.1 would be that of owner.

If the above referred clause of the agreement to sell is considered, then it is clear that there was a clear intention of the parties to terminate the landlord tenant relationship and the possession of the respondent was altered from that of tenant to that of transferee under the contract. Thus, it is held that although the agreement to sell was termed as without possession but in fact the possession of the property in dispute was delivered to the respondent no.1 in the capacity of transferee under contract.

In the present case since, the possession of the respondent no.1 was altered from that of tenant to that of transferee under contract, therefore, this Court is of the considered opinion, that the agreement to sell would be a conveyance and hence, it was insufficiently stamped. Merely because the agreement to sell is a registered document, therefore, it does not mean, that the sufficiency of the stamp duty cannot be looked into by the Court.

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***275. STAMP ACT, 1899 – Sections 49 and 50**

Refund of stamp duty – When permissible – In the case of setting aside of auction sale, the stamp duty and registration charges must be refunded by the State to purchaser.

स्टाम्प अधिनियम, 1899 – धाराएं 49 एवं 50

स्टाम्प शुल्क की वापसी – कब अनुज्ञेय है – नीलामी विक्रय अपास्त करने की स्थिति में राज्य द्वारा क्रेता को स्टाम्प शुल्क और पंजीयन शुल्क अवश्य वापस किया जाना चाहिए।

State of Madhya Pradesh and anr. v. M/s. Supratech Hospital Pvt. Ltd. and anr.

Judgment dated 08.04.2021 passed by the High Court of Madhya Pradesh in Writ Appeal No. 75 of 2021, reported in AIR 2021 MP 122

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PART - II A

GUIDELINES FOR CRIMINAL COURTS WHILE CONSIDERING BAIL APPLICATIONS AT THE STAGE OF FILING OF CHARGESHEET

Three recent judgments of Hon'ble Supreme Court on interpretation of Section 170 Cr.P.C. have been circulated to all the trial courts for information and guidance. These judgments have put an end to one of the most uncertain and controversial aspect of bail i.e., at the stage of filing of chargesheet.

Often, we encounter cases where accused is not arrested during investigation and chargesheet is filed either in absence of accused or accused appears on notice of investigation officer. There is no doubt when the alleged offence is bailable one, however, in cases of non-bailable offences or offences exclusively triable by Court of Sessions, Magistrates and Judges of Special Courts find themselves in diabolic situation as to whether bail may be granted to such an accused or not.

Hon'ble Supreme Court has considered this issue in detail firstly in ***Siddharth v. State of Uttar Pradesh, 2021 SCC Online SC 615***, then in ***Aman Preet Singh v. C.B.I., 2021 SCC Online SC 941*** and lastly in ***Satender Kumar Antil v. Central Bureau of Investigation, 2021 SCC Online SC 922***. The ratio of the above judgments is that an accused of a non-bailable offence whose custody was not required during investigation by the investigating agency, is entitled to be released on bail at the time of filing of chargesheet. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because chargesheet has been filed would be contrary to the governing principles for grant of bail.

It has been further held that unnecessary bail matters should not come up to higher courts.

Hon'ble Supreme Court has issued guidelines in ***Satender Kumar Antil*** (supra) to be followed by trial courts while considering bail applications. The guidelines are as under :

Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5)), Companies Act, (S.212(6)), etc.

D) Economic offences not covered by Special Acts.

Requisite Conditions

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

[No need to forward such an accused along with the chargesheet, ***Siddharth*** (supra)]

Category A -

After filing of chargesheet/complaint taking of cognizance -

a) Ordinary summons should be issued at the first instance including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) Non Bailable Warrant may be issued on failure to appear despite issuance of Bailable Warrant.

d) Non Bailable Warrant may be cancelled or converted into a Bailable Warrant/ Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the Non Bailable Warrant on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided Without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

Category B/D -

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

Category C -

Same as Category B & D with the additional condition of compliance of the provisions of bail under NDPS S. 37, 45 PMLA, 212(6) Companies Act, 43D(5) of UAPA, POSCO etc.

Additional Precautionary Measures -

- The category A above deals with both police cases and complaint cases.
- The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications.
- Where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons, when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit.

- While issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. Naturally the bail application to be ultimately considered, would be guided by the statutory provisions.
- In case of special category of offences as "Economic Offences" not covered by the special Acts, Supreme Court in ***Sanjay Chandra v. CBI, (2012) 1 SCC 40*** has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account: a) seriousness of the charge and b) severity of punishment. Thus, "Economic Offences" form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

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"Justice in accordance with law does not mean mechanical or robotic justice or disposing of cases for statistical purposes. It means the Judge has to decide the maximum number of cases to the best of his ability, by practicing and upholding high ethical standards. The Judge, by his conduct, by his decision-making process, and by rendering decisions fairly, equitably and justly, earn the trust and respect for the judiciary from the public and from the members of the bar."

R.V. Raveendran, J.

"How to be a Good Judge-Advice to New Judges"

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 07.09.2021 OF THE LAW AND LEGISLATIVE AFFAIRS DEPARTMENT, GOVERNMENT OF MADHYA PRADESH REGARDING AMENDMENT IN MADHYA PRADESH JUDICIAL SERVICE (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1994

F. No. 3349/XXI-B(One)/2021 – In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, hereby makes the following amendments in the Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994, namely:-

AMENDMENT

In the said rules,-

1. For rule 16, the following rule shall be sustituted, namely:-

"16. Superannuation Age.-

(1) (a) Subject to the provisions of sub-rule (2) and (3) every member of the service shall retire from the services in the afternoon of the last day of the month, in which he attains the age of 60 (Sixty) years provided he is found fit and suitable to continue after 58 (fifty eight) years of age in service by the High Court:

Provided that a member of service whose date of birth is the first day of a month shall retire from service in the afternoon of the last day of the preceding month on attaining the age of 60 (sixty) years.

(b) Without prejudice to the provisions contained in sub-rule (2), a member of the service not found fit and suitable shall be compulsorily be retired on his attaining the age of 58 years.

(2) Notwithstanding anything to the contrary contain in these Rules or any other rules for the time being in force, a member of the service may, in public interest, be retired at any time after he has completed 10 years of service, or on attaining the age of 50 years, whichever is earlier.

(3) For the purpose of the sub-rule (1) and (2), the Chief Justice may constitute a Screening Committee for the scrutiny and assessment of such member of the service, based on his past record of service, character rolls, quality of judgments, orders and other relevant matters like his integrity, reputation and utility to the Service etc."

2. After rule 16A. the following rule shall be added, namely:-

"16A. Resignation and Execution of Bond.-

The candidate upon regular appointment, will execute a Bond for a sum of Rs. Five lacs, and give an undertaking that, after joining service he will serve for a minimum period of three years. In case he resigns from service

or leaves service in any other manner, before the above mentioned period, he shall pay a sum of Rs. Five lacs or three months pay and allowances, whichever is higher. in case of breach of conditions, the entire amount of the Bond would be liable to be forfeited:

Provided that where the officer is tendering resignation for accepting the job in the Central Government or the State Government of Madhya Pradesh, with prior permission he may not be required to pay the amount of bond."

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NOTIFICATION DATED 06.04.1992 OF THE EXCISE DEPARTMENT, GOVERNMENT OF MADHYA PRADESH EMPOWERING OFFICERS OF THE EXCISE DEPARTMENT UNDER VARIOUS PROVISIONS OF MADHYA PRADESH EXCISE ACT, 1915

Notification No. B-1-89-85-CT-V, dated the 6th April 1992. – In exercise of the powers conferred by clause (c) of Section 7 of the Madhya Pradesh Excise Act, 1915 (II of 1915) and in supersession of all previous notifications issued in this behalf, the State Government hereby appoints the officers of the Excise Department as specified in column (2) of the table below to exercise the powers specified in column (3) thereof in the area specified in corresponding column (4) of the said table :–

S. No.	Officers of the Excise Department	Power under Sections of the Madhya Pradesh Excise Act, 1915	Jurisdiction
(1)	(2)	(3)	4)
1.	Deputy Commissioner Excise, State Flying Squad	39 (a), 51, 52, 54, 54-A, 55 (1), 55 (3) and 59.	Whole of Madhya Pradesh
2.	Assistant Commissioner Excise, Divisional Flying Squad.	39 (a), 51, 52, 54, 54-A, 55 (1), 55 (3) and 59.	In the division of posting & by special orders of the Excise Commissioner in whole of Madhya Pradesh.
3.	District Excise Officer, State/ Divisional Flying Squad.	39 (a), 51, 52, 54, 54-A, 55 (1), 55 (3) and 59.	In the area of posting & by Special Order of the Excise Commissioner in the area specified in the order.
4.	Excise Inspector, State / Divisional Flying Squad.	39 (a), 51, 52, 54, 54-A, 55 (1), and 59.	In the area of posting
5.	Excise Sub-Inspector State/ Divisional Flying Squad.	39 (a), 51, 52, 54, 54-A, 55 (1), and 59.	In the area of posting
6.	Excise Head Constable/ Constable/ Peon, State/ Divisional Flying Squad.	39 (a) and 52	In the area of posting

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH EXCISE (AMENDMENT) ACT, 2021

[Received the assent of the Governor on the 6th September, 2021; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary) dated the 14th September, 2021]

An Act further to amend the Madhya Pradesh Excise Act, 1915.

Be it enacted by the Madhya Pradesh Legislature in the seventy-second year of the Republic of India as follows:–

1. Short title and commencement. – (1) This Act may be called the Madhya Pradesh Excise (Amendment) Act, 2021.

(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Substitution of section 4. – For section 4 of the Madhya Pradesh Excise Act, 1915 (No. 2 of 1915) (hereinafter referred to as the principal Act), the following section shall be substituted, namely:–

> **"4. Power to declare "country liquor", "foreign liquor" and "heritage liquor".** – For the purposes of this Act, or any part thereof, the State Government may, by notification, declare what, shall be deemed to be "country liquor", "foreign liquor" and "heritage liquor".

3. Amendment of section 34. – In section 34 of the principal Act, in sub-section (4), for the words, bracket and figure "sub-section (2)", the words, bracket and figure "sub-section (3)" shall be substituted.

4. Deletion of section 35. – Section 35 of the principal Act shall be deleted.

5. Amendment of section 37. – In section 37 of the principal Act, for the words "one thousand rupees", the words "ten thousand rupees" shall be substituted.

6. Amendment of section 38-A. – In section 38-A of the principal Act, for the words "three hundred rupees" and "two thousand rupees" the words "thirty thousand rupees" and "two lakh rupees" shall be substituted respectively.

7. Amendment of section 40-A. – In section 40-A of the principal Act, for the words "two years" and "two thousand rupees", the words "three years" and "three thousand rupees" shall be substituted respectively.

8. Amendment of section 49-A. – In section 49-A of the principal Act, –

(i) in sub-section (1), for clause (i), (ii) and (iii), the following clauses shall be substituted, namely:–

"(i)	if found unfit for human	– with imprisonment which shall not be less than six months, but which may extend to six years and also with fine which shall not be less than one lakh rupees;

(ii)	causes injury to human being –	with imprisonment which shall not be less than two years but which may extend to eight years and also with fine which shall not be less than two lakh rupees;
(iii)	causes death of a human	with imprisonment which shall not be less than ten years but which may extend to imprisonment for life and also with fine which shall not be less than five lakh rupees.”;

(ii) for sub-section (2), the following sub-section shall be substituted, namely:–

“(2) When any person is convicted under this section for a second or subsequent offence, he shall be punished in relation to circumstances–

(a)	under clause (i) of sub-section (1)	with imprisonment which shall not be less than six years but which may extend to ten years and also with fine which shall not be less than five lakh rupees;
(b)	under clause (ii) of sub- section (1)	with imprisonment which shall not be less than ten years but which may extend to fourteen years and also with fine which shall not be less than ten lakh rupees;
(c)	under clause (iii) of sub- section (1)	with death or imprisonment for life and also with fine which shall not be less than twenty lakh rupees.”.

(iii) after sub section (2), the following explanation shall be added, namely:–

“**Explanation**.– In this section” denatured spirituous preparation “means any preparation made with denatured spirit and includes liquors, french polish, varnish and thinners prepared out of such spirituous preparation.”

9. Amendment of section 54-A. – In section 54-A of the principal Act, proviso shall be deleted.

10. Amendment of section 61. – In section 61 of the principal Act, in sub-section (1), for clause–

(a), the following clause shall be substituted, namely:–

“(a) under section 34 for the contravention of any condition of license, permit or pass granted under this Act, section 37, section 38, section 38-A, section 39 and section 44, except on a written complaint or report of the Collector or an Excise Officer not below the rank of District Excise Officer as may be authorised by the Collector in this behalf;”.

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मध्यप्रदेश उच्च न्यायालय, खण्डपीठ इन्दौर

मध्यप्रदेश उच्च न्यायालय, खण्डपीठ ग्वालियर

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