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

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धारा **302 -** देखें साक्ष्य अधिनियम, 1872 की धाराएं 7, 30 एवं 32।

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Sections 302 and 34 – Constitution of common intention.

धाराएं **302** एवं **34 -** सामान्य आशय का गठन। **124 (ii) 251**

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112 (ii) 224
Section 304-A – Medical negligence – Appellant not waiting for physician to come soon may be an error of judgment but definitely not of criminal negligence.
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धाराएं **306** एवं **498-**क - धारा 113-क को लागू करने के लिए ''क्रूरता'' के घटकों का मौजूद होना आवश्यक है। **133 276**
Sections 307 and 34 – (i) For attempt to murder, whether fatal injury capable of causing death is essential.
(ii) Sentencing in attempt to murder.
धाराएं 307 एवं 34 - (i) क्या मृत्यु कारित करने के लिये पर्याप्त घातक चोटे, हत्या के प्रयत्न के लिये आवश्यक है।
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Section 376 (1) (g) – Gang rape – No sign of forcible intercourse – Unusual conduct of prosecutrix – In consistencies, contradictions and unnatural conduct – Proxcutrix not reliable – Conduct of prosecutrix is not like victim of forcible rape but submissive and consensual – Defence plea of false implication can be considered.
धारा **376 (1) (**छ) - सामूहिक बलात्संग - बलात् मैथुन का कोई चिन्ह नहीं - अभियोक्त्री का असाधारण आचरण - असंगति, विरोधाभास व असामान्य आचरण - अभियोक्त्री विश्वसनीय नहीं है - अभियोक्त्री का आचरण जबरन बलात्संग की पीड़िता की तरह न होकर सहमति व समर्पण को दर्शित करता है - बचाव पक्ष के बचाव कि उन्हें झूठा फंसाया गया है को स्वीकार किया जा सकता है। **126 257**

JAMMU AND KASHMIR HOUSES AND SHOPE RENT CONTROL ACT, 1966
जम्मू एण्ड काश्मीर गृहों एवं दुकान किराया नियंत्रण अधिनियम, **1966**

Section 11 (1) (h) – Eviction – Bonafide requirement – Requirement of the landlord for own occupation by a member of the family.
धारा **11 (1) (**ज) - निष्कासन - सद्भाविक आवश्यकता - स्वयं के व्यवसाय के लिए मकान मालिक की आवश्यकता में परिवार के एक सदस्य की आवश्यकता शामिल है। **148 300**

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000
किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, **2000**

Sections 12 and 15 – Grant of bail to juvenile, when can be rejected?
धाराएं **12** एवं **15 -** किशोर को जमानत प्रदान किये जाने से कब इंकार किया जा सकता है? **136 279**

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015
किशोर न्याय (बच्चों की देखरेख और संरक्षण) अधिनियम, **2015**

Sections 94 and 111 – Jurisdiction of Sessions Court to determine the age.
धाराएं **94** एवं **111 -** आयु का निर्धारण के संबंध में सत्र न्यायालय का क्षेत्राधिकार। **137 281**

LAW OF PRECEDENTS:
पूर्व निर्णय की विधि:

– Precedents are in binding nature – If the issue has been referred to a larger bench of the Supreme Court, that cannot be the basis to ignore the same.
- पूर्व निर्णय की बाध्यकारी प्रकृति के होते है - किसी विषय को सर्वोच्च न्यायालय की गुरूतर पीठ के लिये भेजा गया है, तो यह उसे अनदेखा करने का आधार नहीं हो सकता है। **140 (ii) 286**

LIMITATION ACT, 1963
परिसीमा अधिनियम **1963**

Article 137 – See Order 20 Rule 18 of Civil Procedure Code, 1908.
अनुच्छेद **137 -** देखें सिविल प्रक्रिया सहिंता, 1908 का आदेश 20 नियम 18। **105 210**

MADHYA PRADESH COMPULSORY REGISTRATION OF MARRIAGES RULES, 2008

– See Section 2 of the Arya Samaj Marriage Validation Act, 1937.
- देखें आर्य समाज विवाह विधिमान्यकरण अधिनियम, 1937 की धारा 2। **128 262**

MADHYA PRADESH VAN UPAJ (VYAPAR VINIMAYAN) ADHINIYAM, 1969

मध्यप्रदेश वन उपज (व्यापार विनिमय) अधिनियम**, 1969**

Sections 5 and 15 – Confiscation proceedings being independent cannot be stayed by releasing the vehicle.
धाराएं **5** एवं **15 -** अधिहरण की कार्यवाही स्वतंत्र होने से, उसे वाहन को प्रदान कर स्थगित नहीं किया जा सकता है। **127 260**

MEDICAL JURISPRUDENCE :

चिकित्सीय न्याय-षास्त्र

Asphyxia – See Section 45 of the Evidence Act, 1872.
दम घुटना (चेतनाभाव) - देखें साक्ष्य अधिनियम, 1872 की धारा 45। **138 282**

MOTOR VEHICLES ACT, 1988

मोटर यान अधिनियम **1988**

Sections 147 (1), 149 and 168 – (i) Death claim – Liability of insurer – Category of third party.
(ii) Claimants of deceased entitled for future prospects.
धाराएं **147 (1), 149** एवं **168 -** (i) मृत्यु के आधार पर दावा - बीमाकर्ता का दायित्व - तृतीय पक्षकार की श्रेणी।
(ii) मृतक के दावेदार भविष्य की संभावनाओं के हकदार है। **139 285**

Section 163-A – Maintainability of claim petition – Provisions of section 163-A have overriding effect on all other provisions of M.V. Act, 1988.
धारा **163-**क - क्लेम याचिका की पोषणीयता - धारा 163-क के प्रावधान, मोटर यान अधिनियम, 1988 के सभी प्रावधानों पर अध्यारोही प्रभाव रखते है। **140 (i) 286**

Sections 163-A and 168 – (i) Liability to pay compensation – Tortfeasor is wholly responsible for payment and not the employer.
(ii) Effect of Compassionate appointment on determination of compensation.
धाराएं **163-**क एवं **168 -** (i) प्रतिकर - भुगतान करने का दायित्व - अपकृत्यकर्ता ही भुगतान के लिये पूर्णतः जिम्मेदार है न कि नियोक्ता।
(ii) प्रतिकर के निर्धारण पर अनुकंपा नियुक्ति का प्रभाव। **141 290**

NEGOTIABLE INSTRUMENTS ACT, 1881

परक्राम्य लिखत अधिनियम**, 1881**

Section 138 – See Section 33 and Article 2(1)(b) of Schedule II of the Court Fees Act, 1870

धारा **138 -** देखें न्यायालय शुल्क अधिनियम, 1870 की धारा 33 एवं अनुसूची-II का अनुच्छेद 2 (1) (ख)। **142 292**

Section 138 – See Sections 357, 421 and 431 of the Criminal Procedure Code, 1973

धारा **138 -** देखें दण्ड प्रक्रिया संहिता, 1973 की धाराएं 357, 421 एवं 431। **143* 293**

Section 141 – Offence by Company – When cheque was bounced, accused Director played no role in activities of the company – Proceedings quashed.

धारा **141 -** कम्पनी द्वारा अपराध - जब चेक अनादृत हुआ तक अभियुक्त डायरेक्टर/निदेशक के द्वारा कंपनी की गतिविधियों में कोई भूमिका नहीं निभाई - कार्यवाही अपास्त की गई। **144 293**

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भागीदारी अधिनियम**, 1932**

Section 69 – Effect of filing of suit by non-registered firm.

धारा **69 -** अपंजीकृत फर्म के द्वारा वाद संस्थित किये जाने का प्रभाव। **145 295**

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

पूर्व गर्भाधान और प्रसव पूर्व निदान तकनीक अधिनियम**, 1994**

– See Article 32 of the Constitution of India

- देखें भारतीय संविधान का अनुच्छेद 32 **108 214**

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) RULES, 1996

पूर्व गर्भाधान और प्रसव पूर्व निदान तकनीक नियम**, 1996**

– See Article 32 of the Constitution of India

- देखें भारतीय संविधान का अनुच्छेद 32 **108 214**

PREVENTION OF MONEY LAUNDERING ACT, 2002
धन शोधन निवारण अधिनियम**, 2002**

Sections 4, 19, 43 and 65 – (i) Offences under PMLA, are cognizable and non-bailable.
(ii) Procedure for investigation for offences under PMLA.
(iii) Court of Additional Session Judge, whether Special Court within the Act.
(iv) Validity of application for ***habeas corpus*** under the Act.

धाराएं 4, 19, 43 एवं 65 - (i) मनी-लान्ड्रिंग निरोध अधिनियम के अंतर्गत अपराध संज्ञेय व अजमानतीय हैं।

(ii) धन शोधन निवारण अधिनियम के अपराधों में अनुसंधान की प्रक्रिया।

(iii) क्या अधिनियम के अन्तर्गत अतिरिक्त सत्र न्यायाधीश का न्यायालय, विशेष न्यायालय हैं ?

(iv) अधिनियम के अंतर्गत बंदी प्रत्यक्षीकरण के आवेदन की वैधता।
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PREVENTION OF MONEY LAUNDERING RULES, 2005
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Rule 3 – See Sections 4, 19, 43 and 65 of the Prevention of Money Laundering Act, 2002.
नियम **3 -** देखें धन शोधन निवारण अधिनियम, 2002 की धाराएं 4, 19, 43 एवं 65। **146*** **296**

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005
घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम**, 2005**

Sections 19(i)(b) and 27 – Residential orders in divorce petition.
धारा **19 (i) (**ख) और **27 -** विवाह विच्छेद की याचिका में आवासीय आदेश।
147 **298**

RENT CONTROL & EVICTION :
किराया नियंत्रण एवं निष्कासन

See Section 11 (1) (h) of the Jammu and Kashmir Houses and Shop Rent Control Act, 1966.
देखें जम्मू एण्ड काश्मीर गृहों एवं दुकान किराया नियंत्रण अधिनियम, 1966 की धारा 11 (1) (ज) **148** **300**

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम, **2002**

Section 34 – See Section 9 of the Civil Procedure Code, 1908.

धारा **34 -** देखें सिविल प्रक्रिया संहिता, 1908 की धारा 9। **103** **207**

SPECIFIC RELIEF ACT, 1963

विनिर्दिष्ट अनुतोष अधिनियम, **1963**

Section 10 – See Section 58 (c) of the Transfer of Property Act, 1882

धारा **10 -** देखें संपत्ति अंतरण अधिनियम, 1882 की धारा 58 (ग)।

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TRANSFER OF PROPERTY ACT, 1882

संपत्ति अंतरण अधिनियम, **1882**

Section 58 (c) – Examination of true nature of document to determine whether the transaction is mortgage by conditional sale or sale out and out is necessary.

धारा **58 (ग)** - यह निर्धारित करने के लिये कि क्या संव्यवहार सशर्त विक्रय द्वारा बंधक हैं या विक्रय, दस्तावेज की वास्तविक प्रकृति की परीक्षा आवश्यक है।

149 **301**

WAKF ACT, 1995

वक्फ अधिनियम, **1995**

Sections 51, 52, 83 and 85 – See Section 9 of the Civil Procedure Code, 1908.

धाराएं **51, 52, 83** एवं **85 -** देखें सिविल प्रक्रिया संहिता, 1908 की धारा 9।

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PART – IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

1. The Child Labour (Prohibition and Regulation) Amendment Act, 2016 **71**

FROM EDITOR'S DESK

Sanjeev Kalgaonkar
Director Incharge

Respected Judges,

With the growth of better infrastructure and high speed automotives, road accidents have increased manifold. Negligence on the part of Licensing Authorities, complete ignorance to the traffic rules, illiteracy and sometimes reckless attitude towards road safety norms are the primary causes of road accidents. The statistics accessible in official publication of the Ministry of Road Transport and Highways – Road Accidents in India, 2016 reveal that nearly 1,50,785 persons were killed in 4,80,652 reported road accidents in 2016. These statistics are certainly an eye-opener. Way back in 1979 when the number of deaths were less than half of that figure Hon'ble Mr. JusticeV. R. Krishna Iyer in ***Rattan Singh v. State of Punjab, (1979) 4 SCC 719*** observed that "More people die of road accidents than by most diseases, so much so the Indian highways are among the top killers of the country."

Inadequacy of punishment prescribed under penal provisions of the Indian Penal Code, 1860 has long been debated in legal circles. Still, no amendment has ever been made in the relevant Sections of 279, 337, 338 and 304A of the Code. In ***State of Punjab v. Saurabh Bakshi, (2015) 5 SCC 182*** the Supreme Court observing that the poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear, urged the lawmakers to scrutinize, re-look and re-visit the sentencing policy in Section 304A, IPC. While endorsing deterrent sentencing policy in cases relating to road accidents and holding that benefit of probation should not be given in cases relating to Section 304A IPC, the Supreme Court in ***Dalbir Singh v. State of Haryana, (2000) 5 SCC 82*** observed as under:

> "When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent

element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic."

The couplet of renowned poet Shri Rahat Indori may depict general sentiment –

नयी हवाओं की सोहबत बिगाड़ देती है,
कबूतरों को खुली छत बिगाड़ देती है;
जो जुर्म करते हैं इतने बुरे नहीं होते,
सज़ा न दे के अदालत बिगाड़ देती है।

Now, the question arises what a Magistrate Court can do to ensure proper punishment for an errant driver and to ensure road safety for innocent law abiding drivers.

The Motor Vehicles Act, 1988 also has certain penal provisions which are rarely applied by the Courts. Sections 20 to 24 provide for power of disqualification, suspension and cancellation of driving licenses and endorsement of such disqualification in the driving license. Section 20 authorizes the Court to disqualify a person from driving motor vehicles for a reasonable period upon his conviction in a traffic offence. Section 20 (2) mandates that if the person is convicted for driving a vehicle in drunken conditions (Section 185), such disqualification should be for a minimum period of six months. Section 21 authorizes freezing of the driving license if a person repeats an offence of dangerous driving and this action can be taken immediately on the registration of the second case. Section 22 empowers the Court to finally cancel the driving license if a person is convicted for dangerous driving causing death of, or grievous hurt, to one or more persons for that class or description of motor vehicles. The cancellation is mandatory if the license holder is convicted for the second offence of driving a motor vehicle in drunken condition. Further, sections 183 and 184 of the Act provide for prison sentence for driving a vehicle at an excessive speed and dangerously in public place.

If the facts and circumstances of the case make out the offence punishable under the Motor Vehicles Act, the Magistrate must frame particulars of such offence and if proved guilty, may resort to punishment like disqualification, suspension and cancellation of driving license as well. While deciding the sentence, the Court must put itself in the position of the victim and also remember that money/compensation cannot be adquate for all redemption.

Needless, to say, the Motor Vehicles Act being a Special Law shall prevail over general provision of the Indian Penal Code. Thus, effective and extensive usage of sections 20 to 24 of the Motor Vehicles Act may create an impact in the scenario of this growing menace.

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

Dealing with the scope of Section 34 of the Arbitration and Conciliation Act, 1996, the Supreme Court in case of ***Kinnari Mullick*** held that Court has no power to remand the matter to Arbitral Tribunal. The Court even cannot exercise limited power ***"suo motu"*** to defer the proceedings. This remedy is to be invoked by the party before award is set aside by the Court.

The Supreme Court in case of ***Venu*** reiterated that no limitation is prescribed for filing of an application for carrying out directions of preliminary decree for passing a final decree. It is observed that an application for drawing up of a final decree in a partition suit is in no way an application contemplated under the Limitation Act. It is a reminder to the Court that something which the Court is obliged to do has not been done, so such an application is not governed by any provision of the Limitation Act.

In case of ***Balakram***, it is held that accused has no right to inspect the case diary but in case the Police Officer uses the entries in the case diary to refresh the memory and if the Court uses for the purpose of contradicting such police officer, then the accused may cross-examine the police officer with reference to those entries. Thus, the right of the accused to cross-examine the Police Officer with reference to the entries in police diary is very much limited.

In case of ***Mahendra Singh Dhoni,*** the Apex Court reiterated the primary judicial responsibility of the Magistrate regarding issuance of process. It is observed that Magistrate must carefully scrutinize whether the allegations made in the complaint meet the basic ingredients of the offence, whether the concept of territorial jurisdiction is satisfied and further whether the accused is really required to be summoned.

The High Court of M.P. in the case of ***Raju Adivasi*** relying upon the ***Hardeep Singh v. State of Punjab, AIR 2014 SC 1400*** held that the consent of

District Magistrate envisaged u/s 7 of the Explosive Substances Act, 1908 may be filed before framing of charge. The restriction envisaged under section 7 of the Act is in respect of trial and not for taking of cognizance by the Magistrate. Therefore, the Court may proceed upto the stage of framing of charges without the consent of the District Magistrate being filed.

In case of ***State of U.P. v. Sunil,*** the Apex Court held that the direction to the accused to provide his fingerprints or footprints cannot be considered as violation of the protection guaranteed under Article 20(3) of the Constitution of India. It is further held that non-compliance of such direction of the Court may lead to adverse inference against the accused.

In the case of ***Ashoke Mal Bafna,*** the Supreme Court while dealing with offence by company u/s 138 of the Negotiable Instruments Act held that the Courts must ensure strict compliance of statutory requirement and settled principles of law before holding the Director vicariously liable. In absence of specific averments about role of Director, the Director cannot be held liable by virtue of his post.

In the case of ***Rajasthan Wakf Board,*** it is laid down by the Supreme Court that the civil Court has no jurisdiction to decide the question whether a property is a wakf property, by virtue of the provisions contained in Section 85 of the Wakf Act, 1995.

In the months of May and June, the Academy conducted Specialised Training Programmes for the Advocates at Gwalior, Administrative Staff of the District Courts and also for the Prosecution Officers at Jabalpur. Induction/Refresher Course on Juvenile Justice (Care & Protection of Children) Act, 2015 for the Principal Magistrates of the Juvenile Justice Boards and First Phase Induction Course for the newly appointed Civil Judges Class II of 2017 Batch (Second Batch) were also conducted.

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

Keep blessing our pursuit for judicial excellence.

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

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HIGH COURT OF M.P., JABALPUR

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(Care and Protection of Children) Act, 2015
16.06.2017 & 17.06.2017

PART – I

A NOTE ON NIRBHAYA'S JUDGMENT

[***Mukesh and another v. State (NCT of Delhi) and others, Criminal Appeal 607-608, 609-10 of 2017 decided on May 5, 2017 reported in (2017) 6 SCC 1***]

– By **Vidhan Maheshwari,**
O.S.D., M.P.S.J.A.

Hon'ble Ms. Justice R. Banumathi in her concurring judgment quoted Mahatma Gandhi in following words -

> *"To call woman the weaker sex is a libel; it is man's injustice to woman. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be. If non-violence is the law of our being, the future is with woman. Who can make a more effective appeal to the heart than woman?"*

The incident of 16.12.2012 in the capital region of the country shook the nation's conscience and in the aftermath of the incident many amendments were brought in criminal law for effective and deterrent implementation of law against sexual offences. Hon'ble Mr. Justice Dipak Misra in his Lordship's Judgment described the incident in following words:

> *"The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do."*

As the incident was highlighted and raised many questions about the security of women and rule of law in India, the investigation was done in the best possible manner with best available tools and the charge sheet was promptly filed on 03.01.2013 with supplementary charge sheet being filed on 04-02-2013.

The judgment of the Supreme Court affirming the judgments of the trial Court and the appellate Court i.e. High Court of Delhi, is very important from the perspective of legal study as many legal issues were discussed in detail by a ***Three Judge Bench of the Supreme Court*.** The Judgment runs into more than 425 pages and covers many important aspects relating to criminal law which have a value of precedent for us. The majority judgment was written by Hon'bleMr. Justice Dipak Misra for himself and Hon'ble Mr. Justice Ashok Bhan while Hon'ble Ms. Justice R. Banumathi delivered a concurring judgment echoing the

views of the majority judgment. This Note tries to bring out the important dictums of the judgment on various issues.

The Prosecution Narrative:

On the night of 16.12.2012 the prosecutrix “Nirbhaya” along with her friend(informant) went to watch a movie. After the show at around 8.30 P.M. they took a private bus for their destination. When they entered the bus they noticed four persons in the cabin of the driver and two behind the driver’s cabin. The prosecutrix and his friend(informant) sat on the left side in the row of two seaters and paid the fare of twenty rupees as demanded. The accused persons in the bus did not allow anyone else to board the bus and the lights inside the bus were put off. Few minutes later three accused later identified as Ram Singh, Akshay and a “juvenile” came out of the driver’s cabin and started abusing the informant. Opposition to the abuse led to an altercation. The informant was beaten up by the accused with the help of an iron rod and was also robbed of personal belongings. The prosecutrix was taken at the rear side of the bus and she was raped by the above three accused one after the other. Ater committing rape, three accused came back and took control of the informant while other accused went to the rear side and raped the prosecutrix one after another. The prosecutrix was also subjected to unnatural sex and her private parts were seriously injured using iron rod and hand in the rectal and vaginal region. The entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands. In the end both the prosecutrix and informant were thrown naked out of the moving bus. The accused also tried to kill the prosecuterix and informant by running over the bus, but they moved from the front of the bus within time.

The prosecutrix and the informant were noticed in naked position having blood all around by one of the witnesses. After calling the police, both of them were taken to Safdarjung Hospital where they were initially treated. Dr. Rashmi Ahuja in her preliminary medical report noticed bruises and injury marks on left eye, right angle of eye, left nostril involving upper lip, bleeding from the upper lips, bite marks over right cheek, left cheek, right breast and lower part of left breast of the prosecutrix. Other than this cut marks and wall tears were also recorded on the private parts which were shouting the manner in which the inhumane and gruesome act was committed. The prosecutrix succumbed to the injuries after few days of the treatment despite of the best medical help.

After the registration of FIR, based on the statements of the prosecutrix, informant and CCTV footages, the bus in question was identified. Also Dying Declarations and statements under Section 164 Cr.P.C. were taken of the prosecutrix. The accused were arrested and based upon their information recoveries of iron rod and personal belongings of the prosecutrix and informant were made. DNA samples of the accused as well as the victims were taken and forensic tests were conducted. After other investigation and forensic inquiries chargesheert was presented against the accused. It is pertinent to note that

one of the culprits being “juvenile” was presented before the Board while one of the accused Ram Singh committed suicide in the jail and proceedings qua him stood abated.

The Trial Court as well as the High Court in appeal convicted all the accused under Section 302, 120-B, 365, 366, 376(2)(g), 377, 307, 201, 395 read with 397 and 412. The accused were sentenced to death as punishment under Section 302 IPC while for different terms of sentences and fine under other Sections.

The Judgment :-

The Supreme Court in its judgment has appreciated all the evidences and every aspect of the investigation. The majority as well as concurring judgment has been divided under various headings based on the issues raised before it. Following points were raised and dealt with accordingly by the Supreme Court-

(1.) Delayed FIR

One of the first attack of the defence was on the manner in which the First Information Report was registered. It was argued that the FIR was recorded with much delay after the initial statements of the informant and it was recorded after deciding the course of the investigation. The Supreme Court discussed the basic principle in this regard as following:

> ***“Delay in setting the law into motion by lodging of complaint in Court or FIR at police station is normally viewed by Courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, it becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused.”***

The Court observed that in the case at hand in the initial stages, the intention of all concerned must have been to save the victim by giving her proper medical treatment. The victim was seriously injured and was in a critical condition and it has to be treated as a natural conduct that providing medical treatment to her was of prime importance. The Court held that even if there is a delay, the same being in ***consonance with natural human conduct*** must not be given any weightage. The Court referred to the case of ***Himachal Pradesh v. Rakesh Kumar, (2009) 6 SCC 308*** wherein it was observed that the first endeavour is always to take the person to the hospital immediately so as to provide him medical treatment and only thereafter report the incident to the police. The Court in the said case further held that every minute was precious and, therefore, it is natural that the witnesses accompanying the deceased first tried to take him to the hospital so as to enable him to get immediate medical treatment. Such action was definitely in accordance with normal human conduct and psychology. The Court, under the said circumstances ruled that in fact, it was a case of quick reporting to the police, without undue delay.

(2.) FIR not an encyclopedia

Next argument of the defence was on the point of non-mentioning of the names of the accused in the FIR. It was also contended that the FIR does not contain description of the bus and use of iron rod, which were later stated by the prosecutrix and informant. The Court held that-

> *"As far as the argument that the FIR does not contain the names of all the accused persons is concerned, it has to be kept in mind that it is settled law that FIR is not an encyclopedia of facts and it is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance.''*

As to the omissions in the FIR the Court observed-

> *"In view of the aforesaid settled position of law, we are not disposed to accept the contention that omission in the first statement of the informant is fatal to the case. We are disposed to think so, for the omission has to be considered in the backdrop of the entire factual scenario, the materials brought on record and objective weighing of the circumstances. The impact of the omission, as is discernible from the authorities, has to be adjudged in the totality of the circumstances and the veracity of the evidence. The involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the FIR."*

The Court held that the FIR contained broad statements as to the overt acts of the accused and other particulars. It is to be remembered that injuries to informant and gruesome manner in which the acts against her friend must have put him in traumatic condition. In such situation he cannot be expected to recall and narrate the entire incident at one instance.

(3.) Improvements in the statements of witnesses.

The statements of the informant were recorded under Section 154 Cr.P.C. for the purpose of FIR, under Section 161 Cr.P.C. by the police and also under Section 164 Cr.P.C. by judicial magistrate. Ultimately he was also examined in the Court as PW 1. The statements of the informant/injured were challenged on the ground of being tutored as there were improvements in the statements at every stage. It was also argued that there are many inconsistencies in the statement of the informant which makes his statements unreliable.

The Supreme Court discussed various case laws relating to contradictions and improvements in statements and also the evidentiary value of the statements of the injured witness and quoted a paragraph of the trial Court as follows-

> *"… It is not expected of a victim to disclose all the finer aspects of the incident in the FIR or in the brief history given to the doctor; as doctor(s) are more concerned with treatment of the victims. More so the victim who suffers from an incident, obviously, is in a state of shock and it is only when we move in his comfort zone, he starts recollecting the events one by one and thus to stop the victim from elaborating the facts to describe the finer details, if left out earlier, would be too much."*

The Supreme Court observed:

> *"The contentions assailing the evidence of PW-1 does not merit acceptance, for at the time when he was first examined his friend (the prosecutrix) was critically injured and he was in a shocked mental condition. The evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution. It is to be weighed whether he was present or not and whether he is telling the truth or not."*

The Court said that the main thing to be seen is whether the omissions go to the root of the matter or pertain to insignificant aspects. Also the improvements need not render the evidence as untrustworthy more so when the informant has no reason to falsely implicate the accused.

(4.) Evidentiary value of the injured witness:

The Court while appreciating the evidence of the informant who was also an injured in the case, observed-

> *"The injuries found on the person of PW-1 and the fact that PW-1 was injured in the same occurrence lends assurance to his testimony that he was present at the time of the occurrence along with the prosecutrix. The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight."*

(5.) Reliability of CCTV footages:

As the crime was committed in a moving bus, the CCTV footages of the bus on the specified route was a relevant piece of evidence for the identification of the bus and linking it to the accused. Many CCTV footages were produced before the Court with a certificate under Section 65B of Evidence Act. The CCTV footages were challenged on the ground that they were not taken properly and also that they were taken in piecemeal.

Prosecution witness who was a computer expert of Forensic division testified that all the data were taken in proper manner in his presence and were also sealed properly. He further testified that because the recording was automatic data being fed on regular basis into the hard disk, the question of tampering with the same could not arise. The Court on appreciation of the evidence found it to be reliable and held the CCTV footage as genuine. Very importantly as to the evidentiary value of the CCTV footage the Court observed:

> *"Once it is proved before the Court through the testimony of the experts that the photographs and the CCTV footage are not tampered with, there is no reason or justification to perceive the same with the lens of doubt."*

The Court rejected all the apprehensions about the CCTV footage and relied on it as one of the grounds linking the accused with the crime.

(6.) Recovery under Section 27 of Evidence Act and incriminating circumstance:

Iron rod used for the assault of the informant and also used for the gruesome act with the prosecutrix were recovered at the instance of the accused. Other than this, blood stained cloths (which were later discovered to be of prosecutrix) and personal belongings of the informant and prosecutrix were also recovered on the basis of disclosure of fact made by the accused. The Court discussed in detail the case law relating to Section 27 of Evidence Act including the ***locus classicus*** of ***Pulukuri Kottaya v. Emperor, AIR 1947 PC 67.*** The Court cited some of the paras of that landmark judgment which were as follows:

> *"In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed a" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

The Court also cited a para of the above judgment by referring to the statement made by one of the accused to the police officer. The statement was:

"About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya."

The Court observed that the Privy Council held that:

> "The whole of that statement except the passage *'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come'* is inadmissible."

After explaining the law relating to Section 27 and appreciating the evidence on record the Court said that the items that have been seized and the places from where they have been seized, as is limpid, are within the special knowledge of the accused persons. No explanation has come on record from the accused persons explaining as to how they had got into possession of the said articles. The Court held that only a simple argument of them being planted will not be sufficient to explain the incriminating circumstance against the accused.

(7.) Dying Declaration of the prosecutrix:

The first dying declaration was recorded by the Medical Officer while recording the history of the case. Later another detailed dying declaration was recorded by SDM in question and answer form. Lastly, an application was moved before a metropolitan Magistrate under Section 164 Cr.P.C. to record statements. The Metropolitan Magistrate went to the hospital to record these statements but as the prosecutrix was not in a position to speak, the statements were recorded in the form of questions with multiple choice answers. This statement recorded through gestures and writings of the prosecuterix.

Thus, three dying declaration of the prosecutrix were on the record. These dying declarations were challenged on the grounds of major improvements, infirmity and being tutored.The third dying declaration was also challenged on the ground of being leading.

The Court observed that the first dying declaration being brief in nature was due to her medical conditions. The Court held-

> *"As it appears from the record, the prosecutrix had lost sufficient quantity of blood due to which she was drowsy and could only give a brief account of the incident and injuries caused to her and the informant. Even though the prosecutrix has given only a brief account of the occurrence, yet she was responding to verbal command and hence, the same is natural and trustworthy and furthermore, Ex. PW-49/A is also consistent with the other dying declarations."*

As to the second dying declaration the Court said that the dying declaration was taken by the SDM and it was signed by the prosecutrix as well. Few human errors cannot make the whole dying declaration unreliable. Improvements and details given in the later dying declaration were accepted looking into the fact that earlier dying declaration was made when the medical condition was not all good and the victim was in a complete shock. The Court also discussed the principles for appreciation of the dying declaration as follows:

> *"A dying declaration is an important piece of evidence which, if found veracious and voluntary by the Court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration. However, the Court, while admitting a dying declaration, must be vigilant towards the need for 'Compos Mentis Certificate' from a doctor as well as the absence of any kind of tutoring."*
>
> *"It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various other tests. In a case where there are more than one dying declaration, if some inconsistencies are noticed between one and the other, the Court has to examine the nature of inconsistencies as to whether they are material or not. The Court has to examine the contents of the dying declarations in the light of the various surrounding facts and circumstances."*

The Court referred to an important paragraph of ***Shudhakar v. State of M.P., (2012) 7 SCC 569,*** in which it was held as follows-

> *"Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters."*

Considering the facts and circumstances of the case the Court rejected the defence argument of improvement as a result of being tutored by stating that a mere omission on the part of the prosecutrix to state the entire factual details of the incident in her very first statement does not make her subsequent statements unworthy, especially when her statements are duly corroborated by other prosecution witnesses including the medical evidence.

As to the third dying declaration which was recorded by a Metropolitan Magistrate in multiple choice answers form and recorded on the basis of gestures, nods and writing of the prosecutrix, the Court held that :

> *"we have no hesitation in holding that the dying declaration made through signs, gestures or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the Court ought to take is that the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods. In the present case, this caution was aptly taken, as the person who recorded the prosecutrix's dying declaration was the Metropolitan Magistrate and he was satisfied himself as regards the mental alertness and fitness of the prosecutrix, and recorded the dying declaration of the prosecutrix by noticing her gestures and by her own writings."*

The Court also rejected the argument that it cannot be relied upon as it has not been videographed. The Court held that videography of the dying declaration is only a measure of caution and in case it is not taken care of, the effect of it would not be fatal for the case and does not, in any circumstance, compel the Court to completely discard that particular dying declaration.

Hon'ble Ms. Justice R. Banumathi writing a concurring judgment also dealt with the issue of multiple dying declaration. It was held that:

> *"In cases where there are more than one dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there are more than one dying declaration, it is the duty of the Court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations. Mere fact of recording multiple dying declarations does not take away the importance of each individual declaration. Court has to examine the contents of dying declaration in the light of various surrounding facts and circumstances. This Court in a number of cases, where there were multiple dying declarations, consistent in material particulars not being contradictory to each other, has affirmed the conviction."*

As regard the dying declaration by way of nods and gestures it was held:

> *"Dying declaration made through signs, gesture or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the Court ought to take is to ensure that the person recording the dying declaration was able to correctly notice and interpret the gestures or nods of the declarant. While recording the third dying declaration, signs/gestures made by the victim, in response to the multiple choice questions put to the prosecutrix are admissible in evidence.*
>
> *A dying declaration need not necessarily be by words or in writing."*

(8.) DNA Profiling and evidentiary value:

During investigations, samples from the prosecutrix, informant and all the accused were taken for the purpose of DNA profiling. The report submitted by the Forensic Expert clearly showed the involvement of the accused as the samples taken from the bus, cloths of the accused and iron rod matched with the DNA of the prosecutrix and informant. The Court discussed the science relating to DNA in detail and also the value of the DNA matching. To explain the concept of DNA the Court quoted the case of ***Regina v. Alan James Doheny & Gary Adams, 1997 1 CriAppR 369,*** where Lord Justice Phillips explained the nature and characteristics of DNA. It was observed in that case:

> *"Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes - 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor C.J. in the case of Deen (transcript:December 21, 1993), so we shall gratefully adopt his description."*
>
> *"The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight*

> *travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not."*

The Supreme Court also reffered to Section 53A and 164A of the Cr.P.C. which mandates the prosecution to go in for DNA test in such type of cases. The Court referred to the case of ***Krishan Kumar Malik v. State of Haryana, 2011 7 SCC 130*** wherein it was held:

> *"Now, after the incorporation of Section 53-A in the Cr.P.C w.e.f 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.P.C the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."*

As to the probative value of the DNA test the Court after referring to many precedents held that, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted. Ultimately, the Court relied upon the DNA reports as one of the reliable piece of evidence to link the accused with the crime.

(9.) Finger print analysis:

Chance fingerprints of the accused were taken from the Bus, which were later compared to the samples taken from the accused Vinay Sharma while they were in custody. On examination, chance prints found on the bus were found identical with left palm print and right thumb impression of specimen of accused Vinay Sharma. While the other chance prints were found to be unfit for comparison or different from specimen print, the link established between the chance prints found in the bus and accused Vinay Sharma was accepted by the Court. The Court while giving the conclusion relied on the analysis to establish that accused Vinay Sharma was present in the bus.

(10.) The Odontology report (Bite marks analysis):

New scientific tool of analysis of the bite marks found on the body of the prosecutrix was also used to establish the identity of the accused and their involvement. It is perhaps the first time that the Supreme Court has analysed the Odontology Report and accepted it to establish the identity of the accused. Just like finger prints, bite marks are useful in identification because the alignment of teeth is peculiar to the individual. The Court referred to S. Keiser-Nielsen, an authority on Forensic Odontology to define the basic concept of Forensic Odontology in the following words:

> *"A. Forensic odontology is that branch of odontology which in the interests of justice deals with the proper handling and examination of dental evidence and with the proper evaluation and presentation of dental findings. Only a dentist can handle and examine dental evidence with any degree of accuracy; therefore, this field is above all a dental field."*
>
> *"B. There are three reasons for considering forensic odontology a well-defined and more or less independent subject:1) it has objectives different from those at which conventional dental education aims; 2) forensic dental work requires investigations and considerations different from those required in ordinary dental practice; and 3) forensic dental reports and statements have to be presented in accordance with certain legal formalities in order to be of value to those requesting aid.*
>
> *The area of forensic odontology consists of three major fields of activity:1) the examination and evaluation of injuries to teeth, jaws, and oral tissues from various causes: 2) the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator; and 3) the examination of dental remains (whether fragmentary or complete, and including all types of dental restoration) from unknown persons or bodies for the purpose of identification."*

In this case prosecutrix's body contained various white bite marks. The photographs of bite marks on different parts of the body were taken. These photographs were handed over to dental expert and after comparison with the dental models of the suspects a report was prepared. These photographs were later produced in the Court as well with the certificate under Section 65B of Evidence Act. The analysis report showed that atleast three bite marks were caused by accused Ram Singh, whereas one bite mark was identified to have been most likely caused by accused Akshay. Regarding the Photographic method of analysis the Court referred to ***Dr. K.S. Narayan Reddy, in his book, Medical Jurisprudence and Toxicology (Law, Practice and Procedure), Third Edition, 2010.*** The Court quoted as following:

"Photographic method: The bite mark is fully photographed with two scales at right angle to one another in the horizontal plane. Photographs of the teeth are taken by using special mirrors which allow the inclusion of all the teeth in the upper or lower jaws in one photograph. The photographs of the teeth are matched with photographs or tracings of the teeth. Tracings can be made from positive casts of a bite impression, inking the cutting edges of the front teeth. These are transferred to transparent sheets, and superimposed over the photographs, or a negative photograph of the teeth is superimposed over the positive photograph of the bite. Exclusion is easier than positive matching."

In the cases the odontology report was submitted after the comparison of the photographs and the dental models of the accused. It stated that there is reasonable medical certainty that the teeth on the dental models of the accused persons caused the bite marks visible on photographs. The conclusion was reached on the basis of a sufficient number of concordant points, including some corresponding unconventional/ individual characteristics and a concordance in terms of general alignment and angulation of the biting surfaces of the teeth.

Based on the evidence on record the Court discussed about the evidentiary value of the the odontology report in following words:

"Bite mark analysis play an important role in the criminal justice system. Advanced development of technology such as laser scanning, scanning electron microscopy or cone beam computed tomography in forensic odontology is utilized to identify more details in bite marks and in the individual teeth of the bite. Unlike fingerprints and DNA, bite marks lack the specificity and durability as the human teeth may change over time. However, bite mark evidence has other advantages in the criminal justice system that links a specific individual to the crime or victim. For a bite mark analysis, it must contain abundant information and the tooth that made the mark must be quite distinctive."

The Court ultimately relying on the report observed:

"Forensic Odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which have been utilized by Courts in the administration of justice. In the case at hand, the report is wholly credible because of matching of bite marks with the tooth structure of the accused persons and there is no reason to view the same with any suspicion."

(11.) Appreciation in cases relating to rape:

While the majority judgment relied heavily on the dying declaration, substantive evidence of the informant and the scientific evidence, Hon'ble Ms. Justice R. Banumathi in her concurring judgment discussed the evidenciary value and reliability of the evidence of the prosecutrix at great length. It was held that although in a case of rape, like other criminal cases, onus is always on the prosecution to prove affirmatively each ingredients of the offence and the prosecution must discharge this burden of proof to bring home the guilt of the accused and this onus never shifts but it was also obeserved that:

> *"At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of prosecutrix in lieu of settled legal principles. Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well-settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination etc., if the same is found natural and trustworthy."*
>
> *"Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity."*

In her judgment her lordship quoted a line of ***State of Karnataka v. Krishnappa, (2000) 4 SCC 75*** which says that:

> *"A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."*

Hon'ble Ms. Justice R. Banumathi further quoted the relevant paragraph of the landmark judgment of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217*** where it was held that:

> *"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with slenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male*

chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different.''

The Court observed that by and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence."

As to the appreciation of the evidence of the prosecutrix, it was further observed that:

"Courts should not attach undue importance to discrepancies, where the contradictions sought to be brought up from the evidence of the prosecutrix are immaterial and of no consequence. Minor variations in the testimony of the witnesses are often the hallmark

of truth of the testimony. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Due to efflux of time, there are bound to be minor contradictions/discrepancies in the statement of the prosecutrix but such minor discrepancies and inconsistencies are only natural since when truth is sought to be projected through human, there are bound to be certain inherent contradictions."

The Court also observed that:

"Rape deeply affects the entire psychology of the woman and humiliates her, apart from leaving her in a trauma. The testimony of the rape victim must be appreciated in the background of the entire case and the trauma which the victim had undergone."

(12.) Plea of alibi:

The major defence taken by accused person was of that they were not present in the Bus at the time of incident rather they were present elsewhere at that time. Many defence witnesses including relatives of the accused persons were examined by the defence to substantiate this plea. The Court discussed about the law relating to "plea of alibi" starting with the burden of proof:

"It is well settled in law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards the presence on the spot is established by the prosecution."

The Court discussed the evidence put forth by the defence in detail as well as the accused statements recorded under Section 313 Cr.P.C. The Court found contradictions in the defence evidence as well as contradiction with respect to accused statements. It was noted that some of the witnesses did not even know the exact whereabouts and time of leaving the house of the accused and one witness was interrupted many times by the accused from behind while giving the evidence. The Court reiterated the basic principle to appreciate the evidence where plea of alibi has been taken by the defence, by stating that while weighing the plea of 'alibi', the same has to be weighed against the positive evidence led by the prosecution. The Court said that the prosecution's substantive evidence, dying declarations and also the scientific evidence, viz., the DNA analysis, finger print analysis and bite marks analysis, the accuracy of which is scientifically acclaimed has to weighed against the defence evidence of "plea of alibi". The Court finally held that:

"Considering the inconsistent and contradictory nature of the evidence of 'alibi' led by the accused against the positive evidence of the prosecution, including the scientific one, we hold that the accused have miserably failed to discharge their burden of absolute certainty qua their plea of 'alibi'. The plea taken by them appears to be an afterthought and rather may be read as an additional circumstance against them."

What is important to note that the Court not only rejected the plea of alibi taken by the accused but finding it to be an afterthought also considered it as an additional circumstance against them.

(13.) Criminal Conspiracy:

The accused in the present case were charged for criminal conspiracy as well. The Court discussed the concept of criminal conspiracy in great detail and also the involvement of the accused. After referring and quoting many judgments relating to criminal conspiracy, the Court observed:

> *"As already stated, in a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the sine qua non but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Moreover, it is also relevant to note that conspiracy being a continuing offence continues to subsist till it is executed or rescinded or frustrated by the choice of necessity."*

The Court quoted with approval the landmark Judgment of ***State through Superintendent of Police, CBI/SIT v. Nalini and others, (1999) 5 SCC 253*** in which a three Judge bench summarised the principles relating to criminal conspiracy as under:

> *"Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.*
>
> *1. Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.*
>
> *2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.*

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the Court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy Court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise

inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the graham of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

After finding the fact of conspiracy reffereing to the sequence of events and conduct of the accused the Court also adverted to Section 10 of the Evidence Act. The Court observed that:

"Section 10 of the Indian Evidence Act begins with the phrase "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence" which implies that if prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common intention is admissible against all."

(14.) Compliance of Section 235(2) Cr.P.C.:

One of the contention raised by the defence counsel was that the trial Court failed to comply with Section 235 (2) Cr.P.C., which has resulted in prejudice to the accused. Section 235(2) Cr.P.C. reads as follows:

"(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

The Court referred to the judgment of ***Santa Singh v. State of Punjab, 1976 4 SCC 190*** in which the Court held as follows:

"The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the Court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same."

The Court also quoted the judgment of a three Judge bench of ***Dagdu and others v. State of Maharashtra, 1977 3 SCC 68***, in which the ***Santa Singh*** case (supra) was discussed and it was held that:

"But we are unable to read the judgment in Santa Singh as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question us sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher Court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher Court.

Bhagwati, J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is nut abused and turned into an instrument for unduly protracting the proceedings. The material on which the accused proposes to rely may therefore, according to the learned Judge, be placed before the Court by means of an affidavit. Fazal Ali, J., also observes that the Courts must be vigilant to exercise proper control over their proceedings, that the accused must not be permitted to adopt dilatory tactics under the cover of the new right and that what Section 235(2) contemplates is a short and simple opportunity to place the necessary material before the Court. These observations show that for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the Court which has recorded the conviction. The fact that in Santa Singh this Court remanded the matter to the Sessions Court does not spell out the ratio of the judgment to be that in every such case there has to be a remand. Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."

The Court referred to its order dated 03.02.2017 in the same case when this was argued before the Court. The Court in that order held that it is essential that Section 235(2) must be followed in letter and spirit but the Court also refused to remand the case for the said purpose. The Court in facts of the case directed the accused persons to produce necessary data and advance the contention on the question of sentence. The Court gave an opportunity to the accused to file affidavits on the question of sentence which was considered to be sufficient compliance of Section 235(2) Cr.P.C.

Hon'ble Ms. Justice R. Banumathi in her concurring judgment also discussed Section 235(2) in light of Section 354 of Cr.P.C. in following words:

> *"Section 354 Cr.P.C. specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Cr.P.C. deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. Section 354(3) Cr.P.C. mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.*
>
> *The statutory duty to state special reasons under Section 354(3) Cr.P.C. can be meaningfully carried out only if the hearing on sentence under Section 235(2) Cr.P.C. is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused under Section 235(2) Cr.P.C. on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Cr.P.C. becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment."*

(15.) Rarest of the rare case

Both the trial Court as well as the High Court awarded the death sentence to all the accused facing the trial. The Supreme Court referred to the landmark judgments of ***Bachan Singh (1980 2 SCC 684)*** and ***Machhi Singh (1983 3 SCC 470)*** and discussed in detail the theory of rarest of the rare case and principles to be kept in mind while deciding on the question of sentence. The majority as well as the concurring Judgment referred to various case laws to explain the aggravating and mitigating circumstances to be considered while awarding or not awarding death penalty.

Hon'ble Ms. Justice R. Banumathi in her concurring judgment referred to the case of ***Ramnaresh and Ors. v. State of Chhattisgarh, (2012) 4 SCC 257,*** wherein the Court tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances as follows:-

> *"Aggravating circumstances:*
>
> *(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.*
>
> *(2) The offence was committed while the offender was engaged in the commission of another serious offence.*
>
> *(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.*
>
> *(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.*
>
> *(5) Hired killings.*
>
> *(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.*
>
> *(7) The offence was committed by a person while in lawful custody.*
>
> *(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a*

daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

The majority judgment also referred to ***Bachan Singh*** case wherein it was held that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In the case at hand the defence had put forth the argument of young age, family responsibility and rehabilitation as the mitigating factors, but the Court said the nature of the crime and the manner in which it has been committed is brutal, barbaric and diabolic. The Court held:

> *"It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, PW-1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ex. PW-50/A and Ex. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront*

when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety."

The Court came to the conclusion that the aggravating circumstances outweigh the mitigating circumstances brought on record and the death penalty for all the accused before the Court was confirmed.

In the concurring Judgment Hon'ble Ms. Justice R. Banumathi took note of the increasing number of crimes against women and observed :

"The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper."

Hon'ble Judge further quoted the words of great scholar Swami Vivekananda, ***"the best thermometer to the progress of a nation is its treatment of its women."***

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गिरफ्तारी एवं निरोध: विधिक अपेक्षाएँ

समरेश सिंह
उपसंचालक,
म.प्र. राज्य न्यायिक अकादमी

"The liberty of acting according to one's will would be illusory if it were not protected from obstrutions."

-Austin

''अपनी इच्छानुसार कार्य करने की स्वतंत्रता को यदि निर्बंधनों से संरक्षित नहीं किया गया तो ऐसी स्वतंत्रता केवल भ्रामक होगी।''

- आस्टिन

विधि आयोग की 177वीं रिपोर्ट में पुलिस द्वारा धारा 41 दं.प्र.सं. के अंतर्गत वारंट के बिना गिरफ्तारी के दुरुपयोग के चैकाने वाले आंकड़े सामने आये थे। उक्त रिपोर्ट के अनुसार वर्ष 1998-99 के दौरान म.प्र. राज्य में मूल अपराधों के संबध में की गई गिरफ्तारियों की संख्या जहां एक ओर 4,76,281 थी वही प्रतिबंधात्मक प्रावधानों (जिसमें धारा 41, 151, 109 एवं 110 द.प्र.स. के अंतर्गत की गई गिरफ्तारी के आंकड़े सम्मिलित हैं) के अंतर्गत की गई गिरफ्तारियों की संख्या 3,54,242 थी। उक्त अवधि में की गई कुल गिरफ्तारियों 8,30,523 में से केवल 5,18,658 में ही पुलिस अभियोग पत्र प्रस्तुत कर सकी। उक्त आंकड़े केवल म.प्र. राज्य से संबंधित है और अन्य कुछ राज्यों में तो इससे भी भयावह स्थिति प्रकट हुई। उक्त रिपोर्ट के अनुसार पुलिस द्वारा की गई 60 प्रतिशत गिरफ्तारियां अनावश्यक होती हैं।

भारतीय संविधान का अनुच्छेद 21 प्रत्येक व्यक्ति को, चाहे वह नागरिक हो या गैर-नागरिक, प्राण एवं दैहिक स्वतंत्रता का अधिकार प्रदान करता है। दैहिक स्वतंत्रता का अधिकार समस्त मानवाधिकारों में सर्वोपरि है क्योंकि इस अधिकार पर निर्बंधन लग जाने से व्यक्ति के शेष समस्त मानवाधिकार मूल्यहीन हो जाते हैं। भारतीय संविधान के अनुच्छेद-21 के अनुसार उक्त अधिकार पर विधि द्वारा स्थापित प्रक्रिया के अनुसार ही कोई निर्बंधन लगाये जा सकता है। इसी प्रकार भारतीय संविधान का अनुच्छेद-22 प्रत्येक व्यक्ति को गिरफ्तारी एवं निरोध के विरूद्ध संरक्षण का भी मौलिक अधिकार प्रदान करता है। भारतीय संविधान के उक्त प्रावधानों से स्पष्ट है कि किसी भी व्यक्ति की दैहिक स्वतंत्रता पर विधि की स्थापित प्रक्रिया के अतिरिक्त लगाया गया कोई भी निर्बंधन न केवल संविधान द्वारा प्रदत्त उक्त मौलिक अधिकारों का उल्लंघन होगा, अपितु ऐसा निरोध भारतीय दण्ड संहिता में यथा परिभाषित ''सदोष अवरोध'' की परिधि में आने से एक दण्डनीय अपराध भी होगा।

दण्ड प्रक्रिया संहिता का अध्याय-5 आपराधिक मामलों में व्यक्तियों के गिरफ्तारी के संबंध में प्रावधान करता है। उक्त अध्याय की धारा-41 (1) वह नौ परिस्थितियां बताती है जिनमें पुलिस अधिकारी किसी व्यक्ति को वारंट के बिना गिरफ्तार कर सकता है। किसी व्यक्ति का निरोध निश्चित रूप से उसकी दैहिक स्वतंत्रता पर लगाया गया निर्बंधन है। ऐसे में उक्त व्यक्ति की गिरफ्तारी समुचित आधारों पर की गई है या नहीं, यह सुनिश्चित करने का दायित्व धारा-167 द.प्र.स. के अनुसार न्यायिक

मजिस्ट्रेट को दिया गया है। दण्ड प्रक्रिया संहिता में समाविष्ट स्पष्ट प्रावधानों तथा सर्वोच्च न्यायालय द्वारा समय-समय पर दिये गए मार्गदर्शक सिद्धांतों के बावजूद भी वारंट के बिना गिरफ्तारी के मामलों में पुलिस द्वारा अपनी शक्तियों के दुरुपयोग को रोकने हेतु अधीनस्थ न्यायालयों का उत्तरदायित्व और भी बढ़ जाता है।

इस लेख में अग्रलिखित दो प्रश्नों के संबंध में विधिक स्थिति स्पष्ट करने का प्रयास किया गया है -

(क) क्या पुलिस अधिकारी का मात्र ''संदेह'' किसी व्यक्ति को उसकी दैहिक स्वतंत्रता से वंचित करने के लिये पर्याप्त है **?**

(ख) क्या पुलिस अधिकारी का ''संदेह'' मात्र ही गिरफ्तार किये गये व्यक्ति को अभिरक्षा में दिये जाने हेतु मजिस्ट्रेट की ''संतुष्टि'' का स्थान ले सकता है**?**

जहां तक संदेह के आधार पर पुलिस द्वारा किसी व्यक्ति को गिरफ्तार करने की अधिकारिता का प्रश्न है तो दं.प्र.सं. की धारा- 41 (1) (ख) (खक) एवं (घ) निम्न परिस्थितियों में पुलिस अधिकारी को ''संदेह'' के आधार पर बिना वारंट गिरफ्तार करने की शक्ति प्रदान करती है -

1. किसी व्यक्ति के विरूद्ध संज्ञेय अपराध में लिप्त होने संबंधी कोई युक्तियुक्त परिवाद किया गया है, या कोई विश्वसनीय सूचना प्राप्त हुई, या ऐसा युक्तियुक्त संदेह विद्यमान है, कि ऐसे व्यक्ति ने 7 वर्ष से अनाधिक की अवधि से दण्डनीय कोई संज्ञेय अपराध कारित किया है,

2. किसी व्यक्ति के विरूद्ध ऐसी विश्वसनीय सूचना प्राप्त हुई है कि उसने 7 वर्ष से अधिक अवधि के कारावास या मृत्युदण्ड से दण्डनीय कोई अपराध कारित किया है तथा पुलिस अधिकारी को ऐसी सूचना के आधार पर यह विश्वास करने के कारण विद्यमान है, ऐसे व्यक्ति ने उक्त अपराध कारित किया है,

3. किसी व्यक्ति के कब्जे से कोई ऐसी वस्तु पाई जाती है जिसके चुराई हुई सम्पत्ति होने का उचित रूप से संदेह किया जा सकता है और जिस पर ऐसी वस्तु के बारे अपराध करने का उचित रूप से संदेह किया जा सकता है।

उक्त प्रावधानों के अवलोकन से ही विधायिका का आशय स्पष्ट है कि मात्र संदेह ही किसी व्यक्ति को उसकी दैहिक स्वतंत्रता से वंचित करने के लिए पर्याप्त नहीं है, अपितु ऐसा संदेह ''युक्तियुक्त'' होना भी आवश्यक है। धारा-41 दं.प्र.सं. में दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2008 द्वारा महत्वपूर्ण संशोधन किये गये हैं। उक्त संशोधन के पूर्व धारा-41 (1) (क) दं.प्र.स. के अनुसार पुलिस अधिकारी को किसी भी संज्ञेय अपराध में युक्तियुक्त संदेह के आधार पर गिरफ्तार किये जाने की अधिकारता प्राप्त थी और अपराध के दण्ड के आधार पर संज्ञेय अपराधों में कोई विभेद नहीं किया गया था। कहने का तात्पर्य यह है कि उक्त संशोधन के पूर्व की स्थिति में किसी संज्ञेय अपराध में गिरफ्तारी हेतु मात्र इतना पर्याप्त था कि पुलिस को ऐसा युक्तियुक्त संदेह हो कि ऐसा व्यक्ति किसी संज्ञेय अपराध में लिप्त है, परन्तु ''युक्तियुक्त संदेह'' के संबंध में कोई दिशा-निर्देश उक्त प्रावधानों में

समाविष्ट नहीं थे। वर्ष 2008 में किये गये संशोधनों के उपरान्त इस संबंध में विशिष्ट प्रावधान धारा-41 (1) (ख) के अंतर्गत समाविष्ट किये गये है। नवीन प्रावधानानुसार 7 वर्ष से कम अवधि के संज्ञेय अपराध में वारंट के बिना गिरफ्तारी के पूर्व पुलिस अधिकारी का यह समाधान आवश्यक है कि -

1. ऐसे परिवाद, सूचना या संदेह के आधार पर पुलिस अधिकारी का यह विश्वास करने का कारण है कि ऐसे व्यक्ति ने उक्त संज्ञेय अपराध कारित किया है।

2. पुलिस अधिकारी का यह भी समाधान है कि ऐसी गिरफ्तारी ऐसे किसी अन्य अपराध को कारित करने से निवारित करने के लिये, या अपराध के उचित अन्वेषण के लिये, या अपराध की साक्ष्य को मिटाने या साक्ष्य से छेड़छाड़ करने से निवारित करने के लिये, या मामले के तथ्यों से परिचित किसी व्यक्ति को प्रलोभन देने, धमकी देने या वायदा करने से निवारित करने के लिये या उस व्यक्ति की न्यायालय में उपस्थिति सुनिश्चित करने के लिये आवश्यक है।

उक्त प्रावधान पुलिस द्वारा बिना वारंट के गिरफ्तारी की अनियंत्रित शक्ति के दुरुपयोग को नियंत्रित करने के प्रयोजन से दण्ड प्रक्रिया संहिता में समाविष्ट किए गये हैं। पुलिस अधिकारी द्वारा उक्त प्रावधानानुसार किसी व्यक्ति को गिरफ्तार करने या न करने दोनों दशाओं में कारण अभिलिखित किया जाना भी आज्ञापक किया गया है।

न्याय दृष्टांत *जोगिन्दर कुमार विरूद्ध उत्तर प्रदेश राज्य,* ***ए.आई.आर. 1994 एस.सी. 1349*** में उच्चतम न्यायालय ने यह प्रतिपादित किया कि प्रत्येक मामले में गिरफ्तारी आवश्यक नहीं होती। मात्र इसलिये ही कोई गिरफ्तारी नहीं की जानी चाहिये कि वैसा किया जाना पुलिस अधिकारी के लिये विधिपूर्ण है। गिरफ्तार करने की शक्ति का होना एक बात है और उसके प्रयोग किये जाने का औचित्य होगा बिल्कुल ही दूसरी बात है। किसी व्यक्ति के विरूद्ध किसी अपराध किये जाने के मात्र अभिकथन के ही आधार पर उसे यूँ ही गिरफ्तार नहीं किया जाना चाहिये। गिरफ्तार करने वाले अधिकारी की राय में इस बात का कोई युक्तियुक्त औचित्य होना चाहिये कि वह गिरफ्तारी आवश्यक और न्यायानुमत थी। जघन्य अपराधों को छोड़कर गिरफ्तार करने से बचना चाहिये।

इस संबंध में विधि आयोग द्वारा प्रस्तुत 177वीं रिपोर्ट में की गई संस्तुति भी अवलोकनीय है जो शब्दशः निम्नानुसार है-

> "It is difficult to countenance the argument that a man can be deprived of his liberty merely on suspicion; indeed, Section 41 even as it stands now, speaks of reasonable suspicion and not mere suspicion. We have already pointed out the fall-out of the arrest of a person and how his image and reputation suffers in the eyes of the society by such arrest. We are therefore of the opinion that unless there is some specific information on the basis of which the police officer believes it reasonably probable that the person is involved in an offence, that it is a cognizable offence, and for which it is necessary to arrest him i.e., in the circumstances set out in section 41 as proposed to be amended herein, there can be no question of an arrest.
>
> With a view to drive home the point, let us imagine a situation where there is a provision saying that an order of censure can be

passed against a public servant by his superior without notice to him; how would such public servant feel? Similarly, suppose if there is a provision which says that a public servant can be suspended from service pending inquiry on the basis of suspicion or on the basis of reasonable suspicion, how would it sound? One can always say that suspension pending inquiry is no punishment, that it is only a temporary measure and that if the person is not found guilty ultimately, he can always be restored all the antecedent benefits with retrospective effect. Let us repeat that liberty is no less important than the service career of a public servant. Indeed, the decision of the European Court of Human Rights and the consequent amendment of the Northern Ireland (Emergency Provisions) Act, 1978 – which is indeed an anti-terrorist enactment – indicates the unacceptability of the proposition that a person can be arrested merely on suspicion or merely on a reasonable suspicion of his being concerned in a cognizable offence. The question then arises whether there should be a specific provision in the Code providing that no person shall be arrested on mere suspicion or on reasonable suspicion of his having been concerned in a cognizable offence. We do not think that any such specific provision is called for in view of the fact that section 41(1)(a), as recommended by us in this chapter, permits arrest only in certain specified situations which necessarily means and implies that no arrest can be made on mere suspicion."

इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा *अरनेश कुमार विरूद्ध बिहार राज्य,* ***2014 (3)*** *क्राइम्स* ***40*** *एस.सी.* में निम्नलिखित अभिनिर्धारित किया हैं -

"In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.PC."

उपरोक्त विधिक प्रावधानों तथा सर्वोच्च न्यायालय द्वारा प्रतिपादित मार्गदर्शक सिद्धांतों के अवलोकन से यह स्पष्ट हो जाता है कि पुलिस अधिकारी को किसी संज्ञेय अपराध के संदेह के आधार पर वारंट के बिना संदेही व्यक्ति को गिरफ्तार करने की शक्ति प्राप्त है, परंतु गिरफ्तार करने वाले पुलिस अधिकारी के पास ऐसा संदेह करने के पर्याप्त कारण विद्यमान होने चाहिए, संदेह के अतिरिक्त भी अन्य आधार की युक्तियुक्त संतुष्टि होने पर ही गिरफ्तार किया जा सकता है।

अब प्रश्न यह उत्पन्न होता है कि क्या पुलिस के उक्त संदेह के आधार पर ही गिरफ्तार किए गए व्यक्ति की अभिरक्षा मजिस्ट्रेट प्राधिकृत कर सकता है?

धारा 167 दं.प्र.सं. के अंतर्गत किसी व्यक्ति का निरोध स्वीकार करने के पूर्व मजिस्ट्रेट का यह दायित्व है कि वह इस बात का समाधान कर ले कि उक्त व्यक्ति की गिरफ्तारी धारा 41 (1) दं.प्र.सं. के प्रावधानों के अनुरूप ही समुचित आधारों पर की गई है। इस संबध में धारा 60-क दं.प्र.सं. में भी स्पष्ट प्रावधान किया गया है कि कोई भी गिरफ्तारी दं.प्र.सं. के उक्त उपबंधों के विपरीत नहीं की जावेगी। इस संबंध में सर्वोच्च न्यायालय के न्यायदृष्टांत *अरनेश कुमार* (पूर्वोक्त) में यह आज्ञापक दिशा निर्देश दिए गये हैं कि गिरफ्तार किए गये अभियुक्त की अभिरक्षा स्वीकार करते समय मजिस्ट्रेट का यह बाध्यकारी दायित्व है कि वह अभिलेख पर उपलब्ध सामग्री से यह समाधान कर लें कि गिरफ्तारी के पूर्व उक्त आवश्यक शर्तो की पूर्ति की गई है और उसके उपरांत ही अभियुक्त की अभिरक्षा स्वीकार की जा सकती है। माननीय सर्वोच्च न्यायालय द्वारा निम्नानुसार अभिनिर्धारित किया गया है -

> ".......During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power u/s. 167 Cr.PC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention under Section 167, Cr.P.C., he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of S.41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under S.41 Cr.PC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The

Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer………"

धारा 41 दं.प्र.सं. के अंतर्गत पुलिस द्वारा संदेह के आधार पर गिरफ्तारी किये जाने की पूर्ववर्ती शर्त ही यह है कि गिरफ्तार किये जाने वाले व्यक्ति की संज्ञेय अपराध में संलिप्तता के संबंध में युक्तियुक्त संदेह हो। इस संबंध में भारतीय संविधान का अनुच्छेद 22 (2) एवं धारा-57 दं.प्र.सं. अवलोकनीय जिनके अनुसार वारंट के बिना गिरफ्तार किये गये किसी भी व्यक्ति को 24 घण्टे से अधिक की समयावधि के लिये धारा-167 दं.प्र.सं. के अंतर्गत मजिस्ट्रेट की प्राधिकारिता के बिना निरोध में नहीं रखा जा सकता। धारा-167 दं.प्र.सं. बिना वारंट के गिरफ्तार किये गये व्यक्ति की अभिरक्षा स्वीकृत करने हेतु न्यायिक मजिस्ट्रेट और आपवादिक परिस्थितियों में कार्यपालिक मजिस्ट्रेट को अधिकारिता प्रदान करती है। धारा-167 दं.प्र.सं. के अंतर्गत किसी व्यक्ति की अभिरक्षा स्वीकार करने हेतु संबंधित मजिस्ट्रेट का यह समाधान होना आवश्यक है-

1. जिस व्यक्ति के संबंध में अभिरक्षा चाही गई है उस व्यक्ति को संज्ञेय एवं अजमानतीय अपराध के संबंध में गिरफ्तार किया गया है, तथा

2. उक्त अपराध का अंवेषण 24 घण्टे के अंदर पूरा नहीं किया जा सकता।

धारा- 167 दं.प्र.सं. के अंतर्गत मजिस्ट्रेट द्वारा अपनी शक्तियों का प्रयोग करना भी महज एक कोरी औपचारिकता नहीं है बल्कि एक महत्वपूर्ण कार्य है, जिसका मूल उद्देश्य ही यह सुनिश्चित करना है कि पुलिस द्वारा अपने विवेक का सही उपयोग किया गया है। ऐसे में मजिस्ट्रेट को यह सुनिश्चित करना आवश्यक है कि अभियुक्त के विरूद्ध प्राप्त सूचना अत्यंत सुदृढ़ है और अनुसंधान के दौरान उसके विरूद्ध जो तथ्य तब तक एकत्रित किये गये है, उसके आधार पर प्रथम दृष्ट्या अभियुक्त की किसी संज्ञेय अपराध में संलिप्तता दर्शित होती हैं।

इस संबंध में दण्ड प्रक्रिया संहिता के अध्याय-12 के प्रावधान भी अवलोकनीय है जिनमें पुलिस को दी जाने वाली सूचना एवं अन्वेषण करने की शक्तियों से संबंधित विधि समाविष्ट की गई है।

यदि धारा 167 को धारा 154 व 156 के साथ पढ़ा जावे तो तात्पर्य यह निकलता है कि संज्ञेय मामलों में ही धारा 157 दं.प्र.सं. के तहत प्रथम सूचना रिपोर्ट मजिस्ट्रेट को भेजी जायेगी और उन्हीं मामलों में पुलिस थाने का भारसाधक अधिकारी या उसका अधीनस्थ अधिकारी अनुसंधान के लिये अग्रसर होगा। इस प्रकार धारा 154, 156 व 157 दं.प्र.सं. के समग्र अवलोकन से यह तथ्य स्पष्ट होता है कि प्रथम सूचना रिपोर्ट किसी भी संज्ञेय मामले में अनुसंधान प्रारंभ करने की पूर्ववर्ती शर्त होती है।

अब प्रश्न यह उत्पन्न होता है कि क्या मजिस्ट्रेट धारा **167** द्र.प्र.स. के प्रावधानों के अन्तर्गत ऐसे व्यक्ति का निरोध प्राधिकृत कर सकता है जिसे पुलिस द्वारा संज्ञेय मामले के संदेह के आधार पर गिरफ्तार तो किया गया है परंतु उसके विरूद्ध कोई प्रथम सूचना रिपोर्ट पुलिस द्वारा पंजीबद्ध नहीं की गई है**?**

इस संबंध में सर्वोच्च न्यायालय की संवैधानिक पीठ द्वारा प्रतिपादित न्याय दृष्टांत *ललिता कुमारी विरूद्ध उ.प्र. राज्य **(2014) 2** एस.सी.सी. **1*** की कंडिका 97 अवलोकनीय है जिसमें निम्न मत प्रतिपादित किया गया है-

> "The Code contemplates two kinds of FIRs. The duly signed FIR under S. 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [S. 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith.
>
> The registration of FIR either on the basis of the information furnished by the informant under S.154(1) of the Code or otherwise under S.157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:
>
> (a) It is the first step to 'access to justice' for a victim.
>
> (b) It upholds the 'Rule of Law' in as much as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.
>
> (c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.
>
> (d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR."

*हरियाणा राज्य विरूद्ध भजनलाल, **(1992)** सप्लीमेंट **1** एस.सी.सी. **335*** में सर्वोच्च न्यायालय ने पैरा 49 में स्पष्टतः यह प्रतिपादित किया है कि प्रथम सूचना रिपोर्ट का पंजीबद्ध होना ही अनुसंधान प्रारंभ करने की पूर्ववर्ती शर्त रहेगी अर्थात् यदि प्रथम सूचना रिपोर्ट के पंजीबद्ध किये बिना कोई अनुसंधान किया जाता है तो वह विधि की दृष्टि में संधारणीय ही नहीं है। इसी मत को सर्वोच्च

न्यायालय द्वारा *लल्लन चैधरी विरूद्ध बिहार राज्य **(2006) 12** एस.सी.सी. **229*** के पैरा क्रमांक 8 में भी अनुगमन किया गया जिसके अनुसार धारा 154 दं.प्र.सं. पुलिस अधिकारी के ऊपर यह विधिक दायित्व अधिरोपित करती है कि वह परिवाद के अनुसार प्रथम सूचना रिपोर्ट पंजीबद्ध करे और तत्परता अनुसंधान के लिये अग्रसर हो।

उदाहरण के लिये निःसंदेह धारा 41(1)(घ) दं.प्र.सं. पुलिस अधिकारी को ऐसे व्यक्ति को गिरफ्तार करने की यह शक्ति प्रदान करती है कि जिसके कब्जे से कोई ऐसी वस्तु पाई जाए जिसके ''चुराई हुई संपत्ति होने का उचित रूप से संदेह'' किया जा सकता है और जिस पर ऐसी वस्तु के बारे में अपराध करने का युक्तियुक्त संदेह किया जा सकता है। इसी प्रकार धारा 102 द.प्र.स. पुलिस अधिकारी को किसी संपत्ति को चोरी के संदेह में या चुराई संपत्ति होने के संदेह में ऐसी संपत्ति को जप्त करने की शक्ति प्रदान की गई है, परंतु उक्त दोनों प्रावधानों में भी स्पष्ट रूप से यही प्रावधानित किया गया है कि किसी व्यक्ति को उक्त आधार पर गिरफ्तार करने के पूर्व उसके आधिपत्य में पाई गई वस्तु के चुराई हुई संपत्ति होने का युक्तियुक्त आधार होना आवश्यक है। व्यवहारिक रूप से कई मामलों में यह भी देखा गया है कि पुलिस द्वारा किसी व्यक्ति को चुराई गई संपत्ति के आधिपत्य में पाये जाने के आधार पर चोरी के संदेह में गिरफ्तार कर मजिस्ट्रेट के समक्ष प्रस्तुत किए जाने पर चोरी का अपराध संज्ञेय प्रकृति का होने के कारण ऐसे व्यक्ति की अभिरक्षा अधिकृत कर दी जाती है और अन्ततोगत्वा उक्त संपत्ति के संबंध में धारा 403 भा.द.सं. के अंतर्गत परिवाद पेश कर दिया जाता है जबकि धारा 403 भा.द.सं. का अपराध जमानतीय और असंज्ञेय प्रकृति का है। जमानतीय अपराधों में अभियुक्त जमानत पर छोड़े जाने का हकदार होता है और यदि ऐसे मामले में अभियुक्त सक्षम जमानत देने को तैयार व तत्पर है तो उसकी दैहिक स्वतंत्रता से वंचित कर रिमाण्ड प्राधिकृत किया जाना विधिक रूप से अनुज्ञेय नहीं है। ऐसे मामलो में मजिस्ट्रेट को धारा 167 दं.प्र.सं. के अंतर्गत अपने न्यायिक विवेक का प्रयोग अत्यंत सावधानी से करना चाहिए।

इस संबंध में सर्वोच्च न्यायालय द्वारा पारित न्यायदृष्टांत *एम.टी. एन्ट्रीका लैक्सी एवं अन्य विरूद्ध दोरम्मा, ए.आई.आर. **2012** एस.सी. **2134*** अवलोकनीय है जिसमें यह अभिनिर्धारित किया है कि पुलिस धारा 102 द.प्र.सं. के अंतर्गत केवल वही संपत्ति जप्त कर सकती है जिस पर चोरी का संदेह हो और जिसके संबंध में पुलिस द्वारा अनुसंधान किया जा रहा हैं। सर्वोच्च न्यायालय द्वारा निम्न मत प्रतिपादित किया गया-

> "12. The police officer in course of investigation can seize any property under Section 102 if such property is alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has direct link with the commission of offence for which the police officer is investigating into. A property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under Section 102 of the Code, the police officer can seize such property which is covered by Section 102(1) and no other."

म.प्र. उच्च न्यायालय के समक्ष *मनीष कुमार चैकसे विरूद्ध म.प्र.राज्य* ***(M.Cr.C. No. 6260, 6270/2017, Date of judgment 01/05/2017)*** के प्रकरण में निम्न दो प्रश्न विद्यमान थे-

1. क्या पुलिस बिना प्रथम सूचना रिपोर्ट लेख किये किसी संज्ञेय अपराध में अनुसंधान कर सकती है ? तथा

2. क्या मजिस्ट्रेट ऐसे व्यक्ति की अभिरक्षा अधिकृत कर सकता है जिसके विरूद्ध कोई प्रथम सूचना रिपोर्ट पंजीबद्ध न हो ?

उक्त प्रकरण के तथ्य इस प्रकार थे कि पुलिस द्वारा नोटबंदी के पश्चात दो व्यक्तियों के आधिपत्य से 1,47,0000/- रूपये की पुरानी करेंसी जप्त की गई थी जिसके संबंध में गिरफ्तार किये गये व्यक्तियों द्वारा कोई भी स्पष्टीकरण नहीं दिया गया था। पुलिस द्वारा अभियुक्तगण को धारा 41 सहपठित धारा 102 तथा धारा 379 भा.द.स. के अपराध में गिरफ्तार कर मजिस्ट्रेट के समक्ष अभिरक्षा हेतु प्रस्तुत किया गया। अभियुक्तगण के विरूद्ध संज्ञेय अपराध के संबंध में कोई भी प्रथम सूचना रिपोर्ट पंजीबद्ध नहीं की गई थी।

न्यायालय ने सर्वप्रथम यह अभिनिर्धारित किया कि अनुसंधान, प्रथम सूचना रिपोर्ट के पंजीबद्ध किये जाने से प्रारंभ होगा। धारा 154, 156 एवं 157 दं.प्र.सं. के संयुक्त अध्ययन से यह पता चलता है कि एफ.आई.आर. के पंजीकरण के पश्चात् ही अनुसंधान आता है। विधि के तहत अनुसंधान प्रारंभ करने के लिये एफ.आई.आर. का पंजीबद्ध होना, एक पूर्ववर्ती शर्त है। एफ.आई.आर. के पंजीबद्ध हुये बिना पुलिस के द्वारा कोई अनुसंधान नहीं किया जा सकता है। इसके पश्चात् न्यायालय ने यह अभिनिर्धारित किया कि मजिस्ट्रेट, एक व्यक्तिः जिसे धारा 41 दं.प्र.सं. में गिरफ्तार किया हो, की अभिरक्षा को एफ.आई.आर. के अभाव में नहीं बढ़ा सकता है। मजिस्ट्रेट को स्वयं को इस बात से संतुष्ट होना आवश्यक है कि अनुसंधान के दौरान जो सामग्री एकत्रित की गई है, वह प्रथम दृष्टया अपराध में उसकी संलिप्तता को प्रकट करती है। जहां कि ऐसे व्यक्ति को पुलिस के द्वारा मजिस्ट्रेट के समक्ष धारा 167 द.प्र.सं. में न्यायिक अभिरक्षा या पुलिस अभिरक्षा की अवधि को बढ़ाने के लिये प्रस्तुत किया जाता है और जहां पुलिस के द्वारा ऐसे व्यक्ति के विरूद्ध कोई एफ.आई.आर. पंजीबद्ध नहीं की गई है, मजिस्ट्रेट को धारा 167 के तहत अपने क्षेत्राधिकार का प्रयोग करने से इंकार आवश्यक रूप से करना ही चाहिये और ऐसे गिरफ्तार व्यक्ति की रिहाई सुरक्षित करनी चाहिये क्योंकि उसकी अभिरक्षा 24 घंटे की अवधि व्यतीत हो जाने के कारण अवैधानिक हो गई है।

इसी प्रकार केरल उच्च न्यायालय के समक्ष मनीनंदन विरूद्ध एस.आई पुलिस, 2008 क्रिमिनल ला जर्नल 1338 के मामले में यह प्रश्न विद्यमान था कि क्या मजिस्ट्रेट द्वारा ऐसे व्यक्ति की अभिरक्षा प्राधिकृत की जा सकती है जिसे धारा 41 (1) (घ) द.प्र.स. के अंतर्गत चोरी की संपत्ति आधिपत्य में रखने के संदेह में गिरफ्तार किया गया हो परंतु इसके अतिरिक्त अभिलेख पर अन्य कोई साक्ष्य न हो। उस प्रकरण में भी अभियुक्त को 300 किलोग्राम एलमोनियम के तार के साथ पुलिस द्वारा चोरी के अपराध के संदेह में गिरफ्तार कर अभिरक्षा प्रदान करने हेतु धारा 167 द.प्र.स. के अंतर्गत मजिस्ट्रेट के समक्ष प्रस्तुत किया गया था। केरल उच्च न्यायालय ने मजिस्ट्रेट द्वारा प्राधिकृत उक्त अभिरक्षा को अवैध ठहराते हुए निम्न मत प्रतिपादित किया -

"It is only upon receiving a complaint of facts which constitute an offence or upon a police report of such facts or upon information received from any person other than a police officer or upon his own knowledge that an offence has been committed, can the Magistrate take cognizable of the offence. When the revision petitioner was arrested merely on suspicion under Section 41(1)(d) Cr.P.C. which does not amount to an offence, much less, a cognizable or non-bailable offence, there was absolutely no warrant for the Magistrate to order the detention of the revision petitioner in judicial custody. In such a situation, if at all the Magistrate could make any assumption it could only be that no offence is made out against the revision petitioner and accordingly release him either on self bond or on sureties under Section 436 Cr.P.C."

* * *

"Section 167 Cr.P.C. does not permit the Magistrate to remand an arrested person to custody merely as a matter of routine. The Magistrate must satisfy himself that a non-bailable offence appears to have been committed by the arrested person and that an investigation into such offence has commenced and that detention of the arrested person in custody is really necessary. It is for arriving at the above satisfaction that a copy of the entries in the case diary maintained under Section 172 Cr.P.C. is forwarded to the Magistrate under Section 167(1) Cr.P.C. The duty of the Magistrate becomes all the more insistent in the case of a person who has been arrested on a mere suspicion under Section 41(1)(d) Cr.P.C. The Magistrate has to be watchful since the power to arrest on suspicion under Section 41(1)(d) Cr.P.C. without a warrant is liable to be abused by the police."

इसी प्रकार, न्याय दृष्टांत *फैसल विरूद्ध केरल राज्य*, ***2010 (3)*** *ए.आई.सी.एल.आर.* ***597*** में एक व्यक्ति को धारा 41 व 102 द.प्र.सं. के अंतर्गत एक मोटर सायकिल, जिसके संबंध में यह संदेह था कि वह चोरी की संपत्ति है, के आधिपत्य में पाए जाने से पुलिस द्वारा गिरफ्तार गया। मजिस्ट्रेट द्वारा उक्त व्यक्ति को न्यायिक अभिरक्षा में भेजे जाने का आदेश दिया गया। पश्चातवर्ती प्रक्रम पर पुलिस ने अभियुक्त के द्वारा कोई अपराध कारित किया जाना नहीं पाया। केरल उच्च न्यायालय द्वारा अभिनिर्धारित किया गया कि मजिस्ट्रेट द्वारा ऐसे व्यक्ति को न्यायिक अभिरक्षा में भेजने में त्रुटि की गई। आक्षेपित अपराध को जमानतीय मानकर याचिकाकर्ता को स्वयं के मुचलके पर छोड़े जाने का आदेश दिया गया।

इस संबंध में राजस्थान उच्च न्यायालय द्वारा पारित न्यायदृष्टांत *राहुल पारिक विरुद्ध राजस्थान राज्य, **2017** सी.आर.एल.जे. **721*** (राजस्थान) भी अवलोकनीय है। उक्त प्रकरण के तथ्य इस प्रकार थे कि अभियुक्तगण को एंटी करप्शन ब्यूरो द्वारा दिनांक 11.03.2016 को धारा 7/13 भ्रष्टाचार निवारण अधिनियम के अपराध के संदेह में गिरफ्तार कर विचारण न्यायालय के समक्ष अभिरक्षा हेतु दिनांक 12.03.16 को प्रस्तुत किया गया। न्यायालय द्वारा अभियुक्त की दिनांक 14.03.16 तक की अभिरक्षा प्राधिकृत की गई और इसके उपरांत दिनांक 14.03.16 को पुनः अभियुक्त की 14 दिवस की न्यायिक अभिरक्षा स्वीकृत की गई जबकि उक्त दिनांक तक अभियुक्त के विरुद्ध कोई प्रथम सूचना रिपोर्ट पंजीबद्ध नहीं थी। अभियुक्त के विरुद्ध दिनांक 17.03.16 को प्रथम सूचना रिपोर्ट पंजीबद्ध की गई। उच्च न्यायालय के समक्ष विचारण न्यायालय द्वारा प्राधिकृत उक्त अभिरक्षा आदेश की वैधता को चुनौती दी गई। न्यायालय के समक्ष मुख्य विचारणीय बिंदु यह भी था कि ''क्या मजिस्ट्रेट द्वारा धारा 167 दं.प्र.सं. के अंतर्गत किसी ऐसे व्यक्ति की अभिरक्षा प्राधिकृत की जा सकती है जिसके विरुद्ध धारा 157 दं.प्र.सं. के अंतर्गत कोई रिपोर्ट मजिस्ट्रेट को प्राप्त नहीं हुई हो?''

उक्त प्रकरण में उच्च न्यायालय द्वारा धारा 154, 157, तथा 167 दं.प्र.सं. का निर्वचन करते हुए यह अभिनिर्धारित किया गया कि मजिस्ट्रेट द्वारा अभियुक्त के विरुद्ध संज्ञेय अपराध की प्रथम सूचना रिपोर्ट पंजीबद्ध हुए बिना प्राधिकृत प्रथम अभिरक्षा एवं पश्चातवर्ती अभिरक्षा धारा 167 दं.प्र.सं. के प्रावधानों के प्रतिकूल जाकर दी गई थी अर्थात मजिस्ट्रेट द्वारा अधिकृत निरोध को अवैध ठहराया गया।

उपरोक्त प्रावधानों तथा न्याय दृष्टांतों में पारित विधि से यह स्पष्ट है कि प्रथम सूचना रिपोर्ट संज्ञेय मामले में पुलिस द्वारा अन्वेषण प्रारंभ करने की पूर्ववर्ती शर्त है जो इस बात द्योतक है कि अभियुक्त के विरूद्ध संज्ञेय अपराध के युक्तियुक्त संदेह विद्यमान है। उक्त न्याय दृष्टांतों में पारित विधि का मुख्य उद्देश्य ही यह है कि अभिरक्षा प्राधिकृत करने के पूर्व मजिस्ट्रेट का यह पूर्ण समाधान हो जाए कि जिस व्यक्ति का निरोध प्राधिकृत किया जा रहा है, उसके विरुद्ध संज्ञेय एवं अजमानती अपराध में संलिप्त होने के पर्याप्त आधार विद्यमान हैं। उक्त तथ्य सुनिश्चित करने का सर्वश्रेष्ठ विकल्प यही है कि ऐसे व्यक्ति के विरुद्ध संज्ञेय मामलों को विर्निदिष्ट करने वाली रिपोर्ट अर्थात प्रथम सूचना रिपोर्ट रिमांड प्राधिकृत करने के पूर्व मजिस्ट्रेट के समक्ष प्रस्तुत की जावे जिससे कि मजिस्ट्रेट का यह समाधान हो जाए की अभियुक्त को धारा 41 के प्रावधानों के अनुरुप ही संज्ञेय अपराध के संदेह में ही गिरफ्तार किया गया है और ऐसे व्यक्ति के विरुद्ध अग्रिम अनुसंधान किए जाने के पर्याप्त आधार है। यहां पर यह उल्लेख करना भी समीचीन होगा कि न्यायालय को अभिरक्षा प्राधिकृत करने के पूर्व इस तथ्य का भी ध्यान रखना होगा कि प्रथम सूचना रिपोर्ट से तात्पर्य ऐसी सूचना है जिससे किसी व्यक्ति द्वारा संज्ञेय अपराध का कारित किया जाना प्रकट होता हो। अभिरक्षा प्राधिकृत करते समय प्रथम सूचना रिपोर्ट का कठोर अर्थान्वयन किया जाना अपेक्षित नहीं है अपितु सर्वोच्च न्यायालय एवं उच्च न्यायालय द्वारा इस संबंध में समय-समय पर प्रतिपादित विधि को भी न्यायालय को ध्यान में रखना होगा। इस प्रयोजन हेतु कलकत्ता उच्च न्यायालय की युगल पीठ द्वारा *मनिमोहन घोष विरुद्ध एम्परर, ए.आई.आर. **1931** कल. **745*** में प्रतिपादित निम्न मत अवलोकनीय है-

> “The conditions as to writing in Sec. 154 of the Code are merely procedural. If there is an ‘information relating to the commission of a cognizable offence’ it falls under Section 154 and becomes admissible in evidence as such, even though the police officer may have neglected to record it in accordance with law. Owing to this neglect in particular cases, the Courts have laid down from time to time that the information which starts the investigation is the real first information under section 154 and should be treated in evidence as such. It does not depend on the sweet will of the police officer, who may or may not have recorded it. But the condition as to the character of the statements is really two-fold; first, it must be an information and, secondly, it must relate to a cognizable offence on the face of it and not merely in the light of subsequent events. It was never meant to be laid down that any sort of information would fall under Sec. 154, so long as it was the first in point of time.”

न्यायदृष्टांत *तपिंदर सिंह विरुद्ध पंजाब राज्य,* *ए.आई.आर.* ***1970*** *एस.सी.* ***1566*** में यह प्रतिपादित किया गया है कि दूरभाष पर दिया गया ऐसा संदेश जिससे निश्चित रुप से संज्ञेय अपराध के संबंध में जानकारी न दी गई हो, प्रथम सूचना रिपोर्ट नहीं माना जा सकता। न्यायदृष्टांत *धनंजय चटर्जी उर्फ धन्ना विरुद्ध पश्चिम बंगाल राज्य,* ***(1994) 2*** *एस.सी.सी.* ***220*** तथा *आन्ध्रप्रदेश राज्य विरुद्ध वी.वी. पान्डुरंगा राव,* ***(2009) 15*** *एस.सी.सी.* ***211*** में यह अभिनिर्धारित किया गया कि जहां टेलीफोनिक सूचना के आधार पर अनुसंधान अधिकारी घटनास्थल पर रवाना हो गया और वहां पहुंचकर उसके द्वारा साक्षी का कथन लेखबद्ध किया गया तो ऐसी स्थिति में अनुसंधान अधिकारी द्वारा लेख किया गया कथन ही प्रथम सूचना रिपोर्ट कहलाएगा। पान्डुरंगा राव के मामले में यह भी स्पष्ट किया गया कि जहां अज्ञात व्यक्ति द्वारा पुलिस को घटनास्थल पर भेजने मात्र से ही घटना के संबंध में केवल धुंधली प्रकृति की सूचना दी गई हो जिससे निश्चित रुप से संज्ञेय अपराध का घटित होना प्रकट न होता हो, तो ऐसी सूचना को प्रथम सूचना रिपोर्ट नहीं माना जा सकता परंतु जब संज्ञेय अपराध के संबंध में पुलिस को टेलीफोन पर कोई निश्चित सूचना दी गई हो और उक्त सूचना पुलिस द्वारा अभिलिखित की गई हो तो ऐसी टेलीफोनिक सूचना भी प्रथम सूचना रिपोर्ट की परिधि में आएगी। न्यायदृष्टांत *सुनील कुमार विरुद्ध मध्य प्रदेश राज्य,* *ए.आई.आर.* ***1997*** *एस.सी.* ***940,*** में जहां पुलिस द्वारा घटना की सूचना टेलीफोन पर प्राप्त होने पर उक्त सूचना को रोजनामचा में दर्ज किया गया तो सर्वोच्च न्यायालय द्वारा इसे प्रथम सूचना रिपोर्ट के रूप में मान्य किया गया भले ही उक्त सूचना में किसी विशिष्ट व्यक्ति द्वारा अपराध कारित करने के संबंध में कोई तथ्य उलिखित नहीं किया गया था।

न्याय दृष्टांत *मोह. शफीक पहलवान विरुद्ध मध्यप्रदेश राज्य* ***2002 (5)*** *एम.पी.एल.जे.* ***304*** में न्याय दृष्टांत *तपिंदर सिंह* (उपरोक्त) को उधृत करते हुए यह निर्धारित किया गया कि सिपाही द्वारा टेलीफोन पर घटना के संबंध में दी गई जानकारी को अथवा अस्पताल द्वारा दिए गए संदेश को भी प्रथम सूचना रिपोर्ट के रूप में मान्य किया जा सकता है। उक्त प्रकरण में रोजनामचा सान्हा में संज्ञेय अपराध के संबंध में की गई प्रविष्ट को भी प्रथम सूचना रिपोर्ट के रूप में मान्य किया गया।

मोतीलाल विरुद्ध मध्यप्रदेश राज्य, ***2000 (1)*** *एम.पी.एच.टी.* ***229*** में देहाती नालसी को प्रथम सूचना रिपोर्ट के रूप में मान्य किया गया।

न्याय दृष्टांत *टी. टी. एंटोनी विरुद्ध केरल राज्य, ए.आई.आर.* ***2001****एस.सी.* ***2637*** में पुलिस अधिकारी द्वारा अपराध घटित होने की सूचना प्राप्त होने पर उसे केस डायरी में अंकित किया गया और उसके उपरांत अनुसंधान प्रारंभ किया गया। सर्वोच्च न्यायालय द्वारा अभिनिर्धारित किया गया कि केस डायरी में अंकित उक्त सूचना को प्रथम सूचना रिपोर्ट माना जा सकता है और उसके पश्चात प्राप्त होने वाली सभी जानकारियां धारा 162 द.प्र.स. के अंतर्गत आएगी।

इस संबंध में न्याय दृष्टांत *पुलिस अधीक्षक, सी.बी.आई विरूद्ध तपनकुमार सिंह ए.आई.आर.* ***2003*** *एस.सी* ***4140*** भी अवलोकनीय है जिसके तथ्य इस प्रकार थे कि सीबीआई को टेलीफोन पर संज्ञेय अपराध के संबंध में सूचना प्राप्त होने पर पुलिस द्वारा उक्त सूचना जनरल डायरी में लेख करने के उपरांत अभियुक्त को भ्रष्टाचार निवारण अधिनियम के अंतर्गत अपराध के संदेह में गिरफ्तार किया गया था और उसके उपरांत अभियुक्त के विरूद्ध प्रथम सूचना रिपोर्ट पंजीबद्ध की गई थी। कलकत्ता उच्च न्यायालय द्वारा अभियुक्त के विरूद्ध की गई कार्यवाही को मात्र इसी आधार पर निरस्त कर दिया गया कि अभियुक्त से की गई जप्ती एवं गिरफ्तारी की कार्यवाही अनुसंधान का भाग होती है और अनुसंधान के पूर्व प्रथम सूचना रिपोर्ट पंजीबद्ध किया जाना आवश्यक था। सर्वोच्च न्यायालय द्वारा अभिनिर्धारित किया गया कि प्रकरण की परिस्थितियों को दृष्टिगत रखते हुए पुलिस अधिकारी को प्राप्त संज्ञेय अपराध की सूचना के आधार पर जनरल डायरी में की गई प्रविष्टि ही प्रथम सूचना रिपोर्ट मानी जायेगी और पुलिस द्वारा इसके उपरांत की गई अन्वेषण कार्यवाही को मात्र इस आधार पर निरस्त नहीं किया जा सकता कि औपचारिक प्रथम सूचना रिपोर्ट को जप्ती एवं गिरफ्तारी की कार्यवाही के पश्चात पंजीबद्ध किया गया था।

अंततः पुलिस को किसी व्यक्ति को गिरफ्तार करने के पूर्व यह सुनिश्चित करना चाहिए कि गिरफ्तारी किस उद्देश्य के लिए है और इससे क्या लाभ होगा। पुलिस को गिरफ्तारी के कारणों को अभिलिखित करना होगा और धारा 41 दं.प्र.सं. का पालन सुनिश्चित करना होगा। इसके अतिरिक्त जब ऐसे गिरफ्तार व्यक्ति को मजिस्ट्रेट के समक्ष उसकी अभिरक्षा प्रधिकृत करने के लिए प्रस्तुत किया जाता है तो मजिस्ट्रेट को इस संबंध में संतुष्ट होना आवश्यक है कि अभियुक्त के विरूद्ध संज्ञेय और अजमानतीय अपराध का अभियोग है। पुलिस के संदेह के आधार और मजिस्ट्रेट की संतुष्टि विवेचन से स्पष्ट है कि वारंट के बिना गिरफ्तार किए गए व्यक्ति की अभिरक्षा प्राधिकृत करते समय मजिस्ट्रेट का जहां एक ओर यह समाधान होना आवश्यक है कि अभियुक्त की गिरफ्तारी संज्ञेय अपराध के युक्तियुक्त संदेह के आधार पर की गई हो, वहीं दूसरी ओर उक्त आधार की पुष्टि के लिए यह भी

आवश्यक है कि अभियुक्त के विरुद्ध अभिरक्षा प्राधिकृत किए जाने के पूर्व संज्ञेय अपराध के संबंध में स्पष्ट प्रथम सूचना रिपोर्ट भी अभिलेख पर हो।

निष्कर्ष

उपरोक्त विवेचन उपरांत निम्न निष्कर्ष प्राप्त होते है:-

1. संज्ञेय अपराध के संदेह के आधार पर पुलिस अधिकारी को वारंट के बिना गिरफ्तारी के पूर्व ऐसे संदेह के युक्तियुक्त आधार अभिलिखित करना अनिवार्य है।
2. धारा 167 दं.प्र.सं. के अंतर्गत किसी व्यक्ति का निरोध प्राधिकृत करने के पूर्व मजिस्ट्रेट को यह समाधान कर लेना आवश्यक हैं कि जिस व्यक्ति का निरोध प्राधिकृत किया जा रहा है उस व्यक्ति को धारा 41 दं.प्र.सं. के प्रावधानों के अनुरूप ही गिरफ्तार किया गया है तथा ऐसे व्यक्ति के विरुद्ध किसी संज्ञेय व अजमानतीय मामले में अनुसंधान लंबित है और ऐसा अनुसंधान 24 घंटे के भीतर पूर्ण किया जाना संभव नहीं हैं।
3. चूंकि प्रथम सूचना रिपोर्ट केवल संज्ञेय मामलों में ही पंजीबद्ध की जाती है, ऐसे में प्रथम सूचना रिपोर्ट इस तथ्य के निर्धारण करने का सर्वश्रेष्ठ पैमाना है कि अभियुक्त के विरूद्ध प्रथम दृष्टया संज्ञेय मामला बनता है।
4. प्रथम सूचना रिपोर्ट का तात्पर्य संज्ञेय अपराध की प्रथम सूचना से है। ऐसा कोई सर्वमान्य नियम नहीं है कि धारा 154 द.प्र.स. के अंतर्गत संज्ञेय अपराध की सूचना किसी निश्चित प्रारुप में ही लेख की जाए, अपितु मामले के तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए देहाती नालसी, रोजनामचा अथवा जनरल डायरी में की गई प्रविष्टि, संज्ञेय अपराध के संबंध में पुलिस को फोन या फेक्स पर दी गई निश्चित सूचना की लिखित प्रविष्टि आदि को भी प्रथम सूचना रिपोर्ट के रूप में मान्य किया जा सकता है।
5. ऐसे व्यक्ति की अभिरक्षा धारा 167 दं.प्र.सं. के अंतर्गत स्वीकार नहीं की जा सकती जिसके विरूद्ध संज्ञेय मामले के युक्तियुक्त आधार प्रकट न होते हों। धारा 41 दं.प्र.सं. के अंतर्गत ''पुलिस का संदेह'' एवं धारा 167 दं.प्र.सं. के अंतर्गत ''मजिस्ट्रेट की संतुष्टि'' दोनों पृथक संकल्पनाएं है। मात्र धारा 41 दं.प्र.सं. के तहत गिरफ्तारी अभिरक्षा प्राधिकृत करने के लिये संतुष्टि का आधार नहीं हो सकती है। पुलिस का संदेह सही या गलत भी हो सकता है परंतु अभिरक्षा प्रदान करने के पूर्व मजिस्ट्रेट को यह सुनिश्चित करना आवश्यक है कि जिस व्यक्ति की अभिरक्षा प्रदान की जा रही है, उसके विरुद्ध प्रथम दृष्टया संज्ञेय मामले में अनुसंधान करने हेतु पर्याप्त आधार है। अर्थात केवल पुलिस का संदेह रिमाण्ड प्राधिकृत करने हेतु मजिस्ट्रेट की संतुष्टि का स्थान नहीं ले सकता।

PART - II

NOTES ON IMPORTANT JUDGMENTS

***101. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12(1)(f)**
Availability of alternative suitable accommodation – Open for the landlord to choose a more suitable option for carrying out business of her son – Choice of the landlord cannot be dictated by the tenant. (*Anil Bajaj & anr. v. Vinod Ahuja, AIR 2014 SC 2294* relied upon)

स्थान नियंत्रण अधिनियम, **1961** (म.प्र.) - धारा **12 (1)**(च)

वैकल्पिक उपयुक्त स्थान की उपलब्धता - भू-स्वामी उसके पुत्र के व्यवसाय करने हेतु अधिक उपयुक्त विकल्प को चुन सकता है - भू-स्वामी की पसंद को किरायेदार निर्धारित नहीं कर सकता है (अनिल बजाज एण्ड अन्य विरूद्ध विनोद आहूजा, ए.आई.आर. 2017 एस.सी. 2294 अवलंबित)

Bhupinder Singh Bawa v. Asha Devi
Order dated 08.11.2016 passed by the Supreme Court in Civil Appeal No. 9941 of 2014, reported in AIR 2016 SC 5258

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102. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 (4)

(i) Arbitration proceeding – Remand – No power invested by Parliament in the court to remand the matter to the Arbitral Tribunal – The court has power only to adjourn the proceedings for limited purpose mentioned in sub-section (4) of section 34.

(ii) Arbitration proceeding – Power of court to defer proceeding –Limited discretion available to court by virtue of section 34 (4) – Court cannot exercise limited power *suo motu* to defer proceeding – Limited remedy available under section 34 (4) is to be invoked by the party before the award is set aside by the court.

माध्यस्थम् एवं सुलह अधिनियम, **1996 -** धारा **34 (4)**

(i) माध्यस्थम कार्यवाही - प्रतिप्रेषण - न्यायालय को माध्यस्थम् न्यायाधिकरण को प्रकरण प्रतिप्रेषित (रिमांड) करने की शक्ति प्रदत्त नहीं है - न्यायालय मात्र धारा 34 के उपधारा (4) में उल्लेखित सीमित प्रयोजनों से कार्यवाही स्थगित कर सकता है।

(ii) माध्यस्थम कार्यवाही - कार्यवाही स्थगित करने के लिये न्यायालय की शक्ति - धारा 34 (4) के आधार पर न्यायालय को सीमित विवेक ही उपलब्ध हैं - न्यायालय स्वतः ही कार्यवाही आस्थगित करने के लिये सीमित शक्ति का प्रयोग नहीं कर सकता - न्यायालय द्वारा अवार्ड को अपास्त किये जाने से पूर्व धारा 34 (4) के अंतर्गत पक्षकारों के विकल्प पर सीमित उपचार ही उपलब्ध हैं।

Kinnari Mullick and another v. Ghanshyam Das Damani
Judgment dated 20.04.2017 passed by the Supreme Court in Civil Appeal No. 5172 of 2017, reported in AIR 2017 SC 2785 (Three Judge Bench)

Relevant extracts from the Judgment:

On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section 4 of Section 34. This legal position has been expounded in the case of ***McDermott International Inc. v. Burn Standard Ltd., 2006 AIR SCW 3276*** in paragraph 8 of the said decision, the Court observed thus:

> "8.....parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under sub-section (4) of Section 34 of the Act. The object of sub-section (4) of Section 34 of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award."

In any case, the limited discretion available to the Court under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it ***suo motu***. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application under Section 34(4) of the Act. For, consequent to disposal of the main proceedings under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court.

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103. CIVIL PROCEDURE CODE, 1908 – Section 9

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 34

Jurisdiction of Civil Court, exclusion of – The jurisdiction of the Civil Court is plenary in nature and unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits.

सिविल प्रक्रिया संहिता, **1908 -** धारा **9**

प्रतिभूतीकरण और वित्तीय आस्तियों का पुनर्गठन और प्रतिभूति हित को प्रभावी करने का अधिनियम, 2002 - धारा 34

सिविल न्यायालय के क्षेत्राधिकार का अपर्वजन - सिविल न्यायालय का क्षेत्राधिकार, प्रकृति में सर्वांगीण होता है एवं जब तक कि उसे इससे स्पष्ट रूप से आवश्यक निहितार्थ वंचित नहीं किया जाता, इसे सभी प्रकार के वादों के विचारण का क्षेत्राधिकार प्राप्त है।

Robust Hotels Pvt. Ltd. v. EIH Limited

Judgment dated 07.12.2016 by the Supreme Court in Civil Appeal No. 11886 of 2016, reported in (2017) 1 SCC 622

Relevant extracts from the Judgment:

The scope and ambit of Section 34 of Sarfaesi Act, 2002 have been considered by this Court in several cases. It is sufficient to refer the judgment of this Court in ***Nahar Industrial Enterprises Limited v. Hong Kong & Shanghai Banking Corporation, (2009) 8 SCC 646***. This Court held that the jurisdiction of the Civil Court is plenary in nature, unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits.

Following was laid down in para 110 -111:-

> "110. It must be remembered that the jurisdiction of a civil court is plenary in nature. Unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits.
>
> 111. In ***Dhulabhai v. State of M.P., AIR 1969 SC 78*** this Court opined:
>
>> "32. ... The result of this inquiry into the diverse views expressed in this Court may be stated as follows:
>>
>> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

A perusal of Section 34 indicates that there is express bar of jurisdiction of the Civil Court to the following effect:

"(i) Any suit or proceeding in respect of any matter in which Debt Recovery Tribunal or Appellate Tribunal is empowered by or under this Act to determine.

(ii) Further, no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993."

Thus the bar of jurisdiction of Civil Court has to correlate to the above mentioned conditions.

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104. CIVIL PROCEDURE CODE, 1908 – Section 151

Suit for eviction and recovery of rent – Plaintiff/respondent executed power of attorney in favour of her son – Son filed affidavit under Order 18 Rule 4 CPC on the strength of power of attorney – Objection raised by petitioner/defendant on the ground that whether the rent was properly paid or not is a matter of fact which is within the personal knowledge of plaintiff – Son cannot depose by entering into the shoes of plaintiff – Held, power of attorney holder is a member of family – Knows factual aspect of *bonafide* need – It cannot be held as a strait jacket formula that power of attorney holders cannot depose about non-payment of rent – Power of attorney holder's statement can be demolished during cross-examination – Order of the Trial Court upheld – Petition dismissed.

सिविल प्रक्रिया संहिता**, 1908 -** धारा **151**

निष्कासन और किराया वसूली हेतु वाद - वादी/प्रतिप्रार्थी ने अपने पुत्र के पक्ष में मुख्तारनामा निष्पादित किया - पुत्र द्वारा मुख्तारनामें के आधार पर आदेश 18 नियम 4 व्य.प्र.सं. के अन्तर्गत शपथ पत्र प्रस्तुत किया गया - याचिकाकर्ता/ प्रतिवादी के

द्वारा आपत्ति इस आधार पर उठाई गई कि किराया उचित रूप से अदा किया गया है या नहीं, यह एक ऐसा तथ्य है जो वादी की ही व्यक्तिगत जानकारी में है - पुत्र, वादी के जूते में पैर रखकर साक्ष्य नहीं दे सकता - अभिनिर्धारित, मुख्तारनामें का धारक परिवार का सदस्य है - सद्भाविक आवश्यकता के वास्तविक तथ्यों को जानता है - ऐसा कोई स्ट्रेट जैकेट फार्मूला नहीं है कि मुख्तारनामें का धारक किराया अदा न किये जाने के संबंध में साक्ष्य ही नहीं दे सकता है - प्रतिपरीक्षण के दौरान मुख्तारनामें के धारक के कथनों को ध्वस्त किया जा सकता है - विचारण न्यायालय के आदेश को सही ठहराया गया - याचिका निरस्त की गई।

Ghanshyam Chandil v. Smt. Ramkatori Agrawal

Order dated 28.04.2015 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Writ Petition No. 7646 of 2014, reported in ILR (2016) MP 2682

Relevant extracts from the Order:

The judgment of ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others, (2010) 10 SCC 512*** was considered by this Court in ***Bashir v. Smt. Hussain Bano, 2005 (2) MPLJ 230***. This Court opined that when POA holder is a member of family, he can depose on her behalf regarding the bona fide need. In my view also, the aspect of ***bona fide*** need is a thing which is known to most of the family members. Therefore, it cannot be said that deposition of POA holder on the point of bona fide need is beyond his personal knowledge. In other words, the son, who is POA holder in the present case, knows about the factual aspect of bona fide need. It is well within his personal knowledge and, hence, he can depose with regard to ***bona fide*** requirement.

The second question is whether the question of non- payment of rent can be said to be a question of personal knowledge of plaintiff only.

In my view, it depends on the facts and circumstances ofthe case. In a given case, it may happen that this factual aspect is also known to the POA holder being the son. For example, if mother is very old, illiterate or not very well educated or for other social reason not able to take care of everything, she can very well entrust the work of keeping the record of rent to her son. Putting it differently, there may becases where the mother/father may entrust the work of maintaining the account of rent to their son. Therefore, as athumb rule, it cannot be said that it can be the only plaintiff who may have personal knowledge about the question of non-payment of rent. Thus, as per principle 18(c) laid down in ***Man Kaur (Dead) by LRs. v. Hartar Singh Sangha, AIR 2014 SC 630***, I am unable to hold that principal alone may have personal knowledge in cases of non-payment of rent in eviction suit. This depends on the facts and circumstances of each case. If POA holder enters the witness-box, it is open to thedefendant to ask relevant questions on the aspect of non-payment of rent, personal knowledge about non-payment ofrent etc. POA holder's statement can very well be demolished during cross-examination.

As analyzed above, it cannot be held as a straitjacket formula that in no case POA holder can depose about non-payment of rent. Thus, in my view, the court below has taken aplausible view, which does not require any interference under supervisory jurisdiction of this Court under Article 227 of the Constitution.

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105. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18
LIMITATION ACT, 1963 – Article 137
Whether there is any limitation period for filing an application for carrying out directions of preliminary decree regarding passing a final decree? Held, No – Such application is merely a reminder to the court and cannot be construed as an application within the meaning of the Limitation Act.

सिविल प्रक्रिया संहिता, **1908 -** आदेश **20** नियम **18**

परिसीमा अधिनियम, **1963 -** अनुच्छेद **137**

क्या प्रारंभिक डिक्री के निर्देशों को पूरा कर अंतिम डिक्री पारित करने हेतु आवेदन प्रस्तुत करने के लिये कोई परिसीमा है ? अभिनिर्धारित, नहीं - ऐसा आवेदन मात्र न्यायालय के लिए एक स्मरण पत्र है एवं उसका अर्थ परिसीमा अधिनियम के अंतर्गत एक आवेदन के रूप में नहीं लगाया जा सकता है।

Venu v. Ponnusamy Reddiar (Dead) Thr. Lrs. and another

Judgment dated 27.04.2017 passed by the Supreme Court in Civil Appeal No. 4187 of 2008, reported in AIR 2017 SC 2447

Relevant extracts from the Judgment:

The view adopted by a Single judge of the High Court of Kerala in ***Laxmi & ors. v. A. Sankappa Alwa & ors., 1989 AIR (Ker) 289*** the logic given by the High Court of Kerala that the preliminary decree does not completely dispose of the suit. The suit continues till the final decree is passed. Suit is pending till the passing of the final decree. There is no necessity of filing an application to apply for the final decree proceedings by litigants, then there is an obligation on the court for drawing up a final decree. The court had held thus :

> "I turn to consider the question of obligation of the Court and the parties after a preliminary decree is given in a partition suit. I do not propose to discuss that matter elaborately. In my view a preliminary decree conclusively determines the rights and liabilities of the parties with regard to all or some of the matters in controversy in the suit although it does not completely dispose of the suit. Further proceedings await the suit to work out and adjust the rights of the parties. The Court cannot dismiss a suit for default when once a preliminary decree is passed in a partition suit. The parties to the suit have acquired rights or incurred liabilities under the decree. They are final, unless or until

the decree is varied or set aside. The law being so, if the plaintiff does not take any steps after a preliminary decree is passed, the Court should adjourn the proceedings ***sine die*** with liberty to the parties concerned to end the torpor and suspended animation of the suit by activising it by taking appropriate proceedings. In ***Thomas v. Bhavani Amma, 1969 Ker LT 729, Krishna Iyer, J.*** observed :

> "It is correct law that in a suit for partition, after the passing of a preliminary decree it is the duty of the Court to pass a final decree and what is called an application for final decree is but a reminder to the Court of its duty. If so, it is the Court's duty to give notice to the parties."

No rule provides for the filing of an application by the party for passing a final decree. The preliminary decree will not dispose of the suit. The suit continues. The position being so, it is more appropriate for the Court to adjourn the case ***sine die***. It is difficult for me to say that there is an obligation on the part of the Court to "pass the final decree after necessary enquiries" as observed by Paripoornan, J. in (***Sreedevi Amma v. Nani Amma, 1985 Ker L T 940***).

I am of the opinion that an application for drawing up a final decree in a partition suit is in no way an application contemplated under the Limitation Act. It is a reminder to the Court that something which the Court is obliged to do has not been done and so, such an application, is not governed by any provision of the Limitation Act. When once the rights of the parties have been finally determined in a preliminary decree, an application by a party thereto or the legal representatives, for effecting the actual partition in accordance with the directions contained in the preliminary decree can never be construed to be an application within the meaning of the Limitation Act. It shall be taken to be an application in a pending suit and therefore the question of limitation does not arise.

Similar is the view taken by the Single Bench of High Court of ***Punjab & Haryana in Naresh Kumar & anr. v. Smt. Kailash Devi & ors., 1999 AIR (P&H) 102*** in which reliance has been placed upon the decision of High Court of Madras in ***Ramanathan Chetty v. Alagappa Chetty, 1930 AIR (Mad) 528*** in which it was held that until final decree is passed in a partition suit, limitation will not come into play because the suit continues, till final decree is passed. Reliance is also placed on a decision of High Court of Peshawar in ***Faqir Chand v. Mohammad Akbar Khan, 1933 AIR (Pesh) 10101***, in which it has been observed that there is no obligation of a litigant to apply for final decree proceedings. As such there is no question of application of the limitation. Another decision of the High Court of Orissa had been referred in ***Sudarsan Panda v. Laxmidhar Panda, 1983 AIR (Ori) 121*** in which also similar view had been taken.

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106. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 90

Auction sale – Setting aside – Auction of property of Judgment-debtor for decretal amount in execution of decree – Amount payable by Judgment-debtor less than Rs. 4 Lakh on the date of sale – Property worth more than Rupees one crore sold for Rs. 5,50,000/- only – Improper valuation of the property at time of sale – Judgment-debtor ready to refund the amount – Sufficient ground to set aside sale.

सिविल प्रक्रिया संहिता **1908 -** आदेश **21** नियम **90**

नीलामी द्वारा विक्रय- अपास्त करना - आज्ञप्ति के निष्पादन में आज्ञप्ति राशि के लिए निर्णीत ऋणी की संपत्ति की नीलामी - विक्रय दिनांक को निर्णीत ऋणी को चार लाख से कम राशि अदा करनी थी - एक करोड़ रूपये से अधिक मूल्य की सम्पत्ति को केवल रूपये 5,50,000/- रूपये में विक्रय कर दिया गया - विक्रय के समय सम्पत्ति का अनुचित मूल्यांकन किया गया - निर्णीत ऋणी राशि वापस करने के लिए तैयार था - विक्रय को अपास्त करने के लिए पर्याप्त आधार है।

Sanjay v. Anil S/o Shankarsa Pawar & ors.

Judgment dated 20.02.2017 passed by the Supreme Court in Civil Appeal No. 3045 of 2017, reported in AIR 2017 SC 2565

Relevant extracts from the Judgment:

Though there may be some dispute as to what was the actual value of the property that was sold in auction at the time of sale, it could not be disputed at the Bar that actual value of the property in question was much more than Rs. 5,50,000. We also find that no proper valuation was done of this property at the time of sale. In fact, the valuation report filed by the appellant shows that it is more than Rs.1 crore, as observed by the learned District Judge. This according to us, is sufficient ground to set aside the sale. While doing so, we are supported by the following observations of this Court in ***J. Rajiv Subramaniyan and anr. v. Pandiyas and ors., (2014) 5 SCC 651***:

> "18. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bona fide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr.Dhruv

> Mehta has pointed out that sale consideration is only Rs. 10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules."

We also find that the amount under decree which was payable was not much and was even less than Rs. 4 lakhs as on the date of the sale. That becomes an added reason to set aside the sale of the property, the value of which was much higher. Learned counsel for the appellant fairly stated at the Bar that the appellant was ready to refund the amount paid by respondent No.1. We are of the opinion that the equity would be balanced by directing the appellant to refund the said amount along with interest at the rate of 12 per cent from the date of payment and also the cost of litigation to respondent No. 1, which is quantified at Rs. 1 lakh. The setting aside of the sale is conditioned upon the payment of the aforesaid amount by the appellant to respondent No. 1 within a period of three months from today.

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107. CIVIL PROCEDURE CODE, 1908 – Order 41 Rules 27 and 28

Additional evidence – Permission granted by First Appellate Court but the procedure prescribed under Rule 28 CPC was not followed – Held, while accepting additional evidence, procedure under Rule 28 CPC should be followed to prove the document produced – Passing of decree simplicitor on the basis of additional evidence without following procedure, erroneous.

सिविल प्रक्रिया संहिता, **1908 -** आदेश **41** नियम **27** एवं **28**

अतिरिक्त साक्ष्य - प्रथम अपीलीय न्यायालय द्वारा अनुमति प्रदान किया जाना - नियम 28 के अंतर्गत निहित प्रक्रिया का पालन नहीं किया गया - अभिनिर्धारित, अतिरिक्त साक्ष्य को स्वीकार किये जाते समय, प्रस्तुत दस्तावेज को प्रमाणित करने के लिये नियम 28 में बताई गई प्रक्रिया का पालन किया जाना चाहिये - अतिरिक्त साक्ष्य के आधार पर, प्रक्रिया का पालन किये बिना, डिक्री पारित कर देना त्रुटिपूर्ण हैं।

Alamelu Ammal and another v. S. Rani and others

Judgment dated 02.01.2017 passed by the Supreme Court in Civil Appeal No. 27 of 2017, reported in AIR 2017 SC 2612

Relevant extracts from the Judgment:

It transpires that the High Court has not questioned the order passed by the First Appellate Court in allowing the application of the appellants under Order 41 Rule 27 of the Code of Civil Procedure, 1908. It means that insofar as exercise of the discretion by the First Appellate Court on this aspect was concerned, no fault was found there with and though the High Court rightly held that once the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 was allowed, the procedure contemplated under Order 41 Rule 28 of the

Code of Civil Procedure, 1908 should have been followed by the First Appellate Court and the document in question, which was Exhibit - A10, should have been proved in accordance with law. This was not done and the First Appellate Court simply acted upon the said Exhibit - A10 and on that basis passed the decree in favour of the appellants. However, thereafter the manner in which the High Court proceeded is also blemished to some extent. The High Court has set aside the decree passed by the First Appellate Court simply because the procedure contemplated under Order 41 Rule 28 of the Code of Civil Procedure, 1908 was not followed. In a situation like this more appropriate course of action for the High Court was to remit the case to the First Appellate Court with a direction to follow the procedure as contemplated under Order 41 Rule 28 of the Code of Civil Procedure, 1908 and thereafter decide the first appeal which was filed by the appellants herein.

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108. CONSTITUTION OF INDIA – Article 32

PRE-CONCEPTION AND PRE – NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) RULES, 1996

Female foeticide – Constitutional identity of female child cannot be mortgaged – Female child entitled to enjoy equal rights as granted to male child – Destroying female foetus by artificial means – Extinguishes the dignity of life of woman to be born – Perception of individual or group creating woman with indignity needs a prompt burial – In addition to earlier directions given in *AIR 2013 SC 1571,* directions issued to curb the menance of female foeticide.

भारतीय संविधान - अनुच्छेद **32**

पूर्व गर्भाधान और प्रसव पूर्व निदान तकनीक अधिनियम, **1994**

पूर्व गर्भाधान और प्रसव पूर्व निदान तकनीक नियम, **1996**

स्त्री भ्रूण हत्या - बालिका की संवैधानिक पहचान को बंधक नहीं रखा जा सकता है - बालिका, बालकों को प्रदान किये गये सभी अधिकारों को समान रूप से प्राप्त करने की अधिकारी है - कृत्रिम साधनों से कन्या भ्रूण को नष्ट करना - जन्म लेने वाली स्त्रियों के जीवन की गरिमा को समाप्त करता है - व्यक्ति या समूह की, स्त्रियों को अपमानित करने वाली उक्त धारणा को त्वरित रूप से दफना दिये जाने की आवष्यकता है - ए.आई.आर. 2013 एस.सी. 1571 में जारी किये गये निर्देशों के अतिरिक्त स्त्री भ्रूण हत्या के खतरे को रोकने के लिये निर्देश जारी किये गये।

Voluntary Health Association of Punjab v. Union of India and others

Judgment dated 08.11.2016 passed by the Supreme Court in Writ Petition (Civil) No. 349 of 2014, reported in AIR 2016 SC 5122

Relevant extracts from the Judgment:

It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronization does not arise.

* * *

Keeping in view the deliberations made from time to time and regard being had to the purpose of the Act and the far reaching impact of the problem, we think it appropriate to issue the following directions in addition to the directions issued in the earlier order ***i.e. Voluntary Health Association of Punjab v. Union of India, AIR 2013 SC 1571***:-

(a) All the States and the Union Territories in India shall maintain a centralised database of civil registration records from all registration units so that information can be made available from the website regarding the number of boys and girls being born.

(b) The information that shall be displayed on the website shall contain the birth information for each District, Municipality, Corporation or Gram Panchayat so that a visual comparison of boys and girls born can be immediately seen.

(c) The statutory authorities if not constituted as envisaged under the Act shall be constituted forthwith and the competent authorities shall take steps for the reconstitution of the statutory bodies so that they can become immediately functional after expiry of the term. That apart, they shall meet regularly so that the provisions of the Act can be implemented in reality and the effectiveness of the legislation is felt and realized in the society.

(d) The provisions contained in Sections 22 and 23 shall be strictly adhered to. Section 23(2) shall be duly complied with and it shall be reported by the authorities so that the State Medical Council takes necessary action after the intimation is given under the said provision. The Appropriate Authorities who have been appointed under Sections 17(1) and 17(2) shall be imparted periodical training to carry out the functions as required under various provisions of the Act.

(e) If there has been violation of any of the provisions of the Act or the Rules, proper action has to be taken by the authorities under the Act so that the legally inapposite acts are immediately curbed.

(f) The Courts which deal with the complaints under the Act shall be fast tracked and the concerned High Courts shall issue appropriate directions in that regard.

(g) The judicial officers who are to deal with these cases under the Act shall be periodically imparted training in the Judicial Academies or Training Institutes, as the case may be, so that they can be sensitive and develop the requisite sensitivity as projected in the objects and reasons of the Act and its various provisions and in view of the need of the society.

(h) The Director of Prosecution or, if the said post is not there, the Legal Remembrancer or the Law Secretary shall take stock of things with regard to the lodging of prosecution so that the purpose of the Act is subserved.

(i) The Courts that deal with the complaints under the Act shall deal with the matters in promptitude and submit the quarterly report to the High Courts through the concerned Sessions and District Judge.

(j) The learned Chief Justices of each of the High Courts in the country are requested to constitute a Committee of three Judges that can periodically oversee the progress of the cases.

(k) The awareness campaigns with regard to the provisions of the Act as well as the social awareness shall be undertaken as per the direction No 9.8 in the order dated March 4, 2013 passed in ***Voluntary Health Association of Punjab*** (supra).

(l) The State Legal Services Authorities of the States shall give emphasis on this campaign during the spread of legal aid and involve the para-legal volunteers.

(m) The Union of India and the States shall see to it that appropriate directions are issued to the authorities of All India Radio and Doordarshan functioning in various States to give wide publicity pertaining to the saving of the girl child and the grave dangers the society shall face because of female foeticide.

(n) All the appropriate authorities including the States and districts notified under the Act shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all registrations readily available as per sub-rule 6 of Rule 18A of the Rules.

(o) The States and Union Territories shall implement the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules, 2014 forthwith considering that the training provided therein is imperative for realising the objects and purpose of this Act.

(p) As the Union of India and some States framed incentive schemes for the girl child, the States that have not framed such schemes, may introduce such schemes.

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109. CONTEMPT OF COURTS ACT, 1971 – Sections 2(c) and 12

Unsubstantiated allegations of corruption against judges in a public meeting, which were later published in news paper – Does not come under the category of fair criticism – Amounts to scandalising or lowering the authority of the Court under Section 2(c) (i) – Further held, apology at a belated stage in contradiction to stand and affidavits filed, cannot be accepted – Contemnors fined Rs. 2000/- each.

न्यायालय अवमानना अधिनियम, **1971 -** धाराएं **2** (ग) एवं **12**

न्यायाधीशगण के विरूद्ध जनसभा में भ्रष्टाचार के आधारहीन आक्षेप, जो कि पश्चात् में समाचार पत्र में प्रकाशित किये गये - निष्पक्ष आलोचना की श्रेणी में नहीं आते हैं - धारा 2 (ग)(i) के अंतर्गत न्यायालय पर लांछन/आरोप लगाने या प्राधिकार गिराने का परिणाम रखते हैं - आगे अभिनिर्धारित, विलम्बित प्रक्रम पर क्षमा याचना जो कि लिये गये आधार एवं प्रस्तुत शपथ पत्र के विरोधाभास में है, स्वीकार नहीं की जा सकती - प्रत्येक अवमानकर्ता को रूपये 2000/- रूपये के अर्थदण्ड से दंडित किया गया।

Het Ram Beniwal and others v. Raghuveer Singh and others
Judgment dated 21.10.2016 passed by the Supreme Court in Criminal Appeal No. 463 of 2006, reported in AIR 2016 SC 4940

Relevant extracts from the Judgment:

We are, in the present case, concerned with Section 2(c)(i) of the Act which deals with scandalizing or lowering the authority of the Court. It has been held by this Court that judges need not be protected and that they can take care of themselves. It is the right and interest of the public in the due administration of justice that have to be protected. See ***Asharam M. Jain v. A. T. Gupta*** reported in

(1983) 4 SCC 125. Vilification of judges would lead to the destruction of the system of administration of justice. The statements made by the Appellants are not only derogatory but also have the propensity to lower the authority of the Court. Accusing judges of corruption results in denigration of the institution which has an effect of lowering the confidence of the public in the system of administration of justice. A perusal of the allegations made by the Appellants cannot be termed as fair criticism on the merits of the case. The Appellants indulged in an assault on the integrity of the judges of the High Court by making baseless and unsubstantiated allegations. They are not entitled to seek shelter under Section 5 of the Act.

The often quoted passage from ***Ambard v. Attorney-General for Trinidad and Tobago, [1936] A.C. 322*** is that "justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men." The Privy Council in the same judgment held as follows: "The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune." [Emphasis ours]

In ***Indirect Tax Practitioners Association v. R. K. Jain, AIR 2011 SC 2234*** this Court held in paragraph 23 as follows:

> "Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19 (1) (a) of the Constitution. Only when the criticism of judicial institution transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the court would use this power."

Every citizen has a fundamental right to speech, guaranteed under Article 19 of the Constitution of India. Contempt of Court is one of the restrictions on such right. We are conscious that the power under the Act has to be exercised sparingly and not in a routine manner. If there is a calculated effort to undermine the judiciary, the Courts will exercise their jurisdiction to punish the offender for committing contempt. We approve the findings recorded by the High Court that the Appellants have transgressed all decency by making serious allegations of corruption and bias against the High Court. The caustic comments made by the Appellants cannot, by any stretch of imagination, be termed as fair criticism. The statements made by the Appellants, accusing the judiciary of corruption lower the authority of the Court. The Explanation to sub-Section 12 (1) of the Act provides that an apology should not be rejected merely on the ground that it is qualified or tendered at a belated stage, if the accused makes it bona fide. The stand taken by the Appellants in the contempt petition and the affidavit filed

in this Court does not inspire any confidence that the apology is made bona fide. After a detailed consideration of the submissions made by both sides and the evidence on record, we are in agreement with the judgment of the High Court that the Appellants are guilty of committing contempt of Court. After considering the peculiar facts and circumstances of the case including the fact that the contemptuous statements were made in 2001, we modify the sentence to only payment of fine of Rs. 2,000/- each. The Appeal is dismissed with the said modification.

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110. CONTRACT ACT, 1872 – Sections 20 and 73

(i) Applicability of Section 20 of the Act – Common mistake of both the parties in respect to vital facts of the agreement is necessary.

(ii) Compensation for damages – Breach of contract – Damages can be given only for any loss actually suffered and not for any indirect loss.

संविदा अधिनियम, **1872 -** धाराएं **20** एवं **73**

(i) अधिनियम की धारा 20 की प्रयोज्यता - अनुबंध के महत्वपूर्ण तथ्यों के संबंध में दोनों पक्षकारों की सामान्य भूल आवश्यक है।

(ii) नुकसानी के लिये क्षतिपूर्ति - संविदा का भंग - नुकसानी मात्र वास्तविक रूप से कारित नुकसान हेतु प्रदान की जा सकती है न कि किसी अप्रत्यक्ष नुकसान हेतु।

Rachana Bhargava (Smt.) v. Krishanlal Sahni & ors.

Judgment dated 11.04.2016 passed by the High Court of Madhya Pradesh (Gwalior Bench) in First Appeal No. 225 of 2011, reported in ILR (2016) MP 2535

Relevant extracts from the Judgment:

From careful scrutiny of Section 20 of the Act it is axiomatic that in order to render a contract void on the ground of mistake, three grounds should coexist, namely, both the parties to the contract must be in a mistake, mistake should be one of fact and not of law, and mistake should be essential to the agreement.

Section 73 of the Act deals with one of the remedies available for the breach of contract, namely, damages where a party sustains a loss on account of breach of contract. In order to attract applicability of Section 73 of the Act, it is sine qua non that the defendant is guilty of breach of contract. Section 73 provides for damages which naturally arose in the usual course of things from the breach and which the parties knew when they made the contract, to be likely to result from that breach. In first eventuality usual losses may be claimed whereas in the second eventuality additional losses as well, may be claimed.

At this stage, we advert to the well settled legal position with regard to scope of section 73 of the Act in cases of breach of contract for sale of immoveable properties and principles laid down with regard to ascertainment of damages, as both the parties have relied up on section 73 of the Act. In the case of ***Nagar Das v. Ahmed Khan, (1895) 21 BOM 175***, it was held that the legislature while enacting Section 73 of the Act has not prescribed a different measure of damages in the case of contracts dealing with the land from that laid down in the case of contracts relating to commodities. Similar view was taken in the case of ***Harilal Dalsukhram v. Mulchand, AIR 1928 BOM 427*** and it was held that "as Section 73 imposes no exception on the ordinary law as to damages, whatever the subject matter of the contract, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make good the title, the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. The Supreme Court in the case of ***Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647***, referred to the decision in the case of ***Nagar Das*** (supra) and approved the ratio laid down therein that the legislature has not prescribed a different measure of damages in the contracts dealing with land from that laid down in the case of contracts relating to commodities.

It is well settled legal proposition that damages for a breach of contract must be based on the market price prevalent on the date of the breach. See ***Murlidhar Chiranjilal v. Harishchandra Dwarkadas (1962) 1 SCR 653*** and ***Kailash Nath Associates v. Delhi Development Authority and another, (2015) 4 SCC 136***. It is equally well settled legal proposition that if a contracting party has suffered damage through breach of contract by another contracting party, it is his duty to minimise the damage and if he has failed to do so when it was in his power, he cannot recover in respect of the damage which he could have avoided. [See: ***M. Lachia Setty & Sons Ltd. v. Coffee Board, (1980) 4 SCC 636***]. The Supreme Court in the case of ***Gaziabad Development Authority v. Union of India, AIR 2000 SC 2003*** has held that in case of breach of a commercial contract, damages for anguish and vexation caused by breach of contract cannot be awarded. It is well settled in law that when the parties enter into a contract under a mutual mistake or misapprehension as to a matter of fact essential to the agreement, the very foundation thereof, there is no contract between them, or in order words such a contract is void under Section 20 of the Act. [See ***Tarsem Singh v. Sukhminder Singh (1998) 3 SCC 471***].

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111. CRIMINAL PROCEDURE CODE, 1973 – Sections 41, 154, 156, 157 and 167

(i) Investigation, when commences – Investigation commences with the registration of First Information Report – A conjoint reading of sections 154, 156 and 157 Cr.P.C reveals that investigation succeeds the registration of an FIR – Registration of the FIR is a condition precedent to an investigation under the law – There can be no investigation by the police without the registration of an FIR.

(ii) Whether Magistrate can extend the remand of a person who has been arrested u/s 41 Cr.P.C in the absence of an FIR? Held, No – Further held, Magistrate must satisfy himself that the material so far gathered in the course of investigation, *prima facie* discloses his involvement in the offence – Where such person is produced by the police before the Magistrate u/s 167 Cr.P.C for the extension of his remand in judicial custody or police custody and where no FIR has been registered by the police, the Magistrate must refuse to exercise jurisdiction u/s 167 and secure the release of the person so arrested forthwith as his custody has been rendered illegal after the passage of twenty-four hours.

दंड प्रक्रिया संहिता, **1973 -** धाराएं **41, 154, 156, 157** एवं **167**

(i) अनुसंधान कब प्रारंभ होगा - अनुसंधान, प्रथम सूचना रिपोर्ट के पंजीबद्ध किये जाने से प्रारंभ होगा - धारा 154, 156 एवं 157 दं.प्र.सं. का संयुक्त अध्ययन दर्शाता है कि प्रथम सूचना रिपोर्ट के पंजीकरण के पश्चात् ही अनुसंधान आता है - विधि के तहत प्रथम सूचना रिपोर्ट का पंजीबद्ध होना, अनुसंधान प्रारंभ करने के लिये एक पूर्ववर्ती शर्त है, प्रथम सूचना रिपोर्ट के पंजीबद्ध हुये बिना पुलिस के द्वारा कोई अनुसंधान नहीं किया जा सकता है।

(ii) क्या मजिस्ट्रेट एक व्यक्ति जिसे धारा 41 दं.प्र.सं. में गिरफ्तार किया हो की अभिरक्षा को प्रथम सूचना रिपोर्ट के अभाव में बढ़ा सकता है? अभिनिर्धारित नहीं - आगे अभिनिर्धारित किया गया कि मजिस्ट्रेट को स्वयं को इस बात से संतुष्ट होना आवश्यक है कि अनुसंधान के दौरान जो सामग्री एकत्रित की गई है, वह प्रथम दृष्टया अपराध में उसकी संलिप्तता को प्रकट करती है - जहां कि ऐसे व्यक्ति को पुलिस के द्वारा मजिस्ट्रेट के समक्ष धारा 167 द.प्र.सं. में न्यायिक अभिरक्षा या पुलिस अभिरक्षा की अवधि को बढ़ाने के लिये प्रस्तुत किया जाता है और जहां पुलिस के द्वारा ऐसे व्यक्ति के विरूद्ध कोई प्रथम सूचना रिपोर्ट पंजीबद्ध नहीं की गई है, मजिस्ट्रेट को धारा 167 के तहत अपने क्षेत्राधिकार का प्रयोग करने से इंकार आवश्यक रूप से करना चाहिये और ऐसे गिरफ्तार व्यक्ति को रिहाई सुरक्षित करनी चाहिये क्योंकि उसकी अभिरक्षा 24 घंटे की अवधि व्यतीत हो जाने के कारण अवैधानिक हो गई है।

Manish Kumar Chauksey v. The State of Madhya Pradesh
Judgment dated 01.05.2017 by the High Court of Madhya Pradesh (Jabalpur Bench) in M.Cr.C.No. 6260 of 2017 (Unreported)

Relevant extracts from the Judgment:

It is undisputable that the police can arrest a person in exercise of its powers under the section 41 Cr.P.C on the grounds provided therein. It is also trite law that having so arrested the person, the police cannot detain him for more than twenty-four hours without an order of remand from the Magistrate u/s. 167 Cr.P.C, as mandated u/s. 57 Cr.P.C failing which, the continued detention shall become illegal.

"Investigation" is defined u/s. 2(h) of the Cr.P.C as all proceedings associated with the "collection of evidence" (a) by a police officer or (b) by any other person, so authorised by a Magistrate but other than a Magistrate. The definition clause of the term "Investigation" in section 2(h) of the Cr.P.C does not provide any assistance to answer the first question viz., whether the police can investigate an offence without registering an FIR. Chapter XII of the Cr.P.C titled"Information to the Police and their Powers to Investigate", answers the question.

The chapter starts with section 154 which mandates that every information relating to the commission of a cognizable offence shall be reduced into writing which in common parlance is called a First Information Report or simply as FIR. Thereafter, section 156 Cr.P.C vests the police with the authority to investigate into the commission of a cognizable offence without the order of a Magistrate. Section 157 lays down the procedure for investigation by the police wherein it is mandated that before entering investigation of an offence, which the officer in charge of a police station is empowered to investigate (which when read in conjunction with S.154 and 156 would mean a cognizable offence), upon information received or upon reasonable belief of the police leading to suspect the commission of a cognizable offence, the police shall send a report of the offence viz., the FIR, forthwith to the Magistrate empowered to take cognizance upon a police report and shall proceed to investigate the offence himself or through an officer subordinate to him. A conjoined reading of section 154, 156 and 157 Cr.P.C reveals that investigation succeeds the registration of an FIR.

The above said view of this Court is reflected, by necessary implication, in ***State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335,*** wherein at paragraph 41, the Supreme Court held-

> "..........We have already found that the police have under Section 154(1) of the Code a statutory duty to register a cognizable offence and thereafter under Section 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate" .

Thereafter in paragraph 49 of the same judgment, the Supreme Court held-

> "Resultantly, the condition precedent to the commencement of the investigation under Section 157(1) of the Code is the existence of the reason to suspect the commission of a cognizable offence which has to be, prima facie, disclosed by the allegations made in the first information laid before the police officer under Section 154(1)……" .

In paragraph 49 of ***Bhajan Lal's judgment***, the Supreme Court has rather clearly held that the registration of the FIR is a condition precedent to an investigation, viz.,that without the registration of an FIR there can be no investigation that is sustainable in the eyes of the law. The same view was again taken by the Supreme Court in ***Lallan Chaudhary v. State of Bihar, (2006) 12 SCC 229***, wherein at paragraph 8 the Supreme Court was pleased to observe that

> "Section 154 of the Code thus casts a statutory duty upon the police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation".

In ***Lalita Kumari v. State of U.P., (2014) 2 SCC 1***, a Constitution Bench of the Supreme Court, while emphasising on the duty of the police to register an FIR on the disclosure relating to the commission of a cognizable offence, held at paragraph 38 that

> "The precursor to the present Code of 1973 is the Code of 1898 wherein substantial changes were made in the powers and procedure of the police to investigate. The starting point of the powers of police was changed from the power of the officer in charge of a police station to investigate into a cognizable offence without the order of a Magistrate, to the reduction of the first information regarding commission of a cognizable offence, whether received orally or in writing, into writing and into the book separately prescribed by the Provincial Government for recording such first information. As such, a significant change that took place by way of the 1898 Code was with respect to the placement of Section 154 i.e. the provision imposing requirement of recording the first information regarding commission of a cognizable offence in the special book prior to Section 156 i.e. the provision empowering the police officer to investigate a cognizable offence. As such, the objective of such placement of provisions was clear which was to ensure that the recording of the first information should be the starting point of any investigation by the police. In the interest of expediency of investigation since there was no safeguard of obtaining permission from the Magistrate to commence an investigation, the said procedure of recording first information in their books along with the signature/seal of

the informant, would act as an "extremely valuable safeguard" against the excessive, mala fide and illegal exercise of the investigative powers by the police".

The Constitution Bench of the Supreme Court also placed its seal of approval on the view that the registration of the FIR U/s. 154 Cr.P.C must precede any investigation by the police u/s. 156 Cr.P.C. Therefore, under the law, there can be no investigation by the police without the registration of an FIR.

The second question that begs an answer is whether the Magistrate can extend the remand of a person who has been arrested u/s. 41Cr.P.C in the absence of an FIR? Section 167 Cr.P.C also falls in Chapter XII. It provides for the extension of remand/detention of a person in custody when the investigation cannot be completed within twenty-four hours. Therefore, as stated hereinabove that there can be no investigation where no FIR has been registered and where there is no investigation in progress under the law, there can be no remand of an accused u/s. 167 Cr.P.C.

Under the circumstances, where a person is produced by the police before the Magistrate u/s. 167 Cr.P.C for the extension of his remand in judicial custody or police custody after he has been arrested u/s. 41 Cr.P.C and where no FIR has been registered by the police, the Magistrate must refuse to exercise jurisdiction u/s. 167 and secure the release of the person so arrested forthwith as his custody has been rendered illegal after the passage of twenty-four hours. Even otherwise, the exercise of jurisdiction by the Magistrate u/s. 167 Cr.P.C is not a hollow formality but a solemn exercise, where the discretion exercised by the Magistrate can negatively affect the civil liberties of an individual gravely infracting his fundamental right to life itself. The Magistrate has to arrive at the subjective satisfaction that accusation or information against such a person is well founded. In other words, the Magistrate must satisfy himself that the material so far gathered in the course of investigation, ***prima facie*** discloses the involvement of the person in the offence.

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112. CRIMINAL PROCEDURE CODE, 1973 – Section 53A
INDIAN PENAL CODE, 1860 – Sections 302, 376 (2) (f), 363 and 367

(i) Failure to conduct DNA test of samples taken from accused or failure to prove DNA report by prosecution, effect of – Rape and murder of four year old child – Post-mortem report revealed evidence of rape and death by strangulation/asphyxia – FSL report confirmed the presence of spermatozoa in clothes of accused as well as semen slide of deceased – Held, though a positive result of DNA test would constitute clinching evidence against the accused, negative result will favour the accused or if DNA profiling had not been done or proved, conviction may still be possible based on remaining evidence – The weight of other materials and evidence on record will be considered.

(ii) Death sentence, commutation of – Mitigating circumstances in favour of accused – Crime committed at a young age of 25 years – Probability of reformation, rehabilitation and that accused would not commit similar criminal act in future – Accused not a continuing threat to society – Upholding the conviction, death sentence commuted to life imprisonment.

दंड पक्रिया संहिता, **1973 -** धारा **53**क

भारतीय दंड संहिता, **1860 -** धाराएं **302, 376(2)**(च)**, 363** एवं **367**

(i) अभियुक्त से लिये गये नमूनों का डी.एन.ए. परीक्षण करने में विफलता अथवा अभियोजन द्वारा डी.एन.ए. रिपोर्ट को प्रमाणित करने में विफलता का प्रभाव - 4 वर्ष के बच्चे का बलात्संग और हत्या - पोस्ट मार्टम रिपोर्ट बलात्संग और गला घोंट कर मृत्यु कारित होने की साक्ष्य को प्रकट किया - एफ.एस.एल. रिपोर्ट में अभियुक्त के कपड़ों में शुक्राणुओं की उपस्थिति और साथ ही साथ मृतक की सीमेन स्लाइड में भी उपस्थिति पुष्ट की गई - अभिनिर्धारित, यद्यपि डी.एन.ए. परीक्षण का सकारात्मक परिणाम अभियुक्त के विरूद्ध दृढ़ साक्ष्य निर्मित करता है, नकारात्मक परिणाम अभियुक्त के पक्ष में होगा और यदि डी.एन.ए. प्रोफाइलिंग नहीं की गई है या प्रमाणित नहीं की गई है तथापि शेष साक्ष्य के आधार पर दोषसिद्धि अभी भी संभव है - अभिलेख पर मौजूद अन्य सामग्रियों एवं साक्ष्य पर विचार किया जावेगा।

(ii) मृत्यु दंड का लघुकरण - अभियुक्त के पक्ष में दंड को कम करने की परिस्थितियाँ विद्यमान थी - अपराध 25 वर्ष की कम उम्र में कारित किया गया - पुर्नवास एवं सुधार की संभावना और भविष्य में इसी प्रकार के आपराधिक कृत्य नहीं करेंगे - अभियुक्त समाज के लिये निरंतर खतरा नहीं हैं, दोषसिद्धि को स्थिर रखा गया - मृत्यु दंड को आजीवन कारावास में लघुकृत किया गया।

Sunil v. State of Madhya Pradesh

Judgment dated 08.04.2016 passed by the Supreme Court in Criminal Appeal No. 39 of 2014, reported in (2017) 4 SCC 393 (Three Judge Bench)

Relevant extracts from the Judgment:

From the provisions of Section 53A of the Code and the decision of this Court in ***Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130*** it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in ***Krishan Kuma***r (supra) (para 44) Section 53A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence

on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.

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

Maintenance, grant of – Wife along with her son left matrimonial home due to persistent cruelty and dowry demand – Trial court found husband and his father guilty and convicted them under section 498-A IPC – Wife lost trust in her husband and feared of being tortured again – Appellant has reasonable apprehension for not resuming matrimonial alliance – Order of High Court disallowing maintenance on ground that no reason given by appellant wife for not living with husband, cryptic – Husband liable to pay monthly maintenance to wife and child.

दण्ड प्रक्रिया संहिता, **1973 -** धारा **125**

भरण पोषण प्रदान किया जाना - पत्नी द्वारा लगातार क्रूरता तथा दहेज की मांग के कारण पुत्र के साथ ससुराल छोड़ा गया - विचारण न्यायालय द्वारा पति एवं उसके पिता को धारा 498-क भा.दं.सं. में दोषी मानते हुए दंडित किया गया - पत्नि ने अपने पति पर अपना विश्वास खो दिया और फिर से यंत्रणा दिये जाने का भय उत्पन्न हो गया - अपीलकर्ता को वैवाहिक गठबंधन को पुर्नस्थापित न किये जाने का यथोचित भय विद्यमान था - भरण पोषण से इस आधार पर इंकार करने को उचित नहीं माना गया कि अपीलार्थी पत्नी द्वारा पति से पृथक रहने का कोई कारण नहीं बताया गया - पति, पत्नी व बच्चे का मासिक भरण पोषण भुगतान करने के लिये उत्तरदायी हैं।

Amrita Singh v. Ratan Singh another

Judgment dated 18.04.2017 passed by the Supreme Court in Criminal Appeal No. 944 of 2017, reported in AIR 2017 SC 2937

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114. CRIMINAL PROCEDURE CODE, 1973 – Section 172

EVIDENCE ACT, 1872 – Section 145

(i) Right of the accused regarding police diary – Accused has no right to inspect case diary – The confidentiality is always kept in the matter of investigation and it is not desirable to make the police diary available to the accused on his demand – Accused or his agent is prohibited to call for case diary or even see them – It is not even open for the accused to produce certain pages of police diary obtained by him under the provisions of the Right to Information Act for the purpose of contradicting the police officer.

(ii) Cross-examination – A witness may be cross-examined as to the previous statements made by him without such writing being shown to him – But if it is intended to contradict him by the

writing, his attention must, before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him – Right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Evidence Act.

दंड प्रक्रिया संहिता, **1973 -** धारा **172**

साक्ष्य अधिनियम, **1872 -** धारा **145**

(i) पुलिस डायरी के संबंध में अभियुक्त का अधिकार - अभियुक्त को केस डायरी के अवलोकन का कोई अधिकार नहीं है - अन्वेषण के मामले में हमेशा गोपनीयता रखी जानी चाहिये और अभियुक्त को उसकी मांग पर पुलिस डायरी उपलब्ध कराना वांछनीय नहीं है - अभियुक्त या उसके अभिकर्ता द्वारा केस डायरी को बुलाया जाना या यहां तक कि उसे देखना भी, निषिद्ध है - सूचना का अधिकार अधिनियम के तहत प्राप्त की गई केस डायरी के कुछ पन्नों को भी पुलिस अधिकारी का खंडन करने के लिये भी अभियुक्त उन्हें प्रस्तुत नहीं कर सकता है।

(ii) प्रति परीक्षण- एक साक्षी को उसके द्वारा दिये गये पूर्ववर्ती कथनों के संबंध में उसकी हस्तलिपि उसे दिखाये बिना भी प्रति परीक्षित किया जा सकता है - परंतु यदि उसका आशय उसके लेखन का खंडन करने का है तो उसके लेख को प्रमाणित कर उसका ध्यान उन हिस्सों की ओर आकृष्ट कराया जायेगा जिनका उपयोग उसके खंडन के लिये किया जाना है - अभियुक्त का पुलिस अधिकारी को पुलिस डायरी में किये गये इंद्राजों के संबंध में प्रति परीक्षण करने अधिकार अत्यंत सीमित है और यह केवल तब उत्पन्न होता है जब न्यायालय के द्वारा ऐसे इंद्राजों का उपयोग पुलिस अधिकारी का खण्डन करने के लिये किया जाता है या जब पुलिस अधिकारी के द्वारा अपनी स्मृति को ताजा किया जाता है परंतु यह भी साक्ष्य अधिनियम की धारा 145 व 161 में विहित प्रावधानों के अनुसार ही संभव है।

Balakram v. State of Uttarakhand
Judgment dated 19.04.2017 by the Supreme Court in Criminal Appeal No. 694 of 2017, reported in 2017 (2) ANJ (SC) 31 (Three Judge Bench)

Relevant extracts from the Judgment:

Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of

contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

Section 145 of the Indian Evidence Act consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statements made by him without such writing being shown to him. But the Second limb provides that, if it is intended to contradict him by the writing, his attention must before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Sections 155 (3) and 145 of Indian Evidence Act deal with the different aspects of the same matter and should, therefore, be read together.

Be that as it may, as mentioned supra, right of the accused to cross examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Indian Evidence Act. Thus, a witness may be cross-examined as to his previous statements made by him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) of Cr.P.C. are fulfilled. Section 145 of the Indian Evidence Act does not either extend or control the provisions of Section 172 of Cr.P.C. We may hasten to add here itself that there is no scope in Section 172 of the Cr.P.C. to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer, who made it.

In case of ***Malkiat Singh and others v. State of Punjab, (1991) 4 SCC 341*** this Court while considering the scope of Section 172(3) Cr.P.C. with reference to Section 145 of the Indian Evidence Act observed thus:–

> "It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub–section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence."

The police diary is only a record of day to day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the Statute under Section 172 (2) of Cr.P.C. on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

This Court in the case of ***MukundLal v. Union of India and anr., AIR 1989 SC 144*** while considering the question relating to inspection of the entries made in the case diary by the accused has observed thus:–

> "We are of the opinion that the provision embodied in sub–section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub–section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or

contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub–section (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognised, the embargo engrafted in sub-section (3) of Section 172 of the CrPC would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in ***Mohinder Singh v. Emperor***:

> "The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced."
>
> The public interest requirement from the standpoint of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded."

From the afore-mentioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand. In the case of ***Sidharth etc. v. State of Bihar, AIR 2005 SC 4352*** the entire case diary maintained by the police was made available to the accused by the trial Court. In that context certain observations were made by this Court which read thus:–

> "....But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross–examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC."

Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer
(PW-15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer.

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115. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 and 190

Whether the Court of competent Magistrate can take cognizance under Section 190(1)(b) of 'the Code' against the persons, on the basis of police report forwarded by the police officer under Section 173 (2) of 'the Code' even when it is stated that the investigation is not complete because certain other accused persons are yet to be apprehended, interrogated and that a supplementary charge-sheet shall be filed later on? Held, Yes – Contrary view taken in *Hargovind Bhargava v. State of Madhya Pradesh, 2016 (2) JLJ 245 (Madhya Pradesh)* held *per incuriam* in the light of law laid down by Honb'le the Apex Court in *Rama Chaudhary v. State of Bihar, (2009) 6 SCC 346*.

दंड प्रक्रिया संहिता, **1973 -** धाराएं **173** एवं **190**

क्या सक्षम मजिस्ट्रेट के न्यायालय द्वारा, धारा 173 (2) दं.प्र.सं. के अन्तर्गत पुलिस अधिकारी द्वारा अग्रेषित प्रतिवेदन के आधार पर व्यक्तियों के विरूद्ध संहिता की धारा 190 (1) (ख) के अन्तर्गत संज्ञान लिया जा सकता है, जबकि यह कहा गया है कि अनुसंधान अभी पूर्ण नहीं हुआ है क्योंकि कुछ अन्य अभियुक्तगण की गिरफ्तारी शेष है व उनसे पूछताछ की जानी है, और पश्चातवर्ती प्रक्रम पर पूरक अभियोग पत्र प्रस्तुत किया जायेगा? अभिनिर्धारित, हाँ - *हरगोविन्द भार्गव विरूद्ध म.प्र. राज्य*, ***2016 (2)*** *जे.एल.जे.* ***245*** (मध्यप्रदेश) में लिये गये विपरीत मत को माननीय सर्वोच्च न्यायालय के द्वारा *रामा चैधरी विरूद्ध बिहार राज्य*, **(2009) 6** *एस.सी.सी.* ***346*** में प्रतिपादित विधि के प्रकाश में पर-इन्क्यूरियम घोषित किया गया।

Ritesh Ajmera v. State of M.P.

Judgment dated 27.02.2017 by the High Court of Madhya Pradesh (Indore Bench) in M.Cr.C. No.11145 of 2016 (Unreported)

Relevant extracts from the Judgment :

In ***Ram Lal Narang v. State (Delhi Admin), AIR 1979 SC 1791*** the Apex Court has considered the scheme of 'The Code' as regards submission of the police report before the Magistrate and the power of Magistrate to take cognizance under Section 190(1)(b) the relevant observations are as under:

> "Section 156 Criminal Procedure Code invested the Police with the power to investigate into cognizable offences without the order of a Court. If, from the information received or otherwise, the officer in charge of a Police Station suspected the commission of a cognizable offence, he was required to send forthwith a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and than to proceed in person or depute one of his subordinate officers to proceed to the spot, to investigate the facts and circumstances of the case and to take measures for the discovery and arrest of the offender (Section 157 Criminal Procedure Code). He was required to complete the investigation without unnecessary delay, and, as soon as it was completed, to forward to a Magistrate empowered to take cognizance of the offence upon a police report, a report in the prescribed form, setting forth the names of the parties, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case (Section 173(1) Criminal Procedure Code). He was also required to state whether the accused had been forwarded in custody or had been released on bail. Upon receipt of the report

> submitted under Section 173(1) Criminal Procedure Code by the officer incharge of the Police Station, the Magistrate empowered to take cognizance of an offence upon a police report might take cognizance of the offence (Section 190(1)(b) Criminal Procedure Code). Thereafter, if, in the opinion of the Magistrate taking cognizance of the offence, there was sufficient ground for proceeding, the Magistrate was required to issue the necessary process to secure the attendance of the accused (Section 204 Criminal Procedure Code)...........”

From the aforesaid observations, two things can, clearly be deciphered, firstly, as soon as investigation is complete, the concerned police officer has to forward to the Magistrate a report in prescribed format, secondly, if in the opinion of the Magistrate taking cognizance of the offence, there is sufficient ground for proceeding, the Magistrate is required to issue the necessary process to secure attendance of the accused. In the aforesaid case, the apex Court has further dealt with the provisions contained in Section 173(8) of ‘The Code’, which was introduced on the basis of recommendations made by the Law Commission of India. The relevant part of the recommendation which has been quoted in the aforesaid judgment is reproduced here for the sake of convenience:-

> “14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting, the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused”.

The Apex Court after referring to the aforesaid and some decisions relevant on the point, observed as under in para 21 of the judgment:

> “21. Anyone acquainted with the day today working of the criminal courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a ‘supplemental report’. It is in the interests of

both the prosecution and the defence that the police should have such power. It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is a matter best left to the discretion of the Magistrate. The criticism that a further investigation by the police would trench upon the proceedings before the Court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a Court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests

> of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light."

The aforesaid observations, abundantly, make it clear that even after submission of a report contemplated under Section 173 of 'The Code', the investigating agency may continue with the investigation in exercise of powers under Section 173(8) of 'The Code' and submit a 'supplemental report'. It further flows from the aforesaid enunciation of law, that the Magistrate before whom the report has been submitted under Section 173(2) of 'The Code' may proceed to take cognizance if he is of the view that there is sufficient material to do so. The contention that further investigation of police would trench upon the proceedings before the Court was rejected by the apex Court holding that whatever the police may do, the final discretion with regard to further action is with the Magistrate. The aforesaid observations have been made considering the practical necessity of the police possessing the power to make further investigation and submit a 'supplemental report', which, as stated by apex Court, is in the interest of both the prosecution and the defence.

As held by the apex Court in ***Rama Chaudhary v. State of Bihar, (2009) 6 SCC 346*** the law does not mandate taking of prior permission of the Magistrate for further investigation and that carrying out a further investigation even after filing of the charge-sheet is statutory right of the police. Relevant observations made by Apex Court in para 15, 16, 17 & 18 of the report runs as under:

> "14. Sub-section (1) of Section 173 of Cr.P.C. makes it clear that every investigation shall be completed without unnecessary delay. Sub-section (2) mandates that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government mentioning the name of the parties, nature of information, name of the persons who appear to be acquainted with the circumstances of the case and further particulars such as the name of the offences that have been committed, arrest of the accused and details about his release with or without sureties.
>
> 15. Among other sub-sections, we are very much concerned about sub- section (8) of Section 173 which reads as under:-
>
>> "173. (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such

investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

A mere reading of the above provision makes it clear that irrespective of report under sub-section (2) forwarded to the Magistrate, if the officer in-charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. The above said provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police.

Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right to "further" investigation under sub- section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

18. Sub- section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not fresh report regarding the "further" evidence obtained during such investigation.

In the instant case, the material on record clearly indicates that charge-sheet (report under Section 173(2) of 'The Code') has been filed qua the petitioner and other 5 accused persons against whom the investigation agency was of the view that sufficient material is available with regard to commission of

offence alleged against them. Considering the fact that as many as eight accused persons could not be apprehended and in view of the possibility that further evidence may be collected against the charged-sheeted persons, as well those who are yet to be apprehended; the investigation was kept open.

It is not the case of "re-investigation" and "De- novo investigation". As explained above (para-16) a further investigation, even after filing of the charge-sheet is statutory right of the investigating agency. The co-ordinate Bench of this Court in ***Hargovind Bhargava and ors. v. State of M.P. & ors., 2016 (2) JLJ 245***, a case relied upon by the learned counsel for the petitioner without considering the aforesaid proposition of law, as explained by the apex Court, has observed in para-14 of the report as under:

> "14. The investigating officer cannot be permitted to keep the investigation pending for some accused and to file the charge-sheet against the arrested accused to defeat the provisions of Section 167(2) of Cr.P.C. so that bail should not be granted due to incomplete investigation to the persons who were arrested by the investigating officer. But such procedure is commonly practiced in our State by a few investigating officers that they keep the investigation pending for some of the accused as a right in the light of the provisions of Section 173 (8) of Cr.P.C. However due to such procedure the Session Court starts trial against few accused persons and in the meantime supplementary charge- sheet is filed by adding one or two accused and thereafter re-trial starts if previous trial is not completed and again a piecemeal charge-sheet is filed against remaining accused persons resulting in a retrial or a fresh trial. Such activities of police creates multiplicity of trial against the accused persons who were arrested earlier."

The aforesaid observations are clearly contrary to the dictum of law laid down by Hon'ble the Apex Court in ***Rama Chaudhary's case*** (supra) hence per-incuriam.

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116. CRIMINAL PROCEDURE CODE, 1973 – Section 174

Inquest report, scope of – Very limited scope – Only to ascertain first apparent signs of death – It need not contain every detail – Mere overwriting is inconsequential.

दण्ड प्रक्रिया संहिता**, 1973 -** धारा **174**

मृत्यु समीक्षा प्रतिवेदन की परिधि - मात्र प्रथम दर्शित मृत्यु के लक्षण जानने तक सीमित परिधि है - इसमें सभी विवरण होना आवश्यक नहीं है - मात्र अधिलेखन महत्वहीन हैं।

Bimla Devi v. Rajesh Singh and anr.

Judgment dated 16.12.2015 passed by the Supreme Court in Criminal Appeal No. 1033 of 2010, reported in 2017 (1) ANJ (SC) 316

Relevant extracts from the Judgment:

The factual lacunae raised was overwriting in the inquest report. The inquest report by the police officer is prepared under Section 174 of the Code of Criminal Procedure, 1973. The scope of the section is investigation by the police in cases of unnatural or suspicious death. However, the scope is very limited and aimed at ascertaining the first apparent signs of the death. Apart from this the police officer has to investigate the place wherefrom the dead body is recovered, describe wounds, fractures, bruises and other marks of injury as may be found on the body, stating in what manner or by what weapon or instrument, such injuries appear to have been inflicted. From the above, it thus becomes clear, that the section aims at preserving the first look at the recovered body and it need not contain every detail. Mere overwriting in the name of the informant would not affect the proceedings. The fact of homicidal death was not in dispute and the manner in which the death was occurred is also not disputed. Then merely name being overwritten will not help the defence, when the contents of the inquest report was supported by the eye witnesses and also the medical evidences.

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117. CRIMINAL PROCEDURE CODE, 1973 – Sections 200 and 204
INDIAN PENAL CODE, 1860 – Section 295-A

(i) Offence of deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs – Only those acts are punishable which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of citizens – Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class will not come within the scope of Section 295 of IPC.

(ii) Criminal complaint – Issuance of process – Primary judicial responsibility of Magistrate as to – Magistrates must carefully scrutinize whether the allegations made in the complaint meet the basic ingredients of the offence, whether the concept of territorial jurisdiction is satisfied and further, whether the accused is really required to be summoned.

दण्ड प्रक्रिया संहिता, **1973 -** धाराएं **200** एवं **204**

भारतीय दण्ड संहिता, **1860 -** धारा **295-**ए

(i) धर्म या धार्मिक विश्वासों का अपमान करके किसी भी वर्ग की धार्मिक भावनाओं को अपमानित करने के लिए जानबूझकर और दुर्भावनापूर्ण कृत्यों द्वारा अपराध - केवल धर्म के अपमान के वे कृत्य दण्डनीय है जो कि नागरिकों की उस वर्ग की धार्मिक भावनाओं को उकसाने के लिए जानबूझकर और दुर्भावनापूर्ण आशय से किये जाते है - धर्म को अपमानित करने के आशय के बिना या लापरवाही से या जानबूझकर या दुर्भावनापूर्ण आशय के बिना उस वर्ग की धार्मिक भावनाओं को अपमानित करने के लिए किये गये कृत्य धारा 295 भा.दं.सं. के अंतर्गत नहीं आते हैं।

(ii) आपराधिक परिवाद - आदेशिका का जारी किया जाना - मजिस्ट्रेट का प्राथमिक न्यायिक उत्तरदायित्व - मजिस्ट्रेट को सावधानीपूर्वक यह जाँच करना आवश्यक है कि क्या परिवाद में लगाये गये आरोप, अपराध के आधारभूत तथ्यों को संतुष्ट करते हैं, क्या क्षेत्रीय अधिकारिता की अवधारणा की संतुष्टि होती है और आगे यह कि क्या अभियुक्त के विरूद्ध वास्तव में आदेशिका जारी किया जाना आवश्यक है।

Mahendra Singh Dhoni v. Yerraguntla Shyamsundar

Judgment dated 20.04.2017 by the Supreme Court in Transfer Petition (Criminal) No. 23 of 2016, reported in 2017 (2) Crimes 357 (SC) (Three Judge Bench)

Relevant extracts from the Judgment:

The complaint petition is based on the allegation that the complainant had purchased a monthly business magazine and was disappointed with the main page of the magazine which carried a painting painted with the photo of the petitioner with a caption “God of Big Deals”. There was description underneath which had the characters of some advertisement. As is discernible from the complaint petition, the complainant went to the town Police Station to lodge an F.I.R. on 22.1.2013 but as the police declined to register the same, he was compelled to file a complaint petition under Section 200 of the Code of Criminal Procedure. The learned Magistrate entertained the same and issued summons.

The seminal issue that arises for consideration is whether the allegations made in the complaint constitute an offence under Section 295A of the IPC and whether this Court, in the obtaining factual matrix, relegate the trial at some other place or grant him liberty to file an application under Section 482 CrPC for quashing.

Be it noted, the constitutional validity of Section 295A was assailed before this Court in ***Ramji Lal Modi v. State of U.P., AIR 1957 SC 620*** which was eventually decided by a Constitution Bench. The Constitution Bench, adverting to the multiple aspects and various facets of Section 295A IPC held as follows :-

“8. It is pointed out that section 295A has been included in chapter XV of the Indian Penal Code which deals with offences against the public tranquility and from this circumstance it is faintly sought to be urged, therefore, that offences relating to religion have no bearing on the maintenance of public order, or tranquillity and, consequently, a law creating an offence relating to religion and imposing restrictions on the right to freedom of speech and expression cannot claim the protection of el. (2) of Article 19. A reference to Articles 25 and 26 of the Constitution, which guarantee the right to freedom of religion, will show that the argument is utterly untenable. The right to freedom of religion assured by those Articles is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

9. Learned counsel then shifted his ground and formulated his objection in a slightly different way. Insults to the religion or the religious beliefs of a class of citizens of India may, says learned counsel, lead to public disorders in some cases, but in many cases they may not do so and,, therefore, a law which imposes restrictions on the citizens’ freedom of speech and expression by simply making insult to religion an offence will cover both varieties of insults, i.e., those which may lead to public disorders as well as.those which may not. The law in so far as it covers the first variety may be said to have been enacted in the interests of public order within the meaning of el. (2) of Article 19, but in so far as it covers the remaining variety will not fall within that clause. The argument then concludes that so long as the possibility of the law being applied for purposes not sanctioned by the Constitution cannot be ruled out, the entire law should be held to be unconstitutional and void. We are unable, in view of the language used in the impugned section, to accede to this argument. In the first place el. (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression “in the interests of” public order, which is much wider than

> "for maintenance of" public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order. In the next place section 295A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only Punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of clause (2) of Article 19 as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by Article 19(1)(a). Having regard to the ingredients of the offence created by the impugned section, there cannot, in our opinion, be any possibility of this law being applied for purposes not sanctioned by the Constitution. In other words, the language employed in the section is not wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental right guaranteed by Article 19(1)(s) and consequently, the question of severability does not arise and the decisions relied upon by learned counsel for the petitioner have no application to this case."

On a perusal of the aforesaid passages, it is clear as crystal that Section 295A does not stipulate everything to be penalised and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of class of citizens. It penalise only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings

of that class of citizens. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the Section. The Constitution Bench has further clarified that the said provision only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Emphasis has been laid on the calculated tendency of the said aggravated form of insult and also to disrupt the public order to invite the penalty.

To satisfy ourselves, we have bestowed our anxious consideration and scrutinized the allegations made in the complaint petition and we have no hesitation in holding that the allegations remotely do not satisfy the essential ingredients of the offence and, therefore, applying the principle stated in ***State of Haryana & Ors. v. Bhajan Lal & others, 1992 Supp.(1) SCC 335*** we quash the complaint proceedings initiated against the petitioner.

Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinize whether the allegations made in the complaint proceeding meet the basic ingredients of the offence; whether the concept of territorial jurisdiction is satisfied; and further whether the accused is really required to be summoned. This has to be treated as the primary judicial responsibility of the court issuing process.

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118. CRIMINAL PROCEDURE CODE, 1973 – Sections 207 and 238

Compliance with section 207, necessity of – Case of stealing of 'source code' of software relating to data recovery in computers – Complainant and accused both claimed the seized 'source code' to be their property respectively – Apprehension of misuse of hard discs by accused – Held, for ensuring fair trial and to prove defence, copies of seized hard discs need to be supplied to accused – Right to get the copies is statutorily recognised under section 207 of the Code – Conditional order passed for providing seized hard discs to accused to enable him to defend himself and for safeguarding apprehension of prosecution.

दण्ड प्रक्रिया संहिता**, 1973 -** धाराएं **207** एवं **238**

धारा 207 के अनुपालन की आवश्यकता - साॅफ्टवेयर, जो कि कम्प्यूटर में डाटा रिकवरी से संबंधित था, के 'सोर्स कोड' को चुराये जाने का मामला - परिवादी एवं अभियुक्त दोनों के द्वारा जब्त ''सोर्स कोड'' को अपनी संपत्ति होने का दावा किया गया - अभियुक्त द्वारा हार्ड डिस्क के दुरूपयोग की संभावना व्यक्त की गई - अभिनिर्धारित, निष्पक्ष विचारण को सुनिश्चित करने और अभियुक्त के बचाव को प्रमाणित करने के लिये, जब्त हार्ड डिस्क की प्रतियाँ अभियुक्त को प्रदान की जावें - संहिता की धारा 207 के अंतर्गत प्रतियाँ प्राप्त करने का अधिकार विधि द्वारा प्रदत्त हैं - अभियुक्त को जप्त की गई हार्ड डिस्क को उपलब्ध कराने के लिये सशर्त आदेश

पारित किया गया ताकि अभियुक्त को स्वयं का बचाव करने का अवसर और अभियोजन पक्ष की आशंका को संरक्षित किया जा सके।

Tarun Tyagi v. Central Bureau of Investigation

Judgment dated 08.02.2017 passed by the Supreme Court in Criminal Appeal No. 102 of 2017, reported in (2017) 4 SCC 490

Relevant extracts from the Judgment:

It is clear that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trail that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the charge sheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same.

The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner:

> "to protect the data on a computer disk so that it cannot be changed or removed by a user"

Likewise, Collins Dictionary defines the term "write protected" as under:

> " (of a computer disk) having been protected from accidental writing or erasure"

In view of this opinion of the Expert, it needs to be ensured that the appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure

fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of.

We find that CBI, under similar circumstances in the case of Rupesh Kumar, accepted the order of the trial court whereby directions were given to the CBI to supply the hard disk. In the said case, the trial court found that there was no answer from the CBI whether the software in question was unique and there was no other software in the market for the recovery of lost data from the logical cracked hard disk. Number of softwares are available in the market which negated the arguments of CBI that by supplying the mirror image of the documents, the complainant will lose its money and it will be in violation of the Copyright Act, 1957. In that case, the Court took undertaking from the appellant that he would not misuse the copy of cloned CD. We, thus, are of the opinion that in order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the appellant subject to the following conditions:

> (a) Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the appellant.
>
> (b) The appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court.

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***119. CRIMINAL PROCEDURE CODE, 1973 – Section 389**

(i) Suspension of sentence – Primary factors to be taken into consideration – Nature of accusation, manner of commission of crime, gravity of offence, desirability of release of convict on bail, misuse of liberty of bail granted earlier, etc. – Suspension not to be granted merely on the ground that accused was on bail during trial and order must contain reasons in writing – Further held, antecedents of convict and whether release of convict would be detrimental to the public interest, also need to be considered.

(ii) Suspension of sentence – Substantial part of sentence suffered by accused i.e. 12 years – No hope of final hearing of appeal in near future – Factors for consideration – Period of custody, post conviction behavior, instances of misuse of bail, age, possibility of hearing of appeal in near future efforts for final hearing, accused did not misuse the liberty of temporary suspension, absence of criminal antecedents of accused – Outweigh the gravity of offence and manner of commission of offence.

दण्ड प्रक्रिया संहिता, **1973 - धारा 389**

(i) दंड का निलंबन - ध्यान में रखे जाने योग्य प्राथमिक कारक - आरोप की प्रकृति, अपराध को कारित करने का तरीका, अपराध की गंभीरता, दोषसिद्ध व्यक्ति को प्रतिभूति पर छोड़े जाने की वांछनीयता, पूर्व में प्रतिभूति पर स्वतंत्र किये जाने पर दुरूपयोग आदि - निलंबन केवल इस आधार पर नहीं दिया जाना चाहिये कि अभियुक्त विचारण के दौरान जमानत प्रतिभूति पर था और आदेश में कारण अभिलिखित किये जाने आवश्यक हैं - आगे अभिनिर्धारित किया गया कि दोषसिद्ध व्यक्ति का पूर्व वृत्त और क्या दोषसिद्ध व्यक्ति को प्रतिभूति पर मुक्त करना लोकहित में हानिकारक है, इन्हें भी विचार में लेना चाहिये।

(ii) दंड का निलंबन - अभियुक्त की दण्ड का पर्याप्त हिस्सा जो उसे भुगतना था, वह 12 वर्ष था - निकट भविष्य में अपील की अंतिम सुनवाई की कोई उम्मीद नहीं - विचार किये जाने योग्य कारक - अभिरक्षा में व्यतीत की गई अवधि, सजा के पश्चात् का व्यवहार, प्रतिभूति के दुरूपयोग की घटनायें, उम्र, अपील की निकट भविष्य में अंतिम सुनवाई की संभावना व इसके संबंध में प्रयास, अभियुक्त द्वारा अस्थायी निलंबन की स्वतंत्रता का दुरूपयोग नहीं किया जाना, अभियुक्त के आपराधिक पूर्व वृत्त का अभाव - अपराध की गंभीरता व अपराध को कारित करने के तरीके से अधिक भारी है।

Raghuwar Singh @ Raghuveer Singh v. State of MP
Order dated 13.03.2015 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Appeal No. 572 of 2004, reported in ILR (2016) MP 2549

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***120. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 and 401**
EXPLOSIVE SUBSTANCES ACT, 1908 – Sections 4, 5 and 7

(i) Framing of charge under Sections 4 and 5 of the Act of 1908, validity of – Assailed for non-compliance of Section 7 by prosecution – Consent of District Magistrate envisaged under section 7 – Neither filed alongwith charge sheet nor when the matter was committed – Prosecution filed letter of consent before framing of charge – Held, restriction envisaged under section 7 is in respect of trial – No restriction in respect of taking cognizance by Magistrate – Commencement of trial is at the stage of framing of charge and not when cognizance is taken – Court may proceed upto the stage of framing of charges without consent of District Magistrate – Charge can be framed after consent being granted and placed on record. (*Hardeep Singh v. State of Punjab, AIR 2014 SC 1400* relied on)

(ii) Filing of all documents alongwith final report, whether necessary – Document filed just before framing of charge – Held, trial court has ample power and discretion to receive any document before framing of charge – All documents are not required to be filed alongwith final report. (*Raju v. State of MP, 2002 CrLJ 2367* relied on)

दंड प्रक्रिया संहिता, **1973 -** धाराएं **397** एवं **401**

विस्फोटक पदार्थ अधिनियम, **1908 -** धाराएं **4, 5** एवं **7**

(i) विस्फोटक पदार्थ अधिनियम की धारा 4 व 5 के अंतर्गत आरोप विरचित करना, वैधता - अभियोजन द्वारा धारा 7 की अनुपालन न किये जाने का आक्षेप - धारा 7 के अंतर्गत उपबंधित जिला मजिस्ट्रेट की सहमति - उसे न तो अभियोग पत्र के साथ प्रस्तुत किया गया और न ही जब प्रकरण उपार्पित किया गया - अभियोजन द्वारा सहमति के पत्र को आरोप विरचित किये जाने से पूर्व प्रस्तुत किया गया - अभिनिर्धारित, धारा 7 के तहत उपबंधित निर्बन्धन विचारण के संबंध में है - मजिस्ट्रेट द्वारा संज्ञान लिये जाने के संबंध में कोई प्रतिबंध नहीं है - विचारण का प्रारंभ, आरोप विरचित किये जाने के प्रक्रम पर न कि जब संज्ञान लिया जाता है - न्यायालय, जिला मजिस्ट्रेट की सहमति के बिना भी आरोप विरचित किये जाने के प्रक्रम तक कार्यवाही कर सकता है - सहमति प्रदान कर दिये जाने और अभिलेख पर आ जाने के पश्चात् आरोप विरचित किये जा सकते हैं। (*हरदीप सिंह विरूद्ध पंजाब राज्य, ए.आई.आर.* ***2014*** *एस.सी.* ***1400*** अवलंबित)

(ii) क्या अंतिम प्रतिवेदन के साथ सभी दस्तावेजों का प्रस्तुत किया जाना आवश्यक है? - दस्तावेज आरोप विरचित किये जाने से ठीक पूर्व प्रस्तुत किये गये - अभिनिर्धारित, विचारण न्यायालय को आरोप विरचित किये जाने से पूर्व किसी भी दस्तावेज को अभिप्राप्त करने के संबंध में विस्तृत अधिकार व विवेक प्राप्त है - सभी दस्तावेजों का अंतिम प्रतिवेदन के साथ प्रस्तुत किया जाना आवश्यक नहीं है। (*राजू विरूद्ध म.प्र. राज्य,* ***2002*** *सी.आर.एल.जे.* ***2367*** अवलंबित)

Raju Adivasi & ors. v. State of Madhya Pradesh
Order dated 21.03.2016 passed by the High Court of Madhya Pradesh (Jabalpur Bench) in Criminal Revision No. 2797 of 2015, reported in ILR (2016) MP 2817

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121. DRUGS AND COSMETICS ACT, 1940 – Sections 23(4)(iii) and 25 (4)

Failure to send a sample to manufacturer as required under Section 23 (4)(iii) – Also delay of almost two years in taking of cognizance resulting in expiry of shelf life of drug in the meantime – Rejection of an application to send sample for re-analysis – Violation of valuable vested right of accused for re-analysis of sample by Central Laboratory – Proceedings quashed.

ड्रग्स और प्रसाधन सामग्री अधिनियम, 1940 - धाराएं 23(4)(iii) एवं 25 (4)

धारा 23 (4) (iii) के अंतर्गत अपेक्षित निर्माता को एक नमूना भेजने में विफलता - इसके अतिरिक्त, संज्ञान लेने में लगभग 2 वर्ष का विलंब, जिसके परिणामस्वरूप दवा की उसे धारित करने की आयु समाप्ति हो गयी - पुनः विश्लेषण के लिए नमूना भेजने के लिए प्रस्तुत आवेदन का निरस्त किया गया - केन्द्रीय प्रयोगशाला द्वारा नमूने के पुनः विश्लेषण कराने के संबंध में अभियुक्त के मूल्यवान निहित अधिकार का उल्लंघन - कार्यवाही अपास्त की गई।

Laborate Pharmaceuticals India Ltd. & others v. State of Tamil Nadu Judgment dated 20.02.2017 passed by the Supreme Court in Criminal Appeal No. 364 of 2017, reported in AIR 2017 SC 2423

Relevant extracts from the Judgment:

A reading of the provisions of Sections 23(4) and 25 of the Act would indicate that in the present case the sample having been taken from the premises of the retailer had to be divided into four portions; one portion is required to be given to the retailer; one portion is required to be sent to the Government Analyst and one to the Court and the last one to the manufacturer whose name, particulars, etc. is disclosed under Section 18A of the Act. In the present case, admittedly, one part of the sample that was required to be sent to the appellant (manufacturer) under Section 23(4)(iii) of the Act was not sent. Instead, what was sent on 22nd March, 2012 was only the report of the Government Analyst. When the part of the sample was not sent to the manufacturer, the manufacturer could not have got the same analyzed even if he wanted to do so and, therefore, it was not in a position to contest the findings of the Government Analyst. In the present case, the sample was sent to the appellant-manufacturer on 10th August, 2012 and on 13th September, 2012 the appellant had indicated its desire to have another part of the sample sent to the Central Laboratory for re-analysis. This was refused on the ground that the aforesaid request was made much after the stipulated period of 28 days provided for in Section 25(3) of the Act.

The cognizance of the offence(s) alleged in the present case was taken on 4th March, 2015 though it appears that the complaint itself was filed on 28th November, 2012. According to the appellant the cough syrup had lost shelf life in the month of November, 2012 itself. Even otherwise, it is reasonably certain that on the date when cognizance was taken, the shelf life of the drug in question had expired. The Magistrate, therefore, could not have sent the sample for reanalysis by the Central Laboratory.

All the aforesaid facts would go to show that the valuable right of the appellant to have the sample analyzed in the Central Laboratory has been denied by a series of defaults committed by the prosecution; firstly, in not sending to

the appellant-manufacturer part of the sample as required under Section 23(4) (iii) of the Act; and secondly, on the part of the Court in taking cognizance of the complaint on 4th March, 2015 though the same was filed on 28th November, 2012. The delay on both counts is not attributable to the appellants and, therefore, the consequences thereof cannot work adversely to the interest of the appellants. As the valuable right of the accused for re-analysis vested under the Act appears to have been violated and having regard to the possible shelf life of the drug we are of the view that as on date the prosecution, if allowed to continue, would be a lame prosecution.

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122. DRUGS AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENT) ACT, 1954 – Sections 3 and 4

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

Letter directing the appellant to stop the telecast of advertisement stated to be in violation of the Act, without scrutiny and opportunity of hearing – Held, advertisement cannot be stopped without scrutiny as per rules – Also, an opportunity must be given to the appellant to put up his case during scrutiny – Effect of letter stayed – Permitted to broadcast the advertisement with directions.

औषधि और चमत्कारिक उपचार (आक्षेपणीय विज्ञापन) अधिनियम, **1954 -** धाराएं **3** एवं **4**

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

अपीलार्थी को अधिनियम का उल्लंघन लेखकर बिना जांच एवं सुनवाई का अवसर दिये विज्ञापन का प्रसारण रोकने के निर्देश का पत्र जारी किया गया - अभिनिर्धारित, विज्ञापन को नियमानुसार जाँच के बिना रोका नहीं जा सकता है - यह भी कि अपीलार्थी को जाँच के दौरान उसका मामला रखने का अवसर आवश्यक रूप से दिया जाना चाहिये - पत्र का प्रभाव स्थगित किया गया - विज्ञापन को निर्देश सहित प्रसारित करने की अनुमति दी गयी।

M/s. Tele World Marketing v. Entorr-10 Television Pvt. Ltd. & others
Judgment dated 02.09.2016 passed by the High Court of Madhya Pradesh (Indore Bench) in Misc. Application No. 1379 of 2016, reported in AIR 2016 MP 212

Relevant extracts from the Judgment:

A drug inspector working under respondent No.6 issued a letter dated 03.06.2016 to various T.Vs. Channel for stopping the advertisement in respect of product of the appellant. No doubt when there is a violation of Sections 3 and 4 of the Act, such embargo on telecast of the advertisement can be placed by respondent No.6. However, it is apparent that for putting such embargo, the scrutiny as provided under rule-3 of rules must be done. There is no provision

in the Act or the rules to place interim bar on the telecast of the advertisement pending such scrutiny. Rule-3 of rules further provides that the person who scrutinise such advertisement should be authorised by the State Government. Needless to say that the power exercised by the authorised person should be after following principle of natural justice because when the order passed by an authorised person under sections 3 & 4 of the rules would curb the rights of the petitioner, and therefore, principle of natural justice should be followed and the appellant should be given an opportunity to put up his case and also to place such evidence to show that the advertisement is not violating any provision of the Act. Accordingly, in considered opinion of this court, the learned lower court erred while not taking into consideration the fact that the principle of natural justice was not followed by respondent No.6 while issuing the directions to the T.Vs. Channel telecasting advertisement of the appellant. It may further be mentioned that as mentioned earlier such directions can be issued by the person authorised by the State Government by a notification. As no one appeared on behalf of respondent No.6, it is not clear whether the person issuing the direction was an authorised person or not. Accordingly, I find that there is a prima-facie case in favour of the appellant.

So far as balance of convenience is concerned, without violating the principle of natural justice, the fundamental rights of the appellant cannot be curtailed, and therefore, there appears to be irreparable injuries and also balance of convenience in favour of the appellant.

Accordingly, this appeal is allowed. The impugned order passed by learned lower court dated 12.07.2016 is set-aside. The operation of directions issued by respondent No.6 dated 03.06.2016 to respondents No.1 to 4 is stayed subject to the condition that the appellant shall appear within one week from the date of issuing of this order before the Joint Commissioner (G.M.) Food and Drug Administration, Mumbai from whose office the directions were issued and file the entire documents and material showing that he is not violating any provisions of the Act. The Joint Commissioner is directed to forward his case to the authorised person who shall conduct the scrutiny as provided under rule-3 of the rules and pass a reasoned order thereon by following rules of natural justice within one month. It is further directed that the authorised person after hearing the petitioner and taking into consideration the evidence and other material filed by him is at liberty to issue suitable direction to respondents No.1 to 4 in accordance with law. Respondents No.1 to 4 are permitted to telecast the advertisement of the appellant till final order of the authorised person is passed, however, a notice in clearly legible letter should be given to the consumers in Hindi and English language that the product is not intent to diagnose, cure, mitigate or prevent rheumatism.

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123. EVIDENCE ACT, 1872 – Section 3

- **(i) Appreciation of evidence of witness closely related to deceased – Absence of any independent witnesses – Principle of strict scrutiny to be applied.**
- **(ii) Contradiction between ocular and medical evidence – Testimony of related eye-witness that accused assaulted deceased with stick – No independent eye witness – Medical evidence suggested that injuries were caused due to sharp-edgeded object and not stick – Medical evidence of corroborative value can be used by defence to discredit ocular evidence.**

साक्ष्य अधिनियम, **1872 -** धारा **3**

- (i) मृतक के करीबी संबंधित साक्षी की साक्ष्य का मूल्यांकन - किसी स्वतंत्र साक्षियों का अभाव - कठोर जाँच का सिद्धांत लागू करना चाहिये।
- (ii) मौखिक एवं चिकित्सकीय साक्ष्य में विरोधाभास - संबंधित चक्षुदर्शी साक्षी का अभिकथन कि अभियुक्त द्वारा मृतक पर छड़ी से हमला किया गया - कोई स्वतंत्र चक्षुदर्शी साक्षी नहीं - चिकित्सकीय साक्ष्य द्वारा यह सुझाव दिया गया कि चोटें धारदार उपकरण से आयी है न कि छड़ी से - संपुष्टिकारक चिकित्सकीय साक्ष्य का उपयोग बचाव द्वारा मौखिक साक्ष्य को अविश्वसनीय बनाने हेतु किया जा सकता है।

Baliraj Singh v. State of Madhya Pradesh
Judgment dated 25.04.2017 passed by the Supreme Court in Criminal Appeal No. 333 of 2013, reported in AIR 2017 SC 2114

Relevant extracts from the Judgment:

Considering the totality of the prosecution case, we fail to understand that at the time of such occurrence in a small village, when there was sunlight and PW8 & PW9 along with villagers rushed upon hearing uproar of PW12, no attempt was made by any of the eyewitnesses or villagers to catch hold of the accused. This lacuna in the prosecution case becomes stronger with the fact that in the FIR it was clearly mentioned, as PW8 saying to the complainant that upon hearing hue and cry from the field, PW9, PW12 and other people of village rushed to the field.

Though there was no indication in the FIR on PW8 herself rushing to the scene of offence, it is however apparent that some other people of village rushed to the place of occurrence, but there was none among the villagers who rushed with PWs 8 & 9 as independent eyewitness.

Thus, it is true that other than PW12 – family friend of the deceased, the prosecution has not made any independent witness from the village people who rushed to the place of offence along with PWs 8 & 9 on hearing hue and cry from the field. The circumstances warrant application of due care and caution in

appreciating the statements of eyewitnesses because of the fact that the prime eyewitnesses are related inter-se and to the deceased. Hence, the prosecution has failed to put a strong case as we cannot attach credence to the statements of PWs 8, 9 & 12. The courts below erred in not applying the principle of strict scrutiny in assessing the evidences of eyewitnesses (PWs 8, 9 & 12). Further, we find from the post mortem report (Annexure P1) prepared by Dr. R.K. Dixit (PW 13) upon examining the body of deceased, that there was a punctured wound just below the angle of right mandible over the right side of neck 1" x ½" x 3" and on dissection, he found that major artery was punctured and trachea was cut. There was hematoma underlying the whole side of neck and in the opinion of Doctor, the injury was caused by a sharp piercing object. In his evidence, Doctor (PW 13) confirmed that cause of death was due to excessive haemorrhage form the punctured wound over the right side of neck caused by sharp piercing object and due to punctured major blood vessel, over right side of neck.

It is on record that at the instance of the accused-appellant, police have recovered (Ext.P7) from arhar field the lathi allegedly used in the offence. However, nowhere it is recorded that the seized lathi contained any sharp edges with iron coated. Even it was not sent for examination of Dr. R.K. Dixit (PW 13) to ascertain whether the fatal injury could be resulted by it. Moreover, the record says that the blood on the bloodstained cap of deceased (Ext. P9) seized from the place of occurrence did not tally with that of the deceased. Another glaring deficiency is that Sub-Inspector who conducted the seizure proceedings and prepared the Ext. P7 (seizure memo) has not been examined by the prosecution. It is settled proposition in criminal jurisprudence that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. In this case the nature of injury, contradiction about the time of arrival of the witnesses, contradictions between the ocular and medical evidence, non-examination of Police officer who conducted seizure and subsequent improvement by one of the eye witness casts a serious doubt on the prosecution's case.

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124. EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Sections 302 and 34

(i) Injured witness, credibility of – Non-production of injury report by prosecution of the place where injured was first taken for treatment – Held, such lacuna is not fatal to doubt the prosecution case or to shake the credibility of the witness.

(ii) Common intention – Accused persons came together at place of occurrence in car armed with hammer, sickle and iron-rod – Assaulted the deceased mercilessly on very sensitive parts of body and head – Number of injuries caused on head reflect

individual intention of each accused person to ensure death of deceased – Conviction of accused persons found to be proper.

साक्ष्य अधिनियम, **1872 -** धारा **3**

भारतीय दण्ड संहिता, **1860 -** धाराएं **302** एवं **34**

(i) आहत् साक्षी की विश्वसनीयता - अभियोजन द्वारा आहत् की उस स्थान की चिकित्सीय रिपोर्ट का प्रस्तुत न किया जाना, जहां आहत् को प्रथम बार उपचार के लिये ले जाया गया - अभिनिर्धारित, ऐसी कमी, अभियोजन मामले पर संदेह उत्पन्न करने या साक्षी की विश्वसनीयता पर अधिक्षेप करने के लिये, घातक नहीं हैं।

(ii) सामान्य आशय - अभियुक्तगण कार में घटना स्थल पर एक साथ हथौड़ा, दरांती व लोहे की छड़ ले कर आये - मृतक के शरीर के संवेदनशील भाग एवं सिर पर निर्दयतापूर्वक प्रहार - सिर पर कारित चोटों की संख्या, प्रत्येक अभियुक्त व्यक्ति के मृतक की मृत्यु सुनिश्चित करने के सामान्य आशय को दर्शित करती हैं - अभियुक्तगण की दोषसिद्धि उचित पाई गई।

Chandrasekar and another v. State of Tamil Nadu

Judgment dated 22.05.2017 passed by the Supreme Court in Criminal Appeal No. 1345 of 2012, reported in AIR 2016 SC 2600

Relevant extracts from the Judgment:

The failure of the prosecution to place the injury report of the witness from the Udumalpet Government Hospital, where he was first taken for treatment is a lacuna, but cannot be held to be fatal as to doubt the entire prosecution case or shake the credibility of the witness. It cannot lead to any conclusion of his injury report, Exhibit P-6 from the Ramakrishna Hospital being fabricated. No such suggestion was made by the defence to PW-12 Dr.Krishnaraj. The appellants are named in the FIR registered soon after the occurrence. The fact that the witness may have stated of assault by two known persons to PW-12, without naming any of the appellants is inconsequential. The Doctor was a prosecution witness for the limited purpose of the injury report and not a prosecution witness with regard to the occurrence.

The appellants came together armed with a hammer, sickle and iron rod respectively. They assaulted the deceased indiscriminately on the head repeatedly, a very sensitive part of the human body reflecting the individual intention of each one of them to ensure the death of the deceased. The number of injuries caused on the head speaks for itself regarding the intention of the appellants. There is no need for us to consider and examine issues of common intention, in the facts of the case.

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125. EVIDENCE ACT, 1872 – Sections 7, 30 and 32
CONSTITUTION OF INDIA – Article 20(3)
INDIAN PENAL CODE, 1860 – Section 302

(i) Whether direction to the accused to provide his fingerprints or footprints for corroboration of evidence can be considered as violation of the protection guaranteed under Article 20(3) of the Constitution of India? Held, No – Further held, non-compliance of such direction of the Court may lead to adverse inference, nevertheless, the same cannot be entertained as the sole basis of conviction.

(ii) Circumstantial evidence – Where there is no direct witness to prove prosecution case, conviction of the accused can be made on the basis of circumstantial evidence provided chain of circumstances is complete beyond all reasonable doubt – However, accused cannot be convicted on the basis of circumstantial evidence where basic foundation of connecting the accused with incident had crumbled – A Judgment of conviction could not be founded on sole circumstance that recovery of weapon and other articles have been made.

साक्ष्य अधिनियम, **1872 -** धाराएं, **7, 30** एवं **32**
भारत का संविधान - अनुच्छेद **20 (3)**
भारतीय दंड संहिता, **1860 -** धारा **302**

(i) क्या अभियुक्त को साक्ष्य के संपोषण के लिये अंगुलिचिन्ह या पद चिन्ह उपलब्ध कराये जाने संबंधी निर्देश को भारत के संविधान के अनुच्छेद 20 (3) के अंतर्गत वचनबद्ध संरक्षण के उल्लंघन के रूप में माना जा सकता है? अधिनिर्धारित नहीं - आगे अभिनिर्धारित कि न्यायालय द्वारा दिये गये उक्त निर्देशों का अपालन उसके विरूद्ध अनुमान किये जाने के समर्थ बनायेगा परंतु इसे ही केवल दोषसिद्धी का एक मात्र आधार नहीं बनाया जायेगा।

(ii) परिस्थितिजन्य साक्ष्य - जहाँ अभियोजन मामले को प्रमाणित करने के लिये कोई प्रत्यक्ष साक्षी न हो, वहां अभियुक्त को परिस्थितिजन्य साक्ष्य के आधार पर दंडित किया जा सकता है, बशर्ते परिस्थितियों की श्रृंखला सभी संदेहों से परे पूर्ण हो- यद्यपि अभियुक्त को वहाँ परिस्थितिजन्य साक्ष्य के आधार पर दोषी नहीं ठहराया जा सकता है, जहां अभियुक्त को घटना के साथ जोड़ने वाली मूल नींव ही ध्वस्त हो गई हो - दोषसिद्धी का निर्णय एकमात्र इस परिस्थिति पर निर्धारित नहीं किया जा सकता कि आयुध व अन्य वस्तुओं की बरामदगी हुई है।

State of U.P. v. Sunil
Judgment dated 02.05.2017 by the Supreme Court in Criminal Appeal No 1432 of 2011, reported in 2017 (2) Crimes 377 (SC)

Relevant extract from the Judgment:

After careful perusal of the evidence and material on record, we are of the considered opinion that the following question would play a crucial role in helping us reaching an upright decision:

> Whether compelling an accused to provide his finger prints or foot prints etc. would come within the purview of Article 20(3) of the Constitution of India i.e. compelling an accused of an offence to be a "witness" against himself?

The answer to the question above-mentioned lies in judicial pronouncements made by this Court commencing with celebrated case of ***State of Bombay v. Kathi Kalu Oghad & ors., (1962) 3 SCR 10,*** wherein it was held:

> "To be a witness' may be equivalent to `furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - thought they may have intended to protect an accused person from the hazards of self incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."

We may quote another relevant observation made by this Court in the case of ***Kathi Kalu Oghad*** (supra).

> "When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an

> accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression `to be a witness."

In ***Selvi v. State of Karnataka, (2010) 7 SCC 263***, a three-Judge Bench of this Court while considering testimonial character of scientific techniques like Narco analysis, Polygraph examination and the Brain-Electric activation profile held that

> "The next issue is whether the results gathered from the impugned tests amount to 'testimonial compulsion', thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes 'testimonial compulsion' and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence' which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.
>
> It is quite evident that the narco analysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narco analysis technique was defended on the ground that at the time of conducting the test, it is not known whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narco analysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3)."

Thus, we have noticed that albeit any person can be directed to give his foot-prints for corroboration of evidence but the same cannot be considered as violation of the protection guaranteed under Article 20 (3) of the Constitution of India. It may, however, be noted that non-compliance of such direction of the Court may lead to adverse inference, nevertheless, the same cannot be entertained as the sole basis of conviction.

In a case where there is no direct witness to prove the prosecution case, conviction of the accused can be made on the basis of circumstantial evidence provided the chain of the circumstances is complete beyond all reasonable doubt. It was observed by this Court in the case of ***Prakash v. State of Karnataka, (2014) 12 SCC 133***, as follows:

> "It is true that the relevant circumstances should not be looked at in a disaggregated manner but collectively. Still, this does not absolve the prosecution from proving each relevant fact.
>
> > "6. In a case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypotheses and should be consistent with only the guilt of the accused. (***Lakhjit Singh v. State of Punjab, 1994 Supp (1) 173***)"

It has also been the observation of this Court in ***Musheer Khan v. State of M.P.,(2010) 2 SCC 748***, apropos the admissibility of evidence in a case solely based upon circumstantial evidence that

> "Section 27 starts with the word `provided'.
>
> Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See ***State of Bombay v. KathiKaluOghad, AIR 1961 SC 1808***].
>
> The ***Privy Council in PulukoriKottaya v. King Emperor, 1947 PC 67*** held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.
>
> The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer

the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused.

So the objection of the defense counsel to the discovery made by the prosecution in this case cannot be sustained. But the discovery by itself does not help the prosecution to sustain the conviction and sentence imposed on A-4 and A-5 by the High Court."

From a perusal of the evidence on record, it could without any hesitation be said that the basic foundation of the prosecution had crumbled down in this case by not connecting the respondent with the incident in question. And when basic foundation in criminal cases is so collapsed, the circumstantial evidence becomes inconsequential. In such circumstances, it is difficult for the Court to hold that a judgment of conviction could be founded on the sole circumstance that recovery of weapon and other articles have been made.

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126. EVIDENCE ACT, 1872 – Sections 45 and 8
INDIAN PENAL CODE, 1860 – Section 376 (1)(g)

(i) Gang rape – Medical evidence – Prosecutrix ravished twice by 3-4 adult persons – No sign of forcible intercourse – Medical opinion that prosecutrix accustomed to sexual intercourse – Admittedly, prosecutrix living separately from her husband for 1½ years before the incident, also have its own implication.

(ii) Gang rape – Unusual conduct of prosecutrix – Prosecutrix ravished twice by 3-4 adult persons – Did not shout for any help during intermittent breaks – Post incident consumed food offered by molesters – Instead of hurrying back home in distressed, humiliated and devastated state, visited place of occurrence – To collect information and to teach lesson to accused persons – Conduct of prosecutrix evinces feeling of deprivation of something expected, desired or promised.

(iii) Gang rape – Reliability of prosecutrix evidence – Inconsistencies, contradictions and unnatural conduct – Prosecutrix not reliable and evidence cannot be accepted mechanically.

(iv) Gang rape – Consent – Prosecutrix did not scream or cry for help after abduction or during intermittent breaks while being ravished in garage – No evidence as to abductors had put her under fear or pointed any weapon threatening physical injury – Admitted to have consumed food with abductors after incident – Conduct of prosecutirx not like victim of forcible rape but submissive and consensual.

(v) Gang rape – Defence of false implication – Evidence by independent witness – Prosecutrix used to take financial help from the accused persons – Denial by accused person for financial support – Husband of prosecutrix deserted her due to indulgence in dubious late night activities – In such circumstances, defence plea of false implication cannot be discarded.

साक्ष्य अधिनियम, **1872 -** धाराएं **45** एवं **8**

भारतीय दण्ड संहिता, **1860 -** धारा **376 (1) (**ह)

(i) सामूहिक बलात्संग - चिकित्सीय साक्ष्य - अभियोक्त्री से 3-4 व्यस्क व्यक्तियों द्वारा दो बार बलात्संग किया गया - बलपूर्ण मैथुन का कोई चिन्ह नहीं - चिकित्सीय अभिमत कि अभियोक्त्री मैथुन की अभ्यस्त थी - अभिस्वीकृत रूप से जबकि अभियोक्त्री, अपने पति से घटना के डेढ़ वर्ष पूर्व से पृथक रह रही थी, जिसके अपने परिणाम है।

(ii) सामूहिक बलात्संग - अभियोक्त्री का असामान्य आचरण - अभियोक्त्री का दो बार 3-4 वयस्क व्यक्तियों द्वारा बलात्कार किया गया - आंतरायिक विरामों के दौरान उसके द्वारा किसी भी मदद के लिये चिल्लाया नहीं गया - घटना के पष्चात् उत्पीड़कों द्वारा पेशकश करने पर खाना खाया गया - व्यथित, अपमानित व तहस-नहस अवस्था में घर वापस आने की बजाय जानकारी एकत्रित करने और अभियुक्त व्यक्तियों को सबक सिखाये जाने के लिये घटना स्थल का भ्रमण किया गया - अभियोक्त्री का आचरण वांछित, अपेक्षित या वादा किये गये आचरण के अभाव की भावना को प्रकट करता है।

(iii) सामूहिक बलात्संग - अभियोक्त्री के साक्ष्य की विश्वसनीयता - विसंगति, विरोधाभास व असामान्य आचरण - अभियोक्त्री विश्वसनीय नहीं है एवं उसकी साक्ष्य को यांत्रिक रूप से स्वीकार नहीं किया जा सकता है।

(iv) सामूहिक बलात्संग - सहमति - अभियोक्त्री, अपहरण के पश्चात् या गैराज में बलात्कार के समय आंतरायिक विरामों के दौरान मदद के लिये रोयी या चिल्लायी नहीं थी - ऐसी कोई साक्ष्य नहीं थी कि अपहरणकर्ताओं ने हथियार के आधार पर शारीरिक उपहति कारित करने की धमकी देकर उसे भय में डाल दिया था - यह स्वीकृत था कि घटना के पश्चात् अपहरणकर्ताओं के साथ उसने खाना खाया था - अभियोक्त्री का आचरण बलपूर्वक बलात्संग की पीड़िता की तरह न होकर सहमति व समपर्ण को दर्शित करता है।

(v) सामूहिक बलात्संग - बचाव पक्ष का बचाव कि उन्हें झूठा फंसाया गया है - स्वतंत्र साक्षियों द्वारा साक्ष्य - अभियोक्त्री द्वारा अभियुक्तगण से वित्तीय सहायता प्राप्त की जाती थी - अभियुक्तगण द्वारा वित्तीय सहायता दिये जाने से इंकार किया गया - देर रात की संदिग्ध गतिविधियों में संलिप्तता के कारण अभियोक्त्री के पति द्वारा अभित्याग - ऐसी परिस्थितियों में, अभियुक्त पक्ष का यह बचाव कि उन्हें झूठा फंसाया गया है, खारिज नहीं किया जा सकता है।

Raja and others v. State of Karnataka

Judgment dated 04.10.2016 passed by the Supreme Court in Criminal Appeal No. 1767 of 2011, reported in AIR 2016 SC 4930

Relevant extracts from the Judgment:

To start with, the prosecutrix has contradicted herself qua the place of alleged kidnapping. In the complaint, she mentioned the spot to be near Richmond park, whereas in her evidence she referred to the same as opposite Johnson market. It is more or less authenticated by the evidence on record that after her abduction and on the way to the garage as narrated by her, she did not scream or cry for help. This is of utmost significance as it is not alleged by her that the abductors had put her under fear on the point of any weapon threatening physical injury thereby. This is more so, as admittedly the prosecutrix at the relevant time was a major and could very well foresee the disastrous consequences to follow. She has admitted in her deposition as well that while she was ravished inside the garage and even during the intermittent breaks, she did not shout for any help. Her version in the complaint with regard to the offending act and the number of persons, who had committed the same, is inconsistent with her testimony on oath at the trial. Notably in the complaint she mentioned about four persons of whom three raped and out of them, two committed the act twice. She did not disclose in her complaint that the accused persons were known to her from before and disclosed that they during the time had been referring to themselves as Raju, Venu, Parkash and Francis. This, however has been denied by the investigation officer. On oath, she however introduced a fifth person as well. She accused all the four persons to have committed sexual intercourse with her for the second time. Though grudgingly, as admitted by her, she also consumed the food as offered to her by her molesters.

In cross-examination, she admitted that she was not married to Sarvana though she claimed him to be her husband in her examination-in-chief. She disclosed more than once that the accused persons used to tease her for about 5-6 months prior to the incident and that she used to talk to them as well. In view of this admission of hers, the identification by the prosecutrix of the accused persons in the TIP pales into insignificance. She contradicted herself in the cross-examination by stating that three of the four did rape her for the second time. She was also inconsistent with regard to the writer of her complaint.

Her conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition. From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.

Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated

state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. According to her, she wandered around the place and as disclosed by her in her evidence, to collect information so as to teach the accused persons a lesson. Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also out of the ordinary. Her testimony that she met a cyclist to whom she narrated her tale of woe and that on his information, the Hoysala police came to the spot and that thereafter she was taken to successive police stations before lodging the complaint at Sampangiramanagara police station as well has to be accepted with a grain of salt.

PW8, who medically examined her, opined in clear terms that she was accustomed to sexual intercourse and that no sign of forcible intercourse was discernible. This assumes great significance in view of the allegation of forcible rape by 3 to 4 adult persons more than once. The medical opinion that she was accustomed to sexual inter course when admittedly she was living separately from her husband for 1 and 1/2 years before the incident also has its own implication. The medical evidence as such in the attendant facts and circumstances in a way belies the allegation of gang rape.

The evidence of PW2 Geeta who admittedly had offered shelter to the prosecutrix and her minor daughter, though had been declared hostile, her testimony as a whole cannot be brushed aside. In her testimony, this witness indicated that the prosecutrix used to take financial help from the accused persons and that she used to indulge in dubious late night activities for which her husband had deserted her. The defence plea of false implication as the accused persons had declined to oblige the prosecutrix qua her demand for financial help therefore cannot be lightly discarded in the overall factual scenario. Her version therefore is a plausible one and thus fit in with the defence plea to demolish the prosecution case.

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127. FOREST ACT, 1927 – Sections 26, 41 and 55

MADHYA PRADESH VAN UPAJ (VYAPAR VINIMAYAN) ADHINIYAM, 1969 – Sections 5 and 15

Confiscation proceedings of the vehicle and prosecution for forest offence – Both proceedings are different, each having a distinct purpose – Adhiniyam prescribes for an independent procedure for confiscation – Confiscation proceedings being independent cannot be stayed by releasing the vehicle till the guilt of the accused is completely established in trial – Order releasing the vehicle from confiscation proceedings set aside.

वन अधिनियम, 1927 - धाराएं 26, 41 एवं 55
मध्यप्रदेश वन उपज (व्यापार विनिमय) अधिनियम, 1969 - धाराएं 5 एवं 15
वाहन के अधिहरण की कार्यवाही एवं वन अपराध हेतु अभियोजन - दोनों कार्यवाहियाँ अलग-अलग हैं और प्रत्येक का उद्देश्य भिन्न है - अधिनियम अधिहरण की कार्यवाही के लिए एक स्वतंत्र प्रक्रिया विहित करता है - अधिहरण की कार्यवाही स्वतंत्र होने से, उसे वाहन को छोड़, अभियुक्त के विचारण में पूर्णतः दोषी ठहराये जाने तक, स्थगित नहीं किया जा सकता है - अधिहरण की कार्यवाहीं से वाहन को छोड़े जाने के आदेश को अपास्त किया गया।

State of Madhya Pradesh and others v. Smt. Kallo Bai
Judgment dated 08.05.2017 passed by the Supreme Court in Criminal Appeal No. 932 of 2017, reported in AIR 2017 SC 2516

Relevant extracts from the Judgment:

In the case of ***State of M.P. v. S.P. Sales Agencies, (2004) 4 SCC 448*** the brief facts therein were a truck was intercepted by the police in the District of Gwalior. It was found that 281 cases of Kuttcha manufactured by M/s Harsh Food Products, respondent 2 therein were found in the truck. These wood cases were being transported without requisite transit pass under Rule 3 of M.P. Transit Rules thereafter; this matter was reported to Sub-Divisional Forest Officer, Gwalior, who initiated confiscation proceedings under Section 52 of the Act. This Court had an opportunity to deal with the question as to whether confiscation proceedings can be initiated under section 52 of the Act only after launching of the criminal prosecution or is it open to the forest authorities upon seizure of forest produce to initiate both or either. This Court relying on the cases in ***Divisional Forest Officer v. G. V. Sudhakar Rao, (1985) 4 SCC 573*** and ***State of West Bengal v. Gopal Sarkar, AIR 2002 SC 221*** came to the conclusion that the power of confiscation is independent of any criminal prosecution for forest offences committed.

In view of the foregoing discussions, it is apparent that Section 15 gives independent power to the concerned authority to confiscate the articles, as mentioned there under, even before the guilt is completely established. This power can be exercised by the concerned officer if he is satisfied that the said objects were utilized during the commission of a forest offence. A protection is provided for the owners of the vehicles/articles, if they are able to prove that they took all reasonable care and precautions as envisaged under Sub-section (5) of Section 15 of the Adhiniyam and the said offence was committed without their knowledge or connivance.

Criminal prosecution is distinct from confiscation proceedings. The two proceedings are different and parallel, each having a distinct purpose. The object of confiscation proceeding is to enable speedy and effective adjudication with regard to confiscation of the produce and the means used for committing

the offence while the object of the prosecution is to punish the offender. The scheme Adhiniyam prescribes an independent procedure for confiscation. The intention of prescribing separate proceedings is to provide a deterrent mechanism and to stop further misuse of the vehicle.

At the cost of repetition we clarify that confiscatory proceedings are independent of the main criminal proceedings. In view of our detailed discussion in the preceding paragraph we are of opinion that High Court as well as the provisional court erred in coming to a conclusion that the confiscation under the law was not permissible unless the guilt of the accused is completely established.

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128. HINDU MARRIAGE ACT, 1955 – Sections 7 and 5
CHILD MARRIAGE RESTRAINT ACT, 1929 – Section 5
ARYA SAMAJ MARRIAGE VALIDATION ACT, 1937 – Section 2
MADHYA PRADESH COMPULSORY REGISTRATION OF MARRIAGES RULES, 2008

(i) Performer of marriage, duty of – It is necessary for every performer including Freelancer Pandit to follow the provisions of the Hindu Marriage Act as well as the Child Marriage Restraint Act, 1929 – If marriage is performed at Arya Samaj then it is for them to fulfill various conditions as enumerated in the said Act – If the performer violates the settled provisions of various laws then he would also be liable for prosecution for various crimes.

(ii) Marriage through Arya Samaj Mandir Management – Mandatory directions given by the single bench in ***Naresh Soni v. State of M.P. & Ors.,*** **Writ Petition No. 4424/2016 dated 13/10/2016, reported in** ***2017 (1) MPJR 194*** **– Division Bench held that as the learned Single Judge was not competent to legislate such rules in the shape of directions, the same cannot be upheld.**

(Readers are requested to go through the directions given in *Naresh Soni* (supra) which are published at Page No. 89 as Note no. 45 in February issue of JOTI Journal 2017.)

हिन्दू विवाह अधिनियम, 1955 - धाराएं 7 - 5
बाल विवाह निषेध अधिनियम, 1929 - धारा 5
आर्य समाज विवाह विधिमान्यकरण अधिनियम, 1937 - धारा 2
मध्यप्रदेश विवाहों का अनिवार्य रजिस्ट्रीकरण नियम, 2008

(i) विवाह निष्पादित कराने वाले व्यक्ति का दायित्व - विवाह निष्पादित कराने वाले प्रत्येक व्यक्ति जिसमें स्वतंत्र रूप से काम करने वाले पंडित भी शामिल है, के लिये यह आवश्यक है कि वह हिन्दू विवाह अधिनियम तथा साथ ही साथ बाल विवाह निषेध अधिनियम, 1929 के प्रावधानों का भी पालन करे - यदि विवाह आर्य समाज में निष्पादित हुआ है तो उन्हें उक्त अधिनियमों में विहित विभिन्न शर्तों

को पूर्ण करना होगा - यदि निष्पादक के द्वारा स्थापित विधियों का उल्लंघन किया जाता है, तो वह भी विभिन्न अपराधों के लिये अभियोजन का दायी होगा।

(ii) आर्य समाज मंदिर प्रबंधन के माध्यम से विवाह - *नरेश सोनी विरूद्ध म. प्र. राज्य एवं अन्य*, *रिट याचिका क्रं.* ***4424/2016*** दिनांकित 13/10/2016, 2017 (1) एम.पी.जे.आर. 194 में प्रकाशित में एकल पीठ द्वारा अनिवार्य निर्देश - खंडपीठ के द्वारा यह अभिनिर्धारित कि विद्वान एकल न्यायाधीश निर्देशों के रूप में विधि निर्माण करने में सक्षम नहीं है, अतः उन्हें स्थिर नहीं रखा जा सकता है।

Arya Samaj, Naya Bazar, Lashkar, Gwalior v. State of M.P & ors. Judgment dated 27.06.2017 by the High Court of Madhya Pradesh (Gwalior Bench) in W.A. No. 385 of 2016, reported in 2017 Law Suit (MP) 1069 (DB)

Relevant extracts from the Judgment :

Generally, marriage is to be performed before the Purohit (performer) of AryaSamaj according to the provisions of the Hindu Marriage Act 1955. However, some extra authorities given to the AryaSamaj by provision of Section 2 of the Arya Marriage Validation Act 1937.

According to the provision, if someone is not a Hindu and still interested to enter in the marriage with the help of AryaSamaj then such person is permitted by such aforesaid provision. Hence, the authorities of Arya Samaj have more power than a Pandit who performs a marriage under the Hindu Marriage Act.

Before performing the marriage, it is necessary for every Pandit and every performer of Hindu marriage to examine about various conditions of Hindu marriage as enumerated in Section 5 of the Hindu Marriage Act and while performing the marriage, ceremonies should be required to be performed according to the provision contained under Section 7 of the Hindu Marriage Act. Also, age of marriageable boy and girl is fixed by the Child Marriage Restraint Act 1929 and, therefore, it is necessary for every performer including Freelancer Pandit to follow the provisions of the Hindu Marriage Act as well as the Child Marriage Restraint Act, 1929. In Hindu Marriage Act, no rules are drafted to be followed by the performer of the marriage as to how he would examine the age of bride and bridegroom and other conditions for a Hindu marriage. Similarly, if marriage is performed at AryaSamaj then it is for them to fulfill various conditions as enumerated in Section 5 of the Hindu Marriage Act and also to follow the provisions of the Child Marriage Restraint Act 1929. If age of bride or bridegroom is not properly assessed then according to Section 5 of the Child Marriage Restraint Act, 1929 then the person who performs, conducts or directs a child marriage then he shall be punished by that penal provision. Hence, the legislature did not enact the provisions for assessment of age of bride or bridegroom or the assessment to get fulfillment of conditions for a Hindu marriage. If the performer violates the settled provisions of various laws then he would also be

liable for prosecution for various crimes. Hence, there is no need to give directions as to how the age of the parties be assessed or as to how the conditions for a Hindu marriage shall be assessed. The learned Single Judge has also directed that intimation of marriage application be given to the parents of bride and bridegroom but it is not a condition precedent for performing the marriage under the Hindu Marriage Act and hence, if the entire directions are examined then in nutshell it would be apparent that if the performer of the marriage being a Purohit of AryaSamaj violates any of the conditions of law before performing and while performing the marriage then he shall be liable to face the consequences in criminal side also and, therefore, there was no requirement to lay down such directions so that the Purohit of AryaSamaj should follow such directions.

In this connection, the mandatory marriage registration rules which are framed by the State Government in the name of "Madhya Pradesh Compulsory Registration of Marriages Rules, 2008" may also be considered. According to Rule 4, if marriage is not registered under the Rules, then it will not get a positive effect of registration and if marriage is registered before the concerned Registrar then it would be a conclusive proof relating to marriage of the concerned parties. Hence, it is for the parties to prove that they got legally married though marriage would have been performed by a Pandit or a Purohit of Arya Samaj. Most of the marriages, according to the Hindu Marriage Act, are being performed by various Pandits and there is no provision for registration of such Pandit. When the Court is not in a position to give such directions to the Pandit, in general who performed the marriage of Hindu boy or girl then such directions cannot be given to the Purohit of AryaSamaj otherwise it would cause disparity between two different performers.

Also, as argued by learned counsel for the appellants, there are certain rules framed under AryaSamaj relating to performance of marriage. In such rules, it is mentioned that a person whose marriage is performed may declare within one year of performance of marriage that he was the follower of Arya Samaj. When such internal rules are already framed by the authorities of Arya Samaj then contrary directions could not be given by the learned Single Judge. The Court of Law can always examine the fact of marriage solemnized either by Arya Samaj Purohit under Arya Samaj Marriage Validation Act, 1937 and internal rules of Arya Samaj or by Pandit performing the marriage under Hindu Marriage Act. When the Court finds that a marriage is performed under AryaSamaj by no fulfilling the prerequisites of the AryaSamaj then the Court has to adjudge the validity of the impugned wedding under the Hindu Marriage Act and not otherwise. The Court has no jurisdiction to go beyond the social-network of various religious institutions or a Pandit under the Hindu Marriage Act.

Under these circumstances, in the light of the judgments passed by the Apex Court in ***Union of India v. Deoki Nandan Aggarwal, AIR 1992 SC 96*** and ***Balram Kumawat v. Union of India,(2003) 7 SCC 628,*** such legislation could not

be created by the Single Bench. From perusal of directions issued by learned Single Judge, it is apparent that some of those were contrary to the provisions of the Arya Marriage Validation Act 1937 and internal rules framed under that Act and some of them do not fall within the prerequisites of a valid marriage. Also, when there is no vacuum, the learned Single Judge was not competent to legislate such rules in the shape of directions. Consequently, such directions given by the Single Bench cannot be upheld.

On the basis of aforesaid discussions, all the writ appeals filed by the appellants are hereby allowed and the impugned order dated 13/10/2016 passed by the Single Bench of this Court in Writ Petition No. 4424/2016 (Habeas Corpus) is hereby set aside upto the extent relating to various directions given in para 12 of the order.

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129. HINDU MARRIAGE ACT, 1955 – Section 13(1)(i-a)

(i) Mental cruelty, proof of – Ground of divorce – Cruelty not defined in the Act – The Supreme Court in *Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511* enumerated 16 instances of human behavior which may be considered as mental cruelty – No uniform standard laid down for guidance – Grounds by respondent/husband for divorce does not comply the test laid down in *Samar Ghosh case* – Hence, respondent/husband not entitled for divorce.

(ii) Mental cruelty, proof of – Marriage solemnised in the year 1999 – Solitary incidents of behavior of wife alleged by husband – Incidents, immediately after the marriage – Incidents complained were condoned by subsequent conduct of parties i.e. by giving birth to second daughter – Held, isolated incident of long past condoned due to subsequent compromising behaviour does not constitute cruelty – Further held that incidents alleged should be recurring or continuous and should be in near proximity with the filing of petition.

(iii) Exchange of verbal conversation, whether constitutes cruelty – Mere exchange of verbal conversation, in presence of others does not constitute an act of cruelty – Unless futher supported by some incidents of alike nature.

(iv) Allegation of having extra marital relation, whether constitutes an act of cruelty to claim decree for dissolution of marriage – Held, No.

(v) Restitution of conjugal rights – Husband withdrew from wife's company without any reasonable cause – Husband failed to prove cruelty against wife – Marriage between the parties is held to subsist – Decree of divorce set aside and decree for restitution of conjugal rights passed accordingly.

हिन्दू विवाह अधिनियम, **1955 -** धारा **13 (1) (**प-क)

(i) मानसिक क्रूरता का प्रमाण - विवाह विच्छेद के आधार - क्रूरता को अधिनियम में परिभाषित नहीं किया गया है - सर्वोच्च न्यायालय द्वारा समर घोष विरूद्ध जया घोष (2007) 4 एस.सी.सी. 511 में मानव व्यवहार के 16 उदाहरणों को उल्लेखित किया गया है, जिसे मानसिक क्रूरता माना जा सकता है - मार्गदर्शन के लिये कोई समरूप मानक निर्धारित नहीं किये गये हैं - विवाह विच्छेद के लिये प्रतिप्रार्थी/पति के द्वारा बताये गये आधार समर घोष के प्रकरण में बताये गये परीक्षण की कसौटी को पूर्ण नहीं करते हैं - अतः प्रतिप्रार्थी/पति विवाह विच्छेद प्राप्त करने का हकदार नहीं हैं।

(ii) मानसिक क्रूरता का प्रमाण - विवाह वर्ष 1999 में अनुष्ठापित हुआ था - एकान्त घटनाओं के आधार पर पति द्वारा पत्नी के दुर्व्यवहार के आरोप लगाये गये - विवाह के तुरंत बाद की घटनायें - जिन घटनाओं की शिकायत, उन्हें पक्षकारों द्वारा अपने पश्चात्वर्ती आचरण द्वारा क्षमा किया जा चुका था, जैसे कि दूसरी बेटी को जन्म देकर - अभिनिर्धारित, पूर्व की पृथक घटनायें, जिन्हें पक्षकारों ने पश्चात्वर्ती शमन व्यवहार से क्षमा कर दिया हो, क्रूरता का गठन नहीं करती है - आगे अभिनिर्धारित किया गया कि आक्षेपित घटनायें ऐसी होनी चाहिये जो बार-बार और निरंतर हो तथा आवेदन प्रस्तुत करने के निकटता में भी होना चाहिये।

(iii) क्या मौखिक वार्तालाप का आदान प्रदान क्रूरता को गठित करता है - केवल शब्दों का आदान प्रदान जो अन्य लोगों की उपस्थिति में किया गया है, क्रूरता गठित नहीं करता है - जब तक कि वह समान प्रकृति की कुछ और घटनाओं से समर्थित नहीं हैं।

(iv) विवाहेत्तर संबंध का आरोप क्या क्रूरता को गठित कर विवाह के विघटन के लिये डिक्री प्राप्त करने का हकदार बनाता है - अभिनिर्धारित, नहीं।

(v) दाम्पत्य अधिकारों की पुर्नःस्थापना - पति के द्वारा स्वयं को पत्नी के साह्चर्य से बिना किसी युक्तियुक्त कारण के पृथक कर लिया गया - पति, पत्नी के विरूद्ध क्रूरता को प्रमाणित करने में विफल रहा - पक्षकारों के बीच विवाह जीवित हैं - विवाह विच्छेद की डिक्री को अपास्त किया गया और तद्नुसार दाम्पत्य अधिकारों की पुर्नस्थापना की डिक्री पारित की गई।

Suman Singh v. Sanjay Singh

Judgment dated 08.03.2017 passed by the Supreme Court in Civil Appeal No. 7114 of 2014, reported in (2017) 4 SCC 85

Relevant extracts from the Judgment:

The word “cruelty” used in Section 13(1)(ia) of the Act is not defined under the Act. However, this expression was the subject matter of interpretation in several cases of this Court. What amounts to “mental cruelty” was succinctly

explained by this Court (three Judge Bench) in ***Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511***. Their Lordships speaking through Justice Dalveer Bhandari observed that no uniform standard can ever be laid down for guidance, yet it is appropriate to enumerate some instances of human behaviour which may be considered relevant in dealing with the cases of "mental cruelty". Their Lordships then broadly enumerated 16 category of cases which are considered relevant while examining the question as to whether the facts alleged and proved constitute "mental cruelty" so as to attract the provisions of Section 13 (1) (ia) of the Act for granting decree of divorce.

Keeping in view the law laid down in ***Samar Ghosh's case*** (supra), when we examine the grounds taken by the respondent in his petition for proving the mental cruelty for grant of divorce against the appellant, we find that none of the grounds satisfies either individually or collectively the test laid down in Samar Ghosh's case (supra) so as to entitle the respondent to claim a decree of divorce.

* * *

In our view, the incidents which occurred prior to 2006 could not be relied on to prove the instances of cruelty because they were deemed to have been condoned by the acts of the parties. So far as the instances alleged after 2006 were concerned, they being isolated instances, did not constitute an act of cruelty.

A petition seeking divorce on some isolated incidents alleged to have occurred 8-10 years prior to filing of the date of petition cannot furnish a subsisting cause of action to seek divorce after 10 years or so of occurrence of such incidents. The incidents alleged should be of recurring nature or continuing one and they should be in near proximity with the filing of the petition.

Few isolated incidents of long past and that too found to have been condoned due to compromising behaviour of the parties cannot constitute an act of cruelty within the meaning of Section 13 (1)(ia) of the Act.

* * *

We are not impressed by the submission of the learned counsel for the respondent that an incident which occurred somewhere in 2010 when the appellant visited the office of the respondent and alleged to have misbehaved with the respondent in front of other officers would constitute an act of cruelty on the part of the appellant so as to enable the respondent to claim divorce. In the first place, no decree for divorce on one isolated incident can be passed. Secondly, there could be myriad reasons for causing such isolated incident. Merely because both exchanged some verbal conversation in presence of others would not be enough to constitute an act of cruelty unless it is further supported by some incidents of alike nature. It was not so.

We are also not impressed by the submission of the learned counsel for the respondent that since the appellant had made allegation against the respondent of his having extra-marital relation and hence such allegation would also constitute an act of cruelty on the part of the appellant entitling the

respondent to claim decree for dissolution of marriage. Similarly, we are also not impressed by the submission of learned counsel for the respondent that since both have been living separately for quite some time and hence this may be considered a good ground to give divorce.

* * *

In our considered view, as it appears to us from perusal of the evidence that it is the respondent who withdrew from the appellant's company without there being any reasonable cause to do so. Now that we have held on facts that the respondent failed to make out any case of cruelty against the appellant, it is clear to us that it was the respondent who withdrew from the company of the appellant without reasonable cause and not the vice versa.

In view of foregoing discussion, the appeals succeed and are allowed. The impugned judgment is set aside. As a result, the petition filed by the respondent (husband) under Section 13 (1) of the Act seeking dissolution of marriage is dismissed. As a consequence thereof, the marriage between the parties is held to subsist whereas the petition filed by the appellant against the respondent under Section 9 of the Act seeking restitution of conjugal right is allowed. A decree for restitution of conjugal right is, accordingly, passed against the respondent.

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130. HINDU MARRIAGE ACT, 1955 – Sections 13 (1) (ia) and 25

(i) When allegation or complaint against the husband amounts to cruelty? Merely filing of complaint by wife or trial resulting in acquittal of husband may not amount to cruelty – If allegations are patently absurd and false, then they may amount to cruelty.

(ii) Permanent alimony, entitlement of – Even though the conduct of the wife amounts to cruelty, the court cannot be oblivious to requirements of wife for a decent living – Order regarding one time permanent alimony and house passed.

हिन्दू विवाह अधिनियम**, 1955 -** धाराएं **13 (1) (i.**क) एवं **25**

(i) पति पर लगाये गये आरोप या परिवाद कब क्रूरता के श्रेणी में आयेंगे? - पत्नी के द्वारा केवल परिवाद प्रस्तुत किया जाना या विचारण में पति को दोषमुक्त किया जाना, क्रूरता की श्रेणी में नहीं आता - यदि आरोप स्पष्ट रूप से विवेकहीन और असत्य हैं तो यह क्रूरता की श्रेणी में आयेगा।

(ii) स्थायी निर्वाहिका की पात्रता - यद्यपि पत्नी का आचरण क्रूरता की श्रेणी में आता हैं तब भी एक सभ्य जीवन शैली के लिये पत्नी की आवश्यकता से न्यायालय अनभिज्ञ नहीं हो सकता है - एक बार की स्थायी निर्वाहिका एवं आवास गृह के संबंध में आदेश दिये गये।

Raj Talreja v. Kavita Talreja

Judgment dated 24.04.2017 passed by the Supreme Court in Civil Appeal No. 10719 of 2013, reported in AIR 2017 SC 2138

Relevant extracts from the Judgment:

This Court in Para 16 of ***K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226*** has held as follows:

> "16. Thus, to the instances illustrative of mental cruelty noted in ***Samar Ghosh v. Jaya Ghosh, 2007 (4) SCC 511,*** we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

In ***Ravi Kumar v. Julmidevi, 2010 (4) SCC 476*** this Court while dealing with the definition of cruelty held as follows:

> "19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.
>
> 20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in ***Sheldon v. Sheldon, (1966) 2 WLR 993*** held that categories of cruelty in matrimonial cases are never closed."

Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons

to file the complaints. Merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act 1955 (for short 'the Act'). However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusations against the other spouse would be an act of cruelty. In the present case, all the allegations were found to be false. Later, she filed another complaint alleging that her husband along with some other persons had trespassed into her house and assaulted her. The police found, on investigation, that not only was the complaint false but also the injuries were self inflicted by the wife. Thereafter, proceedings were launched against the wife under Section 182 of IPC.

We have perused the judgment of the High Court. The High Court while dealing with the plea of false complaints held that there was no reason to hold that the criminal complaint filed by the respondent-wife was false and mala fide. We are unable to agree with this finding of the High Court and the court below. Both the courts below relied upon the statement of the wife that her husband had often visited her house and she fulfilled her marital obligations. These observations are not based on any reliable or cogent evidence on record. It is not disputed before us that the wife continues to live in the house which belongs to the mother of the husband whereas the husband lives along with his parents in a separate house and the son and daughter-in-law of the parties live with the wife. The son is working with the husband. We may note that Ms. Makhija has very fairly stated before us that the husband had always fulfilled his paternal obligations to his son and is continuing to pay maintenance to his wife as fixed by the court.

Though we have held that the acts of the wife in filing false complaints against the husband amounts to cruelty, we are, however, not oblivious to the requirements of the wife to have a decent house where she can live. Her son and daughter-in-law may not continue to live with her forever. Therefore, some permanent arrangement has to be made for her alimony and residence. Keeping in view the status of the parties, we direct that the husband shall pay to the wife a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) as one time permanent alimony and she will not claim any further amount at any later stage. This amount be paid within three months from today. We further direct that the wife shall continue to live in the house which belongs to the mother of the husband till the husband provides her a flat of similar size in a similar locality. For this purpose, the husband is directed to ensure that a flat of the value up to Rs.1,00,00,000/- (Rupees One Crore Only) be transferred in the name of his wife and till it is provided, she shall continue to live in the house in which she is residing at present.

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131. INDIAN PENAL CODE, 1860 – Sections 149 and 300
EVIDENCE ACT, 1872 – Sections 3 and 8

(i) Common object, when established – Committing some overt act by all the persons forming unlawful assembly is not necessary – Further held, test to be applied for incurring vicarious liability – Whether other members of assembly knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

(ii) Appreciation of evidence – Absence of motive – Trustworthy evidence of witnesses as to commission of an offence on record – Ocular testimony of the witnesses as to occurrence cannot be discarded – Motive loses its significance, if other evidence is worthy of reliance.

(iii) Culpable homicide amounting to murder – Clause thirdly – Three stab injuries caused on vital parts of body of the deceased i.e. chest, stomach and intestine – Accused having common object caused such injuries – Injuries sufficient in the ordinary course of nature to cause death – Such act falls within the ambit of clause thirdly of section 300 of IPC.

(iv) Murder or culpable homicide – Sudden fight without premeditation – Initial altercation between deceased and accused 'X' at restaurant of accused 'X'– Subsequent arrival of the accused 'X' at spot of crime – Sufficient time elapsed after initial altercation – Accused 'X' arrived with nine armed men at the scene of occurrence; three men equipped with knives and rest equipped with sticks – Accused 'X' inflicted injuries with knife upon unarmed deceased – Injury sufficient in the ordinary course of nature to cause death – Accused not entitled to benefit of Exception four to Section 300.

(v) Appreciation of evidence – Unlawful assembly formed by accused persons in pursuance of common object and assaulted deceased and complainant – Evidence on record silent and vague as to who inflicted stick injury upon complainant – Plea of the accused 'A' & 'B' that though they were armed with knives but as per evidence did not inflict any injury upon any one with knives and had no motive – Further, plea that original quarrel did not involve them and included deceased and accused 'X' – Held, plea not tenable – Conviction of the accused upheld – Appeal dismissed (***Masalti v. State of U.P., AIR 1965 SC 202*** **relied on).**

भारतीय दंड संहिता, **1860 -** धाराएं **149** एवं **300**

साक्ष्य अधिनियम, **1872 -** धाराएं **3** एवं **8**

(i) सामान्य उद्देश्य कब स्थापित होता है - विधि विरूद्ध जमाव निर्मित करने वाले सभी व्यक्तियों द्वारा कुछ कृत्य किया जाना आवश्यक नहीं है - आगे अभिनिर्धारित, प्रतिनिधिक दायित्व को लागू करने के लिये कसौटी- क्या जमाव के अन्य सदस्य पहले से ही यह जानते थे कि वास्तव में जो अपराध कारित किया गया है उसका सामान्य उद्देश्य के अग्रसरण में कारित किया जाना संभावित था।

(ii) साक्ष्य का मूल्यांकन - हेतुक का अभाव - अभिलेख पर साक्षियों की अपराध के कारित होने की विश्वसनीय साक्ष्य- साक्षियों की घटना के संबंध में चक्षुदर्षी साक्ष्य को त्यागा नहीं जा सकता है- अन्य साक्ष्य के विश्वनीय होने के कारण हेतु ने अपने महत्व को खो दिया है।

(iii) आपराधिक मानव वध- हत्या की श्रेणी में- तृतीय खंड- मृतक के शरीर के मार्मिक भागों (छाती, पेट एवं आंतों) पर तीन भौंके हुये घाव- अभियुक्तगण का ऐसी उपहितों को कारित करने का सामान्य उद्देश्य - उपहतियाँ, प्रकृति के मामूली अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त - ऐसा कृत्य धारा 300 भा.दं.सं. के तृतीय खंड की परिधि में आता है।

(iv) हत्या या आपराधिक मानव वध - पूर्व चिन्तन के बिना अचानक लड़ाई- मृतक एवं अभियुक्त 'एक्स' के बीच शुरूआती विवाद इस बात पर कि रेस्टारेंट 'एक्स' का है - अभियुक्त 'एक्स' का अपराध के स्थान पर पश्चातवर्ती प्रक्रम पर आगमन - प्रारंभिक विवाद के बाद पर्याप्त समय व्यतीत हो चुका था- अभियुक्त 'एक्स' घटना स्थल पर 9 सशस्त्र व्यक्तियों के साथ पहुंचा - तीन व्यक्ति चाकू व शेष व्यक्ति छड़ी लिये हुये थे - अभियुक्त 'एक्स' ने चाकू से चोट पहुंचायी - निहत्थे मृतक पर - उपहतियां, प्रकृति के मामूली अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त - अभियुक्त धारा 300 के चैथे अपवाद का लाभ प्राप्त करने का हकदार नहीं है।

(v) साक्ष्य का मूल्यांकन - अभियुक्तगण के द्वारा विधि विरूद्ध जमाव का गठन - सामान्य उद्देश्य के अग्रसरण में मृतक और परिवादी पर हमला किया - अभिलेख पर आयी साक्ष्य मौन एवं अस्पष्ट जबकि प्रतिकूल में परिवादी को छड़ी द्वारा चोटे कारित- अभियुक्त 'ए' व 'बी' का अभिवाक कि यद्यपि वे चाकू के साथ थे परंतु साक्ष्य के अनुसार उनके द्वारा कोई उपहति किसी व्यक्ति को चाकू से कारित नहीं की गई और उनका कोई हेतु भी नहीं था - आगे अभिवाक कि मूल विवाद में वे शामिल नहीं थे और वह अभियुक्त 'एक्स' व मृतक के मध्य हुआ था - अभिनिर्धारित, अभिवाक पोषणीय नहीं है - अभियुक्तगण की दोषसिद्धि को स्थिर रखा गया।

Saddik alias Lalo Gulam Hussein Shaikh and others v. State of Gujarat

Judgment dated 03.10.2016 passed by the Supreme Court in Criminal Appeal No. 1999 of 2010, reported in AIR 2016 SC 5101

Relevant extracts from the Judgment:

Thirdly of Section 300 of the IPC, if the act is done with the intention of causing bodily injury which injury is sufficient in ordinary course of nature to cause death and if the accused persons have common object to cause such injury, then also it will fall under Section 300 of IPC. Thus, intention to cause death is nothing decisive, but, as per clause Thirdly of Section 300 of the IPC, if the accused were having common object of causing only bodily injury, which were found sufficient in the ordinary course of nature, to cause death, such killing will fall within the ambit of this clause Third of Section 300 of IPC. Thus, looking to the deposition of the prosecution witnesses, the offence of murder of Rajubhai Ramubhai Vasava has been proved beyond reasonable doubt against the accused.

* * *

Further, once it is established that the unlawful assembly had a common object, it is not necessary that all the persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [See: ***Daya Kishan v. State of Haryana, (2010) 5 SCC 81; Sikandar Singh v. State of Bihar, (2010) 7 SCC 477, State of U.P. v. Krishanpal & ors., (2008) 16 SCC 73, Debashis Daw v. State of W.B., (2010) 9 SCC 111*** and ***Ramachandran & ors v. State of Kerala, (2011) 9 SCC 257***].

* * *

It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See: ***Hari Shankar v. State of U.P., (1996) 9 SCC 40; Bikau Pandey & ors. v. State of Bihar, (2003) 12 SCC 616; Abu Thakir & ors. v. State of Tamil Nadu, (2010) 5 SCC 91; State of U.P. v. Kishanpal & ors., (2008) 16 SCC 73;*** and ***Bipin Kumar Mondal v. State of West Bengal, (2010) 12 SCC 91***].

It has also been contended by the counsel for the appellants that the evidence is silent and vague as to who inflicted the stick injuries upon PW1. Moreover, the injuries were only on the back and thigh of PW1 while there was no evidence of any injury upon PW2 and PW 3. It was further submitted that though appellant Nos.2 and 3 were armed with knives, the evidence on record shows that appellant Nos.2 and 3 did not inflict any injury upon anyone with their knives. Further, since the original quarrel did not involve appellant Nos. 2 to 7 and the same was confined to the deceased and the prosecution witnesses on one side and Appellant No. 1 on the other, Appellants nos. 2 to 7 did not have any motive/intention to murder the deceased.

These contentions made by the learned counsel for the appellants are not liable to be accepted in light of the observations of this Court in ***Masalti v. State of U.P., AIR 1965 SC 202*** wherein it was held:

> "Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

* * *

Applying the above tests to the case at hand, we have no difficulty in holding that, keeping in view the nature of the injury, the vital part of the body on which the same was inflicted and the weapon used by the Accused No. 1, and the medical evidence, the said injury was sufficient in the ordinary course to cause death.

* * *

Applying these tests to the case at hand, we find that they do not help the cause of Accused No.1. In the present case, Accused No.1 had arrived at the scene of occurrence with nine armed men out of which three were equipped with knives and the rest were equipped with sticks. Sufficient amount of time had elapsed between the initial altercation at the restaurant of Accused No.1 and the subsequent arrival of the accused persons at the spot of the crime. Moreover, it was also established from the evidence on record that Accused No.1 had inflicted knife injury of such a nature, upon the unarmed deceased, that was sufficient in the ordinary course of nature to cause death. Hence, we are not inclined to grant the benefit of this Exception clause to Accused No.1 in the present case.

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***132. INDIAN PENAL CODE, 1860 – Section 304-A**

Medical negligence – Appellant charged for negligence u/s 304-A IPC – Deceased already suffering from haemophilia – Inflicted injuries in road accident – Appellant, a surgeon on call – Attended the hospital and examined the deceased – No evidence of bleeding or injury upon deceased on examination – Accused advised opinion of physician who did not turn up – Appellant without waiting for the physician left the hospital – Held, expecting the physician to come soon may be an error of judgment but definitely not that of criminal negligence – Not a case where appellant should face trial after 20 years of incident – Criminal proceeding initiated against appellant quashed. (*Jacob Mathew v. State of Punjab & anr., (2005) 6 SCC 1* relied on)

भारतीय दंड संहिता**, 1860 -** धारा **304-**क

चिकित्सीय उपेक्षा - अपीलार्थी पर धारा 304-क भा.दं.सं. के अंतर्गत उपेक्षा का आरोप - मृतक पूर्व से ही हीमोफीलिया से पीड़ित था - सड़क दुर्घटना में उपहतियाँ कारित हुई - अपीलार्थी जो कि एक सर्जन था, वह कॉल पर आया - अस्पताल पहुंचकर मृतक का परीक्षण किया - रक्तस्त्राव या उपहतियों का कोई साक्ष्य मृतक की परीक्षा के दौरान नहीं था - चिकित्सक की अभिमत लेने की सलाह परन्तु वह नहीं आया - अपीलार्थी ने चिकित्सक के लिए इंतजार नहीं किया और अस्पताल छोड़ दिया - अभिनिर्धारित, चिकित्सक के जल्द ही आ जाने की उम्मीद, निर्णय की एक त्रुटि हो सकती है लेकिन यह निश्चित रूप से यह चिकित्सीय उपेक्षा नहीं है - यह ऐसा मामला नहीं है, जहाँ अपीलकर्ता घटना के 20 साल बाद विचारण का सामना करे - अपीलकर्ता के विरूद्ध प्रारंभ की गई आपराधिक कार्यवाही को अपास्त किया गया। (*जेकब मैथ्यू विरूद्ध पंजाब राज्य व एक अन्य,* ***(2005) 6*** *एस.सी.सी.* ***1*** अवलंबित

Dr. Sou Jayshree Unwal Ingole v. State of Maharashtra & anr.
Judgment dated 06.04.2017 passed by the Supreme Court in Criminal Appeal No. 636 of 2017, reported in 2017 (2) Crimes 49

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133. INDIAN PENAL CODE, 1860 – Sections 306 and 498-A
EVIDENCE ACT, 1872 – Section 113-A

Ingredient of "cruelty" is essential for application of Section 113-A – Mere harassment would not lead to a conclusion of "abetment of suicide" as it is of something lesser degree than "cruelty" – Acquittal under Section 498-A – Case under Section 306 is not made out – Also, link or intention on the part of in-laws to assist the victim to commit suicide is necessary.

भारतीय दण्ड संहिता, **1860 -** धाराएं **306** एवं **498-**क

साक्ष्य अधिनियम, **1872 -** धारा **113-**क

धारा 113-क को लागू करने के लिए ''क्रूरता'' के आवश्यक तत्वों का मौजूद होना आवश्यक है - केवल उत्पीड़न के आधार पर ही ''आत्महत्या के दुष्प्रेरण'' के निष्कर्ष पर नहीं पहुंचा जा सकता है क्योंकि इसका स्तर ''क्रूरता'' की अपेक्षा कम है - धारा 498-क के अंतर्गत दोषमुक्ति - धारा 306 के अंतर्गत भी प्रकरण निर्मित नहीं होता है - इसके अतिरिक्त पीड़ित को आत्महत्या करने में सहायता करने के लिए ससुराल वालों का आशय व संबंध होना भी आवश्यक है।

Heera Lal and another v. State of Rajasthan
Judgment dated 24.04.2017 passed by the Supreme Court in Criminal Appeal No. 790 of 2017, reported in AIR 2017 SC 2425

Relevant extracts from the Judgment:

Having heard the learned counsel appearing for the parties and having gone through the evidence, we are of the opinion that Section 113-A of the Indian Evidence Act requires three ingredients to be satisfied before it can be applied i.e., (i) that a woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage and (iii) the husband or his relatives who are charged had subjected her to cruelty.

This Court in an illuminating Judgment in ***Ramesh Kumar v. State of Chhattisgarh, (2001) 9 SCC 618*** has stated the law as follows:-

> "This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of

> the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the above said circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the above said three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption.The expression - "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrefutable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says – "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

We find that having absolved the appellants of the charge of cruelty, which is the most basic ingredient for the offence made out under Section 498A, the third ingredient for application of Section 113A is missing, namely, that the relatives i.e., the mother-in-law and father-in-law who are charged under Section 306 had subjected the victim to cruelty. No doubt, in the facts of this case, it has been concurrently found that the in-laws did harass her, but harassment is

something of a lesser degree than cruelty. Also, we find on the facts, taken as a whole, that assuming the presumption under Section 113A would apply, it has been fully rebutted, for the reason that there is no link or intention on the part of the in-laws to assist the victim to commit suicide.

In the absence of this vital link, the mere fact that there is a finding of harassment would not lead to the conclusion that there is " abetment of suicide".

On the facts, therefore, we find, especially in view of the fact that the appellants have been acquitted for the crime under Section 498 A of the Code, that abetment of suicide under Section 306 is not made out.

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***134. INDIAN PENAL CODE, 1860 – Sections 307 and 34**

(i) Fatal injury capable of causing death, whether essential – Attempt to murder – Held, not essential – Intention coupled with some common act in execution thereof is sufficient. [Relied on – *State of MP v. Kashiram and others, (2009) 4 SCC 26* and *Jage Ram & others v. State of Haryana, (2015) 11 SCC 366*].

(ii) Attempt to murder – Sentence – Accused sentenced for 3 years imprisonment under Section 307 – Plea of accused – To release with the sentence already undergone – Incarceration of one year and a little more is left – Crime heinous in nature – Held, undue sympathy leading to imposition of inadequate sentence would harm justice system and would undermine public confidence in the efficacy of law. [*Sevaka Perumal & anr. v. State of Tamil Nadu, (1991) 3 SCC 471* relied on]

भारतीय दण्ड संहिता, **1860 -** धाराएं **307** एवं **34**

(i) क्या हत्या के प्रयत्न के लिये मृत्यु कारित करने के लिये पर्याप्त घातक चोटें आवश्यक हैं - अभिनिर्धारित, आवश्यक नहीं हैं - आशय के साथ उसके प्रवर्तन में सामान्य कृत्य ही प्रर्याप्त है (*स्टेट आफ एम.पी. विरूद्ध काशीराम एवं अन्य,* ***(2009) 4*** *एस.सी.सी.* **26** एवं *जैगे राम व अन्य विरूद्ध हरियाणा राज्य,* ***(2015) 11*** *एस.सी.सी.* ***366*** अवलंबित)

(ii) हत्या का प्रयत्न - दंड - अभियुक्त को धारा 307 के अंतर्गत 3 वर्ष के कारावास से दंडित किया गया - अभियुक्त का अभिवाक - उसे भुगताई गई सजा के आधार पर ही छोड़ा जावे - एक वर्ष और उससे कुछ अधिक की सजा शेष थी - अपराध जघन्य प्रकृति का था - अभिनिर्धारित - अनुचित सहानुभूति, जो अपर्याप्त दंड अधिरोपित करने की ओर अग्रसर करती है, वह न्याय प्रणाली को नुकसान पहुंचाएगी और विधि की प्रभावोत्पादकता में जनता के विश्वास को कमजोर करेगी। (*सेवका पेरूमल एवं अन्य विरूद्ध तमिलनाडू राज्य,* ***(1991) 3*** *एस.सी.सी.* ***471*** अवलंबित)

Chhanga @ Manoj v. State of Madhya Pradesh
Judgment dated 28.02.2017 passed by the Supreme Court in Criminal Appeal No. 898 of 2005, reported in 2017 (2) Crimes 51

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***135. INDIAN PENAL CODE, 1860 – Sections 376 and 302**
CRIMINAL PROCEDURE CODE, 1973 – Sections 235, 366 and 368

(i) Whether conviction and order of sentence passed on the same day by trial court necessarily vitiate the proceedings? Held, No – Merely because no separate date was given for hearing on sentence, entire exercise cannot be flawed or vitiated.

(ii) Sentencing policy – Awarding of death sentence – It is the cumulative effect of both the aggravating and mitigating circumstances that need to be taken into account – Both aspects namely, aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts.

भारतीय दंड सहिता, **1860 -** धाराएं **376** और **302**

दंड प्रक्रिया संहिता, **1973 -** धाराएं **235, 366** और **368**

(i) क्या विचारण न्यायालय द्वारा समान दिन दोषसिद्धी एवं दंड का आदेश पारित करना आवश्यक रूप से कार्यवाही से दूषित करता है? अभिनिर्धारित, नहीं - मात्र क्योंकि सजा पर सुनवाई के लिये पृथक से तिथि से नहीं दी गयी, संपूर्ण कार्यवाही त्रुटिपूर्ण या दूषित नहीं हो जाती है।

(ii) दंड नीति - मृत्यु दंड प्रदान किया जाना - यह उत्प्रेरक एवं लघुकारी दोनों, परिस्थितियों का ऐसा संचयी प्रभाव है, जिसे ध्यान से रखा जाना चाहिए - दोनों परिस्थितियों को उनका महत्व दिया जाना चाहिए और न्यायालय को दोनों के बीच संतुलन बनाना होगा और देखना होगा कि किस तरफ न्याय का संतुलन झुकता है।

Vasanta Sampat Dupare v. State of Maharashtra

Judgment dated 03.05.2017 by the Supreme Court in Review Petition (Crl.) No. 637 of 2015, reported in 2017 (2) Crimes 382 (SC)

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136. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 12 and 15
Grant of bail to juvenile – Juvenile assaulted the victim with knife, on refusal to grant money for buying liquor – Juvenile addicted to intoxicants – Conduct of juvenile, short-tempered, disobedient and socially not adaptable – According to report of Probation Officer,

guardian not in position to exercise disciplinary control over juvenile – Held, release of juvenile on bail would expose him to moral, psychological and physical danger and likely to indulge in criminal activities to raise money – Bail rejected in the interest of justice.

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, **2000 -** धाराएं **12** एवं **15**

किशोर को जमानत प्रदान किया जाना - किशोर के द्वारा शराब खरीदने के लिये धन दिये जाने से इंकार करने के कारण पीड़ित पर चाकू से हमला किया गया - किशोर मादक पदार्थो का आदी था - किशोर का आचरण, क्रोधी (आशु कोपी), अवज्ञाकारी, और सामाजिक रूप से स्वीकार्य नही था - परीवीक्षा अधिकारी की रिपोर्ट के अनुसार, अभिभावक, किशोर पर अनुशासनात्मक नियंत्रण करने की स्थिति में नहीं - अभिनिर्धारित, जमानत पर किशोर को रिहा करने से नैतिक, मनोवैज्ञानिक और शारीरिक खतरे के लिये असंरक्षित हो जायेगा और धन एकत्र करने के लिए आपराधिक गतिविधियों में संलिप्त होने की भी संभावना है - जमानत को न्यायहित में खारिज किया गया।

Prashant Mishra v. State of M.P.

Order dated 14.03.2016 passed by the High Court of Madhya Pradesh (Jabalpur Bench) in Criminal Revision No. 2257 of 2015, reported in ILR (2016) MP 2817

Relevant extracts from the Order:

The juvenile is alleged to have assailed the victim with knife because he refused to give him money for buying liquor. At the time of offence, he was already under the influence of some intoxicant. The report dated 11.07.2015 submitted by the Probation Officer is also revealing. It is stated in no uncertain terms therein that the father and the parental grand-mother of juvenile had expired in a motor accident on 15.11.2011; however, even before the aforesaid incident, juvenile had run away from his home and lived in places like Delhi, Meerut etc. After the death of his father and grand-mother, the returned home; however, during his stay away from home, he had become addicted to intoxicants. He consumes various kind of intoxicants like Ganja, Whitener ink etc. He even goes to the extent of rubbing the paste used for repairing puncture on a piece of cloth and inhales the odor for getting his kick. For the purpose of buying these intoxicants, he needs money and for raising the same, he sells the house-hold goods and takes money from the boys and villagers. He beats up people whenthey refuse to part with money. He is considered by the villagers to be short-tempered and disobedient. His conduct was not considered to be good. His mother also discloses that he is not socially adaptable and mostly stays alone in his room, he doesn't meet people. After the death of his father, he is

looked after by his parental grand-father and mother; however, they are unable to exercise any kind of disciplinary control over him. In order to indulge in his addiction of intoxication, he even man handles his grand-father and mother and misbehaves with them.

In the opinion of the Probation Officer, his rehabilitation in the family may lead to further development of criminal tendencies in the juvenile and if he is restored to his family he may, in all probability, expose himself moral, psychological and physical dangers.

In view of the report of the Probation Officer and the circumstances under which the offence is alleged to have been committed, it appears that in the case of his release on bail, the juvenile would expose himself to moral, psychological and physical dangers because it is obvious that he is addicted to various kinds of intoxicants and is more than likely to indulge in criminal activities to raise money. His guardians i.e. mother and the grand-father are clearly not in a position to exercise any disciplinary control over him. If he indulges in criminal activities to raise money for buying liquor etc., the victims may be inclined to retaliate at some point, putting the juvenile in physical danger. In aforesaid circumstances, it would not be in the interest of justice to release the juvenile on bail just yet, regardless of the fact that he has already spent 8 months in remand home. However, simply denying the bail to the juvenile is not the way out. His stay in the observation home should be utilized for the purpose of deaddiction and reformation. He needs to be cured of his addiction, if possible, and properly counselled with a view to reclaim him as a useful member of the society.

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137. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Sections 94 and 111

Determination of age, jurisdiction of Sessions Court as to – The Court of Session has no power to determine the age of accused and this power is granted only to the Juvenile Justice Board constituted under the Act.

किशोर न्याय (बच्चों की देखरेख और संरक्षण) अधिनियम, **2015 -** धाराएं **94** एवं **111**

आयु का निर्धारण, इस संबंध में सत्र न्यायालय का क्षेत्राधिकार - सत्र न्यायालय को अभियुक्त की आयु निर्धारित करने की कोई शक्ति नहीं है और यह शक्ति मात्र अधिनियम के अंतर्गत गठित किशोर न्याय बोर्ड को ही प्रदान की गई है।

Indra Singh v. State of M.P.

Order dated 15.03.2017 by the Madhya Pradesh High Court (Indore Bench) in Criminal Revision No. 793 of 2016, reported in2017 (1) MPWN 105

Relevant extracts from the Order :

In light of provisions of section 111 of new Act, it is apparent that all the actions taken and acts done under the repealed Act, shall be deemed to have been done and taken under the corresponding provisions of this Act. Corresponding provision in the present case is section 94 of new Act. The new Act came into force in January, 2016 while the impugned order was passed in March, 2016 and therefore, it was incumbent on the learned Special Judge that Judge should follow the provisions of section 94, according to which, the Court of Session had no power to determine the age of accused and this power is granted only to the Juvenile Justice Board, constituted under the Act. How the age would be determined, is provided in sub-section (2) of section 94 of new Act and therefore, it is apparent that the impugned order was not passed in accordance with the provisions of the new Act and therefore, the impugned order is liable to be set aside.

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138. MEDICAL JURISPRUDENCE – ASPHYXIA

EVIDENCE ACT, 1872 – Section 45

Report of the doctor that death was caused due to asphyxia as a result of the injuries on the neck region – Did not mention whether asphyxia was due to strangulation or hanging, but gave opinion of pressure on the neck – Defence of the accused that deceased died due to suicide by hanging – Absence of ligature mark around the neck – Held, deceased died due to pressure on the neck and not by hanging – No reason to differ with doctor's opinion – Acquittal by the High Court set aside.

चिकित्सीय न्याय-शास्त्र - दम घुटना (चेतनाभाव)

साक्ष्य अधिनियम, **1872 -** धारा **45**

चिकित्सक का प्रतिवेदन की मृत्यु गर्दन के भाग पर चोटों से हुये श्वास अवरोध के कारण हुई - यह उल्लेखित नहीं किया गया कि श्वास अवरोध गला घोंटने या लटकने से हुआ परंतु गर्दन पर दबाव का अभिमत दिया गया - अभियुक्त का बचाव कि मृतक की मृत्यु लटक कर आत्महत्या करने से हुई - गले के चारों ओर फंदे के निशान की अनुपस्थिति - अभिनिर्धारित, मृतक की मृत्यु गर्दन पर दबाव के कारण हुई एवं न कि लटकने से - चिकित्सक के अभिमत से असहमत होने का कोई कारण नहीं हैं - उच्च न्यायालय द्वारा दी गई दोषमुक्ति अपास्त की गई।

State of Rajasthan v. Ramesh

Judgment dated 20.11.2015 passed by the Supreme Court in Criminal Appeal No. 1526 of 2008, reported in 2017 (1) ANJ (SC) 327

Relevant extracts from the Judgment:

It is an admitted fact on record that Sheela, daughter of the accused-respondent, died on 28.4.1999, as is apparent from the statement of accused recorded under Section 313 CrPC read with the prosecution evidence, discussed above. Death of Sheela was not natural is also admitted fact, and established on record, for the reason that where the prosecution case is that she died due to asphyxia by strangulation and throttling, the version of the defence is that she died by hanging. In an appeal against acquittal we have to examine the evidence on record to find out whether prosecution has successfully proved or not that the accused/respondent caused homicidal death of Sheela, as suggested by it, and also as to whether two views – one taken by the trial court and another by the High Court were possible in the present case or not as to the cause of death of the deceased.

We have already quoted above the ante mortem injuries recorded in the autopsy report by PW-8 Dr. Viveka Nand. We have also reproduced the opinion given by him at the end of the autopsy report as to the cause of death. PW-8 has stated in his report (Ex.P-12) dated 29.4.1999 that the deceased died of Asphyxia as a result of injuries on the neck region, but he did not mention as to whether it was asphyxia due to strangulation or hanging. But in his oral testimony he has stated that the deceased had died due to injuries around her neck and suffocation. He has further stated that on 19.5.1999 in response to letter No. 1490 dated 3.5.1999 of Station House Officer, Kalwad, he gave following reply to him: -

> "After going through above mentioned post mortem report it is clear that there was no ligature mark around the neck. Hence it is clarified that the above mentioned person did not die because of hanging. She died because of asphyxia as the result of pressure over neck."

This report is exhibited as P-13 on the record proved by the Medical Officer (PW-8) during his examination. There is no suggestion in the cross-examination to PW-8 Dr. Viveka Nand that cause of death could have been asphyxia due to hanging. It is argued on behalf of the respondent that since the deceased committed suicide by hanging herself with a Chunni/Dupatta, and her body was brought down immediately after the incident, as such, no ligature mark was found around the neck, and it is a case of suicide by hanging.

Hanging is a form of death, produced by suspending the body with a ligature round the neck, the constricting force being the weight of the body, or a part of the body weight. In other words, the hanging is the ligature compression of the neck by the weight of one's body due to suspension.

According to Modi's Medical Jurisprudence and Toxicology (23rd Edition), "ligature mark depends on the nature and position of ligature used, and the time of suspension of the body after death. If the ligature is soft, and the body is cut down from the ligature immediately after the death, there may be no mark……."

'Strangulation' is defined by Modi as "the compression of the neck by a force other than hanging. Weight of the body has nothing to do with strangulation. Ligature strangulation is a violent form of death which results from constricting the neck by means of a ligature or by any other means without suspending the body. When constriction is produced by the pressure of the fingers and palms upon the throat, it is called as throttling. When strangulation is brought about by compressing the throat with a foot, knee, bend of elbow, or some other solid substances, it is known as mugging (strangle hold)."

As to appearances due to asphyxia, Modi says: -

"The face is puffy and cyanosed, and marked with petechiae. The eyes are prominent and open. In some cases, they may be closed. The conjunctivae are congested and the pupils are dilated. Petechiae are seen in the eyelids and the conjunctivae. The lips are blue. Bloody foam escapes from the mouth and nostrils, and sometimes, pure blood issues from the mouth, nose and ears, especially if great violence has been used. The tongue is often swollen, bruised, protruding and dark in colour, showing patches of extravasations and occasionally bitten by the teeth. There may be evidence of bruising at the back of the neck. The hands are usually clenched. The genital organs may be congested and there may be discharge of urine, faeces and seminal fluid."

In 'asphyxia', according to Modi, "ligature is usually situated above the thyroid cartilage, and the effect of its pressing the neck in that situation is to force up the epiglottis and the root of the tongue against the posterior wall of the pharynx. Hence, the floor of the mouth is jammed against its roof, and occludes the air passages,……….."

In the light of above, we have examined the observations of PW-8 Dr. Viveka Nand in the autopsy report (Ex. P-12), prepared by him at the time of post mortem examination. We have already quoted above the ante mortem injuries and findings on the neck dissection and also the opinion given by the Medical Officer. At this stage, we think it relevant to mention here the observations made by the Medical Officer (PW-8) as to external appearances mentioned in page one of the post mortem report, which disclose–

> "Both eyes were semi open and looked like protruded, on opening eyes are reddish congested, mouth closed, lips and face along with nails show bluish discolouration, abdomen slightly distended, condition of pupils – both dilated".

After carefully going through the medico legal evidence on record, we are of the opinion that it was not a case where a view could have been taken that the deceased died of hanging. There was no reason to disagree with the opinion given by PW-8 Dr. Viveka Nand (Ex. P-13) that the deceased had died of asphyxia as a result of pressure over the neck.

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139. MOTOR VEHICLES ACT, 1988 – Sections 147 (1), 149 and 168

- **(i) Death claim – Liability of insurer – Third party – Deceased travelling in car of employer – Insurance policy covered all occupants except those carried for hire or reward – Deceased being employee falls in category of third party – Compensation claimed by dependants of the deceased, covered in insurance policy.**
- **(ii) Death claim, compensation of – Plea of insurance company – Deceased not entitled to future prospects as he was 51 years old – No evidence on record establishing deceased's age to be 51 years at time of accident– Claimants of deceased entitled to future prospects. (*Sarla Verma v. DTC, AIR 2009 SC 3104* relied on)**

मोटरयान अधिनियम, **1988 -** धाराएं **147 (1), 149** एवं **168**

- (i) मृत्यु के आधार पर दावा - बीमाकर्ता की देयता - तृतीय पक्षकार - नियोक्ता की कार में मृतक द्वारा यात्रा - बीमा पालिसी में, किराया या प्रतिफल पर लिये जाने के अतिरिक्त सभी सवारियों को शामिल किया गया था - मृतक, कर्मचारी होने के कारण तृतीय पक्षकार की श्रेणी में आता है - मृतक के आश्रितों द्वारा किया गया प्रतिकर का दावा बीमा पालिसी के अंतर्गत है।
- (ii) मृत्यु के आधार पर दावा प्रकरण में प्रतिकर - बीमा कंपनी का अभिवाक - मृतक, भविष्य की संभावनाओं के लिये हकदार नहीं था, क्योंकि वह 51 वर्ष का था - दुर्घटना के समय मृतक की आयु 51 वर्ष थी, यह स्थापित करने वाली कोई साक्ष्य अभिलेख पर नहीं थी - मृतक के दावेदार भविष्य की संभावनाओं के हकदार हैं। (*सरला वर्मा विरूद्ध डी.टी.सी.*, *ए.आई.आर.* ***2009*** *एस.सी.* ***3104*** का अवलंब लिया गया)

New India Assurance Co. Ltd. v. Shanti Bopanna and others

Judgment dated 18.04.2017 passed by the Supreme Court in Civil Appeal No. 5412 of 2017, reported in AIR 2017 SC 2857

Relevant extracts from the Judgment:

The clause of the policy clearly covers the insured against all sums which the insurer may become liable to pay in respect of :

"(i) death of or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward)...."

We thus find that the claim of the widow and the adopted son is fully covered by the clause in the insurance contract, i.e., the policy and there is no scope for acceding to the submission made on behalf of the appellant-company that the claim is excepted by virtue of the provisions of Section 147 (1) of the Act in this case. We, therefore, reject the contention made on behalf of the appellant that the deceased was not a third party because he was an employee sitting in the car. It is obvious from the circumstances that the deceased was indeed a third party being neither the insurer not the insured.

The next contention raised on behalf of the appellant is that the future prospects have been unreasonably granted to the respondents. According to the appellant, the High Court noted that according to the appellant-company the deceased was 51 years but we find that no categorical finding was recorded that the deceased was 51 years of age. We, therefore, accept the finding of the Tribunal that the deceased was 49 years of age. It might therefore, not be necessary to consider the submission made by the appellant-company that because the deceased was above 50 years of age, the thumb rule laid down in the case of ***Sarla Verma v. DTC reported in 2009 (6) SCC 121*** ought to have been followed. We find from the observations relied on in ***Sarla Verma's case*** (supra) that there is a thumb rule that future prospects may not be awarded in case the deceased is above 50 years of age...

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140. MOTOR VEHICLES ACT, 1988 – Section 163-A
LAW OF PRECEDENTS:

(i) Claim petition, maintainability of – Victim himself victimizer to avoid liability – Section 163-A of Act is founded under 'fault' liability principle – The provisions of Section 163A have overriding effect on all other provisions of MV Act, 1988 – Owner or Insurance Company is at liberty to defeat claim under Section 163A of Act by pleading and establishing through evidence a 'fault' ground ('wrongful act', 'neglect', or 'default').

(ii) Precedents, binding nature of – It is well settled position that so long as the decision of the Supreme Court on the point is in force, the same will be binding on all the subordinate Courts – The fact that the issue has been referred to a larger Bench of the Supreme Court, that cannot be the basis to ignore the same and the decision will be binding precedent until overturned by a larger Bench of the Supreme Court.

मोटर यान अधिनियम, **1988 -** धारा **163-**क

पूर्व निर्णय की विधि:

(i) क्लेम याचिका की पोषणीयता - दायित्व से बचने के लिये पीड़ित स्वयं पीड़ा देने वाला बना - अधिनियम की धारा 163-क ''गलती'' दायित्व सिद्धांत के अंतर्गत स्थापित है - धारा 163-क के प्रावधान, मोटर यान अधिनियम 1988 के सभी प्रावधानों पर अधिभावी प्रभाव रखते है - स्वामी या बीमा कंपनी अधिनियम की धारा 163-क के तहत दावे को यह अभिवचन करके और साक्ष्य के माध्यम से ''गलती'' ('गलत कार्य', उपेक्षा या चूक) के आधारों को स्थापित कर निष्फल करने के लिये स्वतंत्र है।

(ii) पूर्व निर्णय की बाध्यकारी प्रकृति - यह सुस्थापित स्थिति है कि किसी बिन्दु पर सर्वोच्च न्यायालय का निर्णय सभी अधीनस्थ न्यायालयों पर बाध्यकारी होगा - यह तथ्य कि किसी विषय को सर्वोच्च न्यायालय की बड़ी पीठ के लिये भेजा गया है, उसे अनदेखा करने का आधार नहीं हो सकता है और निर्णय एक बाध्यकारी पूर्व निर्णय होगा, जब तक कि उसे सर्वोच्च न्यायालय की वृहत पीठ के द्वारा पलट नहीं दिया जाता है।

Oriental Insurance Company Ltd. v. Sanju Bai

Order dated 31.08.2015 by the High Court of Madhya Pradesh (Jabalpur Bench) in M.A. No. 1721 of 2015, reported in 2016 ACJ 1000 (FB)

Relevant extracts from the Order:

Indeed, the reference judgment is a common judgment dealing with other Miscellaneous Appeals, but, learned single Judge has disposed of the companion matters and chose to merely refer M.A. No. 2508/2007. He has formulated two questions to be referred by the Full Bench. The same read thus:

> "1. Whether a claim petition is maintainable and the claimants are entitled for compensation where victim himself is the victimizer to avoid the liability.
>
> 2. Whether in the claim petition filed by the victim under section 163-A of the Motor Vehicles Act, owner/Insurance company is liable to plead and prove that the victim himself was the victimizer to avoid the liability."

These questions, in our opinion, have already been answered by the Supreme Court in ***National Insurance Company v. Sinitha and others, 2012 ACJ 1 (SC)***. In that case, the claim for compensation was due to the death of a rider of motor cycle on account of his negligence. In paragraphs No. 15 and 16 of the said decision, the Supreme Court observed thus :

“15. The heading of Section 163A also needs a special mention. It reads, “Special Provisions as to Payment of Compensation on Structured Formula Basis”. It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the “fault” liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact, that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the “no-fault” liability principle, without reference to the “fault” grounds. When compensation is high, it is legitimate that the insurance company is not fastened with liability when the offending vehicle suffered a “fault” (“wrongful act”, “neglect”, or “defect”) under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the “fault” liability principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including

> the inferences and conclusions drawn by us from the judgment of this Court in ***Oriental Insurance Company Limited v. Hansrajbhai V. Kodala, (2001) 5 SCC 175***, as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the learned counsel for the petitioner."

Indeed, in the subsequent decision of coordinate Bench of the Supreme Court in the case of ***United India Insurance Company v. Sunil Kumar, 2013 ACJ 2856 (SC),*** the correctness of the view expressed in ***Sinitha's case*** (supra) and ***United India Insurance Company v. SheelaDatta, 2011 ACJ 2729 (SC),*** has been doubted and the question is referred to the larger Bench of the Supreme Court. Nevertheless, it is well settled position that so long as the decision of the Supreme Court on the point is in force, the same will be binding on all the subordinate Courts. The fact that the issue has been referred to larger Bench of the Supreme Court, that cannot be the basis to ignore the decision of the Supreme Court cited on the subject, which is still holding the field and will be, therefore, binding precedent until overturned by a larger Bench of the Supreme Court. Besides the above said decisions, counsel for the appellant wanted to rely on other decisions of different High Courts, which in our opinion, is not necessary.

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141. MOTOR VEHICLES ACT, 1988 – Sections 163-A and 168

(i) Compensation – Liability to pay – Death or permanent disability due to accident – Compensation may be claimed against the tortfeasor, who may be driver or owner of the vehicle or the insurer – Such a tortfeasor is wholly responsible for payment – Employer certainly not responsible for payment of compensation – Employer may also offer compassionate appointment to dependants of the injured/deceased.

(ii) Compassionate appointment on determination of compensation, effect of – Deceased was an employee of Gujrat Electricity Board – Dependants of the injured/deceased claimed compensation from tortfeasor – Claimants receiving money in form of salary due to compassionate employment offered by employer – Employer is not a tortfeasor – Held, financial benefit of compassionate employment is not liable to be deducted from compensation amount – Both the sources are different and has no co-relation.

मोटरयान अधिनियम, **1988 -** धाराएं **163-**क एवं **168**

(i) प्रतिकर - भुगतान करने का दायित्व - दुर्घटना के कारण मृत्यु या स्थायी अक्षमता - प्रतिकर, अपकृत्यकर्ता के विरूद्ध मांगा जा सकता है, जो वाहन का चालक या वाहन का स्वामी या बीमाकर्ता हो सकता है - ऐसे अपकृत्यकर्ता ही भुगतान के लिये पूर्णतः उत्तरदायी है - निश्चित रूप से प्रतिकर के भुगतान के लिये नियोक्ता उत्तरदायी नहीं हैं - नियोक्ता आहत्/मृतक के आश्रितों के लिये अनुकम्पा नियुक्ति का प्रस्ताव कर सकते हैं।

(ii) प्रतिकर के निर्धारण पर अनुकंपा नियुक्ति का प्रभाव - मृतक गुजरात इलेक्ट्रिसिटी बोर्ड का एक कर्मचारी था - आहत/मृतक के आश्रितों द्वारा अपकृत्यकर्ता से प्रतिकर का दावा - नियोक्ता द्वारा दी गई अनुकंपा नियुक्ति की वजह से वेतन के रूप में दावेदार धनराशि प्राप्त कर रहे थे - नियोक्ता, अपकृत्यकर्ता नहीं है - अभिनिर्धारित, अनुकंपा नियुक्ति के आधार पर प्राप्त रोजगार का वित्तीय लाभ, प्रतिकर की राशि से कटौती करने के लिये दायी नहीं हैं - दोनों स्त्रोत भिन्न-भिन्न हैं और उनका आपस में कोई संबंध नहीं हैं।

National Insurance Co. Ltd v. Rekhaben and others
Judgment dated 07.03.2017 passed by the Supreme Court in Civil Appeal No. 8867 of 2012, reported in AIR 2017 SC 2580

Relevant extracts from the Judgment:

The main contention of the appellant in these appeals is that the amount of salary received by the claimants being appointed by the employers of the deceased on compassionate grounds must be reduced from the award of compensation made in favour of the claimants. Thus, the only issue before us in

these appeals is whether the income of the claimants from compassionate employment is liable to be deducted from the compensation amount awarded by the Tribunal under the Statute.

The payment of compensation may be claimed under Section 163A of the Motor Vehicles Act, 1988 (for short, the 'Act'). The liability to pay the amount of compensation under Section 163A of the Act, is imposed on the owner of the motor vehicle or the authorised insurer, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle. It is payable to the legal heirs or the victim, as the case may be. In other cases, an award may be made in respect of the claim arising out of the accident under Section 168 of the Act. The Tribunal may make an award determining the amount of compensation "which appears to it to be just", specifying the person or persons to whom compensation shall be paid and in making the award, the Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

In these cases, compensation is claimed against the tort feasor who may be the driver or owner of the vehicle or the insurer. In respect of an accident in which the tort feasor is found to be liable, the owner or the driver of the vehicle or the insurer, as the case may be, may alone be held responsible for the payment of such compensation since the accident has resulted in the injury or death which gives rise to the claim of the claimants. No other party is involved in it. And certainly not the employer who may offer compassionate appointment to the dependants of the injured/ deceased.

* * *

In the present cases, the claimants were offered compassionate employment. The claimants were not offered any sum of money equal to the income of the deceased. In fact, they were not offered any sum of money at all. They were offered employment and the money they receive in the form of their salary, would be earned from such employment. The loss of income in such cases cannot be said to be set off because the claimants would be earning their living. Therefore, we are of the view that the amount earned by the claimants from compassionate appointments cannot be deducted from the quantum of compensation receivable by them under the Act.

In the cases before us, compensation is claimed from the owner of the offending vehicle who is different from the employer who has offered employment on compassionate grounds to the dependants of the deceased/injured. The source from which compensation on account of the accident is claimed and the source from which the compassionate employment is offered, are completely separate and there is no co-relation between these two sources. Since the tort feasor has not offered the compassionate appointment, we are of the view that an amount which a claimant earns by his labour or by offering his services,

whether by reason of compassionate appointment or otherwise is not liable to be deducted from the compensation which the claimant is entitled to receive from a tort feasor under the Act. In such a situation, we are of the view that the financial benefit of the compassionate employment is not liable to be deducted at all from the compensation amount which is liable to be paid either by the owner/ the driver of the offending vehicle or the insurer.

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142. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

COURT FEES ACT, 1870 – Section 33 and Article 2(1)(b) of Schedule II

CIVIL PROCEDURE CODE, 1908 – Section 149

Whether Magistrate can entertain a private complaint under section 138 of the Negotiable Instruments Act without requisite Court fees? Held, Yes – The complianant may be permitted for payment of court fees at a later stage.

परक्राम्य लिखत अधिनियम, **1881 -** धारा **138**

न्यायालय शुल्क अधिनियम, **1870 -** धारा **33** एवं अनुसूची-**II** का अनुच्छेद **2 (1) (**ख)

सिविल प्रक्रिया संहिता, **1908 -** धारा **149**

क्या मजिस्ट्रेट धारा 138 परक्राम्य लिखत अधिनियम के अंतर्गत परिवाद अपेक्षित न्यायालय शुल्क के बिना ग्रहण कर सकता है? अभिनिर्धारित हाँ - परिवादी को पश्चातवर्ती प्रक्रम पर न्यायालय शुल्क के भुगतान की अनुमति दी जा सकती है।

Mukesh Tiwari v. Smt. Janki Singh

Order dated 01.04.2016 by the High Court of Madhya Pradesh (Jabalpur Bench) in Miscellaneous Criminal Case No.15905 of 2015, reported in 2016 (2) MPWN 13

Relevant extracts from the Order:

It is not in dispute before this Court that as per Article 2 (1) (b) of Schedule II appended to the Court-fees Act, 1870, the court-fee in the sum of Rs.96,000/- was payable on the complaint and it was paid before the process was issued against the accused; thus, the only question that remains for consideration is whether the trial Court had jurisdiction to accept court-fees after presentation of the complaint ?

The arguments of learned counsel for the applicant that there is no provision in the Court-fees Act, 1870 corresponding section 149 of the CPC is fallacious as it advanced in ignorantia the section 33 of the Court-fees Act, 1870.

Thus, the Presiding Judge in a criminal Court, may, in spite of the bar contained in section 6 of the Act, accept filing of a document in respect of which proper fee has not been paid, if in his opinion it is necessary to prevent the failure of justice.

In view of section 33, learned Magistrate certainly had jurisdiction to entertain the private complaint without the requisite court-fees and allow payment thereof at a later stage. Thus, no jurisdictional error was committed by the trial Court in entertaining the complaint without adequate court-fees and permitted the payment thereof at a later stage, particularly where it was paid before the order issuing process against the accused. In any case, payment of adequate court-fees was a matter between the complainant and the state. As such, the Courts below committed no error in declining to dismiss the complainant on the ground of court-fees, in the interest of justice, warranting interference by the High Court in exercise of inherent powers as no case of abuse of process of the Court or injustice is made out by the petitioner.

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***143. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

CRIMINAL PROCEDURE CODE, 1973 – Sections 357, 421 and 431

INDIAN PENAL CODE, 1860 – Section 70

Whether undergoing the jail sentence prescribed in default of compensation absolve a person from liability to pay compensation? Held, No – It is recoverable by process u/s 421(1) of Cr.P.C. even after undergoing default sentence.

परक्राम्य लिखत अधिनियम, **1881 -** धारा **138**

दण्ड प्रक्रिया संहिता, **1973 -** धाराएं **357, 421** एवं **431**

भारतीय दण्ड संहिता, **1860 -** धारा **70**

क्या प्रतिकर भुगतान के व्यतिक्रम में दिये गये दण्डादेश की सजा को भुगतने के पश्चात् वह व्यक्ति प्रतिकर के भुगतान के दायित्व से मुक्ति प्राप्त कर लेता है ? - अभिनिर्धारित, नहीं - यह दण्ड प्रक्रिया संहिता की धारा 421(1) में विहित प्रक्रिया द्वारा वसूली योग्य है, भले ही व्यतिक्रम के दण्डादेश को भुगता जा चुका हो।

Kumaran v. State of Kerala

Judgment dated 05.05.2017 by the Supreme Court in Criminal Appeal No. 896 of 2017, reported in 2017 (2) ANJ (SC) (Suppl.) 1

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144. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141

(i) Offence by Company – Issuance of summon to Director – Courts to ensure strict compliance of the statutory requirement and settled principles of law before holding the Director vicariously liable – Magistrate to examine nature of allegations made in complaint and to proceed further with proper application of mind.

(ii) Offence by company – Vicarious liability of the Director – Accused, Director of the company, issued cheque – Cheque not presented during his tenure or within the validity period of 6 months – Accused resigned from company prior to presentation of cheque – Said fact substantiated by Form-32 submitted to Registrar of Companies – Accused played no role in activities of the company when cheque bounced – Absence of specific averments about role of Director – Director cannot be held liable by virtue of his post – Proceeding against accused, Director liable to be quashed.

परक्राम्य लिखत अधिनियम, **1881- धारा 141**

(i) कम्पनी द्वारा अपराध - निदेशक को संमंस का जारी किया जाना - न्यायालयों द्वारा निदेशक को प्रतिनिधिक रूप से उत्तरदायी ठहराने के पूर्व वैधानिक अपेक्षाओं और विधि द्वारा स्थापित सिद्धांतों का कठोर अनुपालन सुनिश्चित करना चाहिए - मजिस्ट्रेट को परिवाद में किये गये आक्षेपों की प्रकृति की जांच करनी चाहिए और उचित रूप से मनोनियोग कर कार्यवाही अग्रसर करनी चाहिए।

(ii) कम्पनी द्वारा अपराध - निदेशक का प्रतिनिधिक दायित्व - कम्पनी के निदेशक अभियुक्त, द्वारा चेक जारी किया गया- चेक को उसके कार्यकाल के दौरान या वैधता के छः माह के भीतर प्रस्तुत नहीं किया गया - अभियुक्त ने, चेक को प्रस्तुत किये जाने से पूर्व ही कम्पनी से इस्तीफा दे दिया - उक्त तथ्य की पुष्टि कम्पनी के रजिस्ट्रार को प्रस्तुत फार्म- 32 से होती थी - अभियुक्त ने चैक के अनादृत होने के समय कम्पनी की गतिविधियों में कोई भूमिका नहीं निभाई - निदेशक की भूमिका के बारे में विनिर्दिष्ट प्रकथन का अभाव है - निदेशक को उसके पद के आधार पर उत्तरदायी नहीं ठहराया जा सकता है - अभियुक्त निदेशक के विरूद्ध कार्यवाहियां अपास्त किये जाने योग्य है।

Ashoke Mal Bafna v. M/s. Upper India Steel Mfg. & Engg. Co. Ltd.

Judgment dated 06.03.2017 passed by the Supreme Court in Criminal Appeal No. 529 of 2017, reported in AIR 2017 SC 2854

Relevant extracts from the Judgment:

To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action [See : ***Pooja Ravinder Devidasani v. State of Maharashtra & ors., AIR 2015 SC 675***].

In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

Turning to the case on hand, admittedly the cheques dated 28-12-2004 were issued while the appellant was Director of the Company with validity for a period of six months but during that period they were not presented for realization at the bank. The appellant has resigned as Director w.e.f. 2-1-2006 and the fact of his resignation has been furnished by Form 32 to the Registrar of Companies on 24-03-2006 in conformity with the rules. Thereafter, the appellant had played no role in the activities of the default Company. This fact remains substantiated with the Statement filed by the default Company on 20-02-2006 with the Registrar of Companies that in an advertisement of the Company seeking deposits (Annexure P3), only the names of three Directors of the Company were shown as involved in the working of the Company and the name of appellant was not therein. Indisputably, therefore, the cheques bounced on 24-08-2006 due to insufficient funds were neither issued by the appellant nor the appellant was involved in the day to day affairs of the Company.

Before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and then to proceed further with proper application of mind to the legal principles on the issue. Impliedly, it is necessary for Courts to ensure strict compliance of the statutory requirements as well as settled principles of law before making a person vicariously liable.

The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of Court. Looking at the facts of the present case in the light of settled principles of law, we are of the view that this is a fit case for quashing the complaint. The High Court ought to have allowed the criminal miscellaneous application of the appellant because of the absence of clear particulars about role of the appellant at the relevant time in the day to day affairs of the Company.

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145. PARTNERSHIP ACT, 1932 – Section 69

Filing of suit by non-registered firm, effect of – Partner of a non-registered firm filing suit against co-partners seeking cancellation of sale-deed by one partner without his consent – Clause 25 (d) of Partnership Deed prohibited transfer of immovable property belonging to firm without the consent in writing of other partners – Suit property purchased out of funds of the firm for development and sale – Bar to file suit under section 69 applicable.

भागीदारी अधिनियम, **1932 -** धारा **69**

अपंजीकृत फर्म के द्वारा वाद संस्थित किये जाने का प्रभाव - अपंजीकृत फर्म के एक भागीदार द्वारा उसकी सहमति के बिना सह-भागीदार द्वारा निष्पादित विक्रयपत्र के निरस्ती हेतु सह-भागीदारों के विरूद्ध वाद प्रस्तुत - भागीदारी विलेख के खण्ड 25 (डी) में फर्म की अचल संपत्ति के अंतरण को सह भागीदारों की लिखित सहमति के बिना निषेधित किया गया था - वादग्रस्त संपत्ति को फर्म की राशि से विकास एवं विक्रय के लिये खरीदा गया था - धारा 69 के अधीन वाद को प्रस्तुत किये जाने का निबंधन लागू होता है।

Farooq v. Sandhya Anthraper Kurishingal and others

Judgment dated 24.04.2017 passed by the Supreme Court in Civil Appeal No. 5587 of 2017, reported in AIR 2017 SC 2945

Relevant extracts from the Judgment:

Having heard the learned Senior counsel appearing for the parties, it is clear that the plaint, read as a whole, relied upon clause 25 (d) of the Partnership Deed which specifically states that no partners of the firm shall without the consent in writing of the other partners be entitled to transfer immovable property belonging to the firm. The plaint then goes on to say that the suit schedule property was purchased out of the funds of the firm for the purpose of development and sale. In paragraph 11, the plaintiffs discovered that a sale deed has been executed by the first defendant. It has been specifically stated that the plaintiffs had never consented to the same and the first defendant has no authority to sell any immovable property belonging to the firm. The plaint, read as a whole, leaves no manner of doubt that the basis for the suit is Section 69 of the Partnership Act read with clause 25 (d) of the Partnership Deed dated 29th December, 1995. Paragraph 18 of the plaint does not carry the matter further inasmuch as the only sentence which could possibly be relied upon, and which was relied upon by the High Court, is that the plaintiffs are entitled to file the suit even independently of the partnership firm. Having found that the basis of the suit is the factum of partnership and having relied upon clause 25 (d) of the Partnership Deed, it is clear that the Trial Court correctly found that the bar of Section 69 of the Act was attracted in the facts of this case.

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***146. PREVENTION OF MONEY LAUNDERING ACT, 2002 – Sections 4, 19, 43 and 65**

PREVENTION OF MONEY LAUNDERING RULES, 2005 – Rule 3

CRIMINAL PROCEDURE CODE, 1973 – Section 9

(i) Offences under PMLA, whether cognizable – Section 4 – Offence of money laundering is punishable with rigorous imprisonment for a term not less than 3 years extending to 7 years and with

fine – As per Section 4 read with Second Schedule of CrPC, offences under PMLA are cognizable offences – Further, section 45 of the Act states that offences under PMLA are cognizable and non-bailable.

(ii) Procedure for investigation of offences under PMLA – PMLA being Special Act and also as per Section 65 of the Act, the provisions of investigation under PMLA have overriding effect – Provisions of Cr.P.C. which are consistent with provisions of PMLA are applicable – No procedure prescribed for investigation under Section 65 – Hence, procedure prescribed under Cr.P.C to be followed.

(iii) Court of Additional Session Judge, whether a Special Court under the Act – Central Government vide notification dated 01.06.2006 issued under section 43(1) of the Act, designated Court of Sessions as Special Courts for trial of offences under the Act – Additional Sessions Judge covered within meaning of Court of Sessions under Section 9 of Cr.P.C. – Central Government not confined the designation to "Sessions Judge" as special court – Hence, Additional Sessions Judge is competent court to try the offences under the Act.

(iv) Application for habeas corpus, validity of – On ground of illegal detention under the Act, Section 19 empowers specified officers to arrest a person by following prescribed procedure mentioned under the Act – Rules formulated under the Act mandates arresting officer to forward a copy of order of arrest and material in sealed cover to adjudicating officer – Arrest of accused in accordance with section 19 of the Act – Bail not rejected in contravention of section 45 of the Act – Hence, application for habeas corpus not maintainable.

धन शोधन निवारण अधिनियम**, 2002 -** धाराएं **4, 19, 43** एवं **65**

धन शोधन निवारण नियम**, 2005 -** नियम **3**

दंड प्रक्रिया संहिता**, 1973 -** धारा **9**

(i) क्या धन शोधन निवारण अधिनियम के अंतर्गत अपराध संज्ञेय हैं ? धारा 4 धनशोधन के अपराध ऐसे कठोर कारावास से जो कि 3 वर्ष से कम का नहीं होगा और जो कि 7 वर्ष तक का हो सकता है और जुर्माने से भी दंडनीय है - धारा 4 एवं दंड प्रक्रिया संहिता की प्रथम अनुसूची के द्वितीय भाग के अनुसार धन शोधन निवारण अधिनियम के अपराध संज्ञेय हैं - इसके अतिरिक्त इस अधिनियम की धारा 45 यह उपबंधित करती है कि धन शोधन निवारण अधिनियम के अपराध संज्ञेय व अजमानतीय होंगे।

(ii) धन शोधन निवारण अधिनियम के अपराधों में अनुसंधान की प्रक्रिया - धन शोधन निवारण अधिनियम एक विशेष अधिनियम है - अधिनियम की धारा 65 के अनुसार, धन शोधन निवारण अधिनियम में अनुसंधान के प्रावधान अध्यारोही प्रभाव रखेंगे - दंड प्रक्रिया संहिता के वे प्रावधान जो धन शोधन निवारण अधिनियम से संगत हैं, वे लागू होंगे - अनुसंधानकर्ता अधिकारी अधिनियम के अंतर्गत पुलिस आफीसर नहीं हैं - धारा 65 में अनुसंधान के संबंध में कोई प्रक्रिया विहित नहीं की गई हैं - अतः दंड प्रक्रिया संहिता में विहित प्रक्रिया को ही अनुसरित किया जायेगा।

(iii) क्या अधिनियम के अन्तर्गत अतिरिक्त सत्र न्यायालय का न्यायालय, विशेष न्यायालय हैं? केन्द्र सरकार के द्वारा धारा 43 (1) के अंतर्गत अधिसूचना दिनांकित 01/06/2006 जारी कर पदांकित सत्र न्यायालय को अधिनियम के अन्तर्गत अपराधों के विचारण के लिये विशेष न्यायालय घोषित किया गया - धारा 9 दंड प्रक्रिया संहिता के अंतर्गत सत्र न्यायालय में अतिरिक्त सत्र न्यायालय भी आता हैं - इस पद को ''विशेष न्यायाधीश'' के रूप में सत्र न्यायाधीश तक सीमित नहीं किया गया था - अतः अतिरिक्त सत्र न्यायाधीश का न्यायालय अधिनियम के अन्तर्गत अपराधों का विचारण करने के लिये सक्षम हैं।

(iv) बंदी प्रत्यक्षीकरण के आवेदन की वैधता - अधिनियम के अंतर्गत अवैधानिक निरोध के आधार पर - धारा 19 के अंतर्गत विर्निदिष्ट अधिकारियों को विहित विधि का पालन करके किसी व्यक्ति को गिरफ्तार करने की शक्ति प्राप्त हैं - अधिनियम के अंतर्गत जो नियम बनाये गये हैं वह गिरफ्तार करने वाले अधिकारी के लिये यह आज्ञापक करते हैं कि वह गिरफ्तारी के आदेश की प्रति एवं सामग्री को सीलबंद कर अधिनिर्णयक अधिकारी के पास अग्रेषित करें - अभियुक्त की गिरफ्तारी धारा 19 के अनुसार ही की गई थी - अधिनियम की धारा 45 के उल्लंघन में जमानत आवेदन को निरस्त नहीं किया गया - अतः बंदी प्रत्यक्षीकरण का आवेदन पोषणीय नहीं हैं।

Vijay Madanlal Choudhary v. Union of India and anr.

Order dated 20.10.2015 passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Petition No. 4336 of 2015, reported in ILR (2016) MP 2492

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147. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 19 (i) (b) and 27

Residential orders in divorce petition – Affidavits of wife and daughter alleging domestic violence by appellant-husband – Family Court exercised its discretion after satisfying that domestic violence has taken place and granted interim order to husband to

remove himself from shared household though jointly owned by both till disposal of divorce petition – Not perverse – No interference by the Supreme Court.

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम **2005 -** धाराएं **19 (**प) (ख) और **27**

विवाह विच्छेद की याचिका में आवासीय आदेश - पति अपीलार्थी द्वारा घरेलू हिंसा के आक्षेप विषयक पत्नि और पुत्री के शपथ पत्र प्रस्तुत - परिवार न्यायालय ने अपने विवेकाधिकार का प्रयोग इस बात से संतुष्ट होने के बाद किया कि घरेलू हिंसा कारित हुई थी - अंतरिम आदेश पारित किया गया कि पति को ऐसी साझा गृहस्थी से, जो दोनों के द्वारा स्वामित्व की थी, विवाह विच्छेद याचिका के निराकरण पर्यन्त पृथक किया जाता है - आदेश अनुचित नहीं है - उच्चतम न्यायालय द्वारा कोई हस्तक्षेप नहीं।

Samir Vidyasagar Bhardwaj v. Nandita Samir Bhardwaj
Judgment dated 09.05.2017 passed by the Supreme Court in Civil Appeal No. 6450 of 2017, reported in AIR 2017 SC 2713

Relevant extracts from the Judgment:

It is an undisputed fact that the property is a shared household of the parties. The appellant-husband is working with the Taj Group of Hotels and the respondent-wife is working as an airhostess with the British Airways. As is seen from the organisations in which they are working, both the appellant and the respondent are independent and having their own source of income. We have gone through the allegations of domestic violence made not only by the respondent-wife but also in the affidavits filed by their grown up daughters wherein they have expressed their feelings in view of the dispute between their parents and also their feelings as to the conduct of their father at home. We do not propose to go into those averments in the affidavit sworn in by the daughters, lest it would prejudice either parties while contesting the main matter.

Section 19(1)(b) of the Protection of Women Domestic Violence Act provides that the Court may direct the appellant-husband to remove himself from the shared household. The order passed under Section 19 of the Act seeks to maintain continued and undisturbed residence of the aggrieved party within the shared household and in pursuance of same it directs the respondent to execute a bond with or without surety or secure an alternate accommodation for the aggrieved party and pay the rent for the same and restrains the respondent from or renouncing property rights or valuable security of the aggrieved party.

The Family Court arrived at a finding that prima facie material was available on record to accept the allegation of the respondent-wife on domestic violence wherein the concerned Judge had exercised his discretion under Section 19(1)(b) of the Domestic Violence Act which provides that the Magistrate on being satisfied

that domestic violence has taken place can remove the spouse from the shared household which in our opinion he has rightly done. Exercise of discretion by Family Court cannot be said to be perverse warranting interference. The High Court while declining to interfere with the order has also considered the factual and legal position.

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148. RENT CONTROL & EVICTION :

JAMMU AND KASHMIR HOUSES AND SHOP RENT CONTROL ACT, 1966 – Section 11 (1) (h)

Bonafide requirement – Plaintiff established genuine and reasonable requirement of tenanted premises – Genuine need, is a matter of appreciation – Non-examination of member of the family by plaintiff who intends to do business in the premises cannot be a ground for repelling the reasonable requirement of landlord – Held, requirement of the landlord for own occupation includes occupation by a member of the family.

किराया नियंत्रण एवं निष्कासनः

जम्मू एण्ड काश्मीर गृहों एवं दुकान किराया नियंत्रण अधिनियम, **1966 -** धारा **11 (1)** (ज)

सद्भाविक आवश्यकता - वादी द्वारा किरायेदारी परिसर के संबंध में वास्तविक एवं युक्तियुक्त आवश्यकता को साबित किया - वास्तविक आवश्यकता, गुण दोषों के विवेचन का विषय है - वादी द्वारा परिवार के ऐसे सदस्य का, जो कि परिसर में व्यवसाय करना चाहता था, परीक्षण न कराये जाने मात्र से वादी की युक्तियुक्त आवश्यकता को निरस्त नहीं किया जा सकता - अभिनिर्धारित, स्वयं के व्यवसाय के लिये मकान मालिक की आवश्यकता में परिवार के एक सदस्य की आवश्यकता शामिल हैं।

Mehmooda Gulshan v. Javaid Hussain Mungloo

Judgment dated 17.02.2017 passed by the Supreme Court in Civil Appeal No. 1398 of 2011, reported in AIR 2017 SC 1047

Relevant extracts from the Judgment:

Mere non-examination of the family member who intends to do the business cannot be taken as a ground for repelling the reasonable requirement of the landlord. Under the Act, the landlord needs to establish only a reasonable requirement. No doubt, it is not a simple desire. It must be a genuine need. Whether the requirement is based on a desire or need, will depend on the facts of each case.

*   *   *

Thus, the question is whether there is a reasonable requirement by the landlord of the premises. This would depend on whether the landlord has been able to establish a genuine element of need for the premises. What is a genuine need would depend on the facts and circumstances of each case. Merely because the landlord has not examined the member of the family who intends to do business in the premises, he cannot be non-suited in case he has otherwise established a genuine need.

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149. TRANSFER OF PROPERTY ACT, 1882 – Section 58 (c)
SPECIFIC RELIEF ACT, 1963 – Section 10
Examination of true nature of document to determine whether the transaction is mortgage by conditional sale or sale out and out – Conditions laid down in *Chunchun Jha's case* reiterated – Transaction concluded in one document, styled as "Deed of conditional Sale", condition as to re-conveyance after five years and plaintiff's offer to resale to defendant – Document held to be mortgaged with conditional sale.

संपत्ति अंतरण अधिनियम**, 1882 -** धारा **58 (**ग)
विर्निदिष्ट अनुतोष अधिनियम**, 1963 -** धारा **10**
यह निर्धारित करने के लिये कि क्या संव्यवहार सशर्त विक्रय द्वारा बंधक हैं या विक्रय, दस्तावेज की वास्तविक प्रकृति की परीक्षा - चुन चुन झा के प्रकरण में प्रतिपादित शर्तो का अवलंबन - संव्यवहार एक ही दस्तावेज में निष्पादित था, जिसका शीर्षक था ''सशर्त विक्रय का लेख'', जिसकी शर्त थी कि पांच वर्षो बाद प्रतिहस्तांतरण और वादी, प्रतिवादी को पुर्न विक्रय करेगा - दस्तावेज को सशर्त विक्रय द्वारा बंधक होगा अभिनिर्धारित किया गया।

Srinivasaiah v. H.R. Channabasappa through LRs. and others
Judgment dated 25.04.2017 passed by the Supreme Court in Civil Appeal No. 5576 of 2017, reported in AIR 2017 SC 2141

Relevant extracts from the judgment:

When we examine the nature of document in question (Ex.P-1), we are of the opinion that the document (Ex.P-1) is a mortgage with conditional sale as defined under Section 58 (c) of the T.P. Act. This we say for following reasons:

First, it is not in dispute that the plaintiff was the owner of the suit land. Second, the parties concluded the transaction in question by executing one document (Ex.P-1). Third, the document (Ex.P-1) is styled as a "Deed of Conditional Sale". Fourth, it contains a condition that defendant No.1 will be allowed to remain in possession of the suit property for 5 years and enjoy the fruits of the land and that during this period, the plaintiff will be entitled to get

the suit property re-conveyed in his name on paying Rs.1500/- by getting the sale deed executed in his name and obtain possession of the suit land from defendant No.1. Fifth, the plaintiff offered to pay `1500/- to defendant No.1 with a request to resale the land to him.

In our considered opinion, the aforesaid five reasons satisfies the third condition of Section 58(c) of the T.P. Act, namely, "on condition that such payment being made, the buyer shall transfer the property to the seller". It also satisfies the tests laid down by this Court in ***Chunchun Jha v. Ebadat Ali and anr., AIR 1954 SC 345)*** namely, First, the transaction is concluded in one document; Second, the document styled as a "Deed of Conditional Sale" itself contains the condition of repurchase on offering the sale money without interest for the reason that defendant No.1 was allowed to use the land till the money is not paid back to him by the seller (plaintiff); and Third, parties' intention as per terms of Ex.P-1 is also supported by the evidence which was accepted by the two Courts - Trial Court and the High Court.

In the light of foregoing discussion, we are of the considered opinion that the Trial Court and the High Court was right in decreeing the plaintiff's suit whereas the first Appellate Court was not right in dismissing the suit.

In other words, the reasoning and the conclusion arrived at by the Trial Court and the High Court while holding that Ex.P-1 is a "mortgage deed by conditional sale" as defined under Section 58(c) of the T.P. Act is just and proper and hence it deserves to be upheld by this Court.

We also note that the High Court rightly took note of the law laid down in the case of ***Chunchun Jha*** (supra) and the requirements of Section 58(c) of the T.P. Act and keeping the same in mind interpreted Ex.P-1 and came to a right conclusion.

Learned Counsel for the appellant, however, placed reliance on the decision in ***Vanchalabai Raghunath Ithape v. Shankarrao Baburao Bhilare, (2013) 7 SCC 173*** and contended that the law laid down therein supports his contention that the Ex.P-1 is a sale out and out.

We have perused the decision in ***Vanchalabai Raghunath Ithape's case*** (supra). First, we note therein that it did not take note of law laid down by this Court in the case of ***Chunchun Jha*** (supra), which is a decision of larger Bench (4 Judge Bench); Second, we further find that there the High Court had affirmed the findings of fact recorded by the Courts below in paras 19, 20, 25, 26 and 29 which are reproduced in para 9 of the decision at pages 176 and 177 wherein it is mentioned in para 26 of the first appellate order "Admittedly there was no relationship of debtor and creditor between the parties". This finding of fact was affirmed by the High Court, which, in turn, was upheld by this Court; Third, such is not the case here because in the case at hand, the plaintiff came out with a

case that he took loan of Rs.1500/- from defendant No.1 and to secure the payment of loan, a conditional sale deed was executed in the form of mortgage deed. It was not so in the case of ***Vanchalabai Raghunath Ithape*** (supra).

It is for these three reasons, we prefer to rely upon the law laid down by the earlier larger Bench in the case of ***Chunchun Jha*** (supra) which continues to hold the field to guide us as to how to examine the true nature of the document such as the one involved in the case (Ex. P-1).

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150. WAKF ACT, 1995 – Sections 51, 52, 83 and 85
CIVIL PROCEDURE CODE, 1908 – Section 9
Does civil court has jurisdiction to decide the question whether a property is a Wakf property or not? Held, No.

वक्फ अधिनियम, **1995 -** धाराएं **51, 52, 86** एवं **85**
सिविल प्रक्रिया संहिता, **1908 -** धारा **9**
क्या सिविल न्यायालय को यह क्षेत्राधिकारिता हैं कि वह यह निर्धारित करे कि कोई संपत्ति वक्फ संपत्ति हैं या नहीं - अभिनिर्धारित, नहीं।

Rajasthan Wakf Board v. Devki Nandan Pathak and others
Judgment dated 04.05.2017 passed by the Supreme Court in Civil Appeal No. 6310 of 2017, reported in AIR 2017 SC 2155

Relevant extracts from the Judgment:

The main question that arises for consideration in this appeal is whether the High Court was justified in holding that the suit was not capable of being tried by the Tribunal under Section 83 of the Act and the remedy of the plaintiff was to file a civil suit before the Civil Court.

The Waqf Act, 1995 was amended by The Wakf (Amendment) Act, 2013 (Act No. 27/2013). Since the case at hand is governed by the un-amended Act, we take note of some of the relevant un-amended provisions of the Act herein below.

Section 51 of the Act provides that notwithstanding anything contained in the Wakf Deed, any gift, sale, exchange or mortgage of any immovable property, which is a Wakf property, shall be void unless it is effected with the prior sanction of the Board. Section 52 of the Act empowers the Board to approach the Collector of the District to obtain possession of such Wakf property, which is alienated in contravention of Section 51 or Section 56 of the Act. It also provides a right of appeal to the Tribunal against the order of the Collector passed under Section 52(2) of the Act. Section 54 of the Act provides that the Chief Executive Officer to approach the Tribunal to seek an order of eviction against any encroacher of the Wakf property.

Section 83 of the Act empowers the Tribunal to determine any dispute, question or other matter relating to a Waqf or Wakf property under this Act. Section 85 of the Act which deals with the Bar of jurisdiction of Civil Court provides that no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter relating to any Wakf, Wakf property or other matter which is required by or under this Act to be determined by the Tribunal.

Reading the averments made in the plaint in the light of aforementioned sections, we are of the considered opinion that the Tribunal was right in its view in holding that it had the jurisdiction to try the suit on merits whereas the High Court was not so in holding the otherwise.

In other words, we are of the view that the Tribunal does have jurisdiction to decide the question arising in the suit filed by respondent No.6 and, therefore, the Tribunal rightly tried the suit on merits. The reasons are not far to seek.

In the first place, the main question involved in the suit was whether the suit land is a Wakf property or not. Plaintiff says that it is a Wakf property whereas the defendants say that it is not the Wakf property but it is their self property. This question, in our opinion, can be decided only by the Tribunal and not by the Civil Court as has been decided by this Court consistently in ***Ramesh Gobindram v. Sugra Hamayun Mirza Waqf, (2010) 8 SCC 726*** and ***Bhanwar Lal & Anr. v. Rajasthan Board of Muslim Wakf & ors., (2014) 16 SCC 51)***. Second, once the property is declared to be a Wakf property, a fortiori, whether the sale of such property is made by a person not connected with the affairs of the Wakf or by a person dealing with the affairs of the Wakf, the same becomes void by virtue of Section 51 of the Act unless it is proved that it was made after obtaining prior permission of the Board as provided under the Act. One cannot dispute that the matters falling under Sections 51 and 52 of the Act are also required to be decided by the Tribunal and hence jurisdiction of the Civil Court to decide such matters is also barred by virtue of provisions contained in Section 85 of the Act.

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CHILD LABOUR (PROHIBITION AND REGULATION) AMENDMENT ACT, 2016

NO. 35 OF 2016

[29th July, 2016.]

The Act of Parliament received the assent of the President on the 29th July, 2016, and is hereby published for general information:—

An Act further to amend the Child Labour (Prohibition and Regulation) Act, 1986.

BE it enacted by Parliament in the Sixty-seventh Year of the Republic of India asfollows:—

1. Short title and commencement. (1) This Act may be called the **Child Labour (Prohibition and Regulation) Amendment Act, 2016**.

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

2. Amendment of long title – In the Child Labour (Prohibition and Regulation) Act, 1986 (hereinafter referred to asthe principal Act), for the long title, the following shall be substituted, namely:—

> "An Act to prohibit the engagement of children in all occupations and to prohibitthe engagement of adolescents in hazardous occupations and processes and thematters connected therewith or incidental thereto.".

3. Amendment of short title – In section 1 of the principal Act, in sub-section (1), for the words, brackets andfigures "the Child Labour (Prohibition and Regulation) Act, 1986", the words, brackets andfigures "the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986" shall besubstituted.

4. Amendment of section 2 – In section 2 of the principal Act,—

(a) clause (i) shall be renumbered as clause (ia) thereof and before clause (ia) asso renumbered, the following clause shall be inserted, namely:—

‘(i) "adolescent" means a person who has completed his fourteenth year of age but has not completed his eighteenth year;’;

(b) for clause (ii), the following clause shall be substituted, namely:—

‘(ii) "child" means a person who has not completed his fourteenth year ofage or such age as may be specified in the Right of Children to Free andCompulsory Education Act, 2009, whichever is more;’.

5. Substitution of new section for section 3 – For section 3 of the principal Act, the following section shall be substituted, namely:—

"3. Prohibition of employment of children in any occupation and process – (1) No child shall be employed or permitted to work in any occupation orprocess.

(2) Nothing in sub-section (1) shall apply where the child,—

(a) helps his family or family enterprise, which is other than any hazardousoccupations or processes set forth in the Schedule, after his school hours orduring vacations;

(b) works as an artist in an audio-visual entertainment industry, includingadvertisement, films, television serials or any such other entertainment or sportsactivities except the circus, subject to such conditions and safety measures, asmay be prescribed:

Provided that no such work under this clause shall effect the schooleducation of the child.

Explanation.—For the purposes of this section, the expression,

(a) ''family'' in relation to a child, means his mother, father, brother,sister and father's sister and brother and mother's sister and brother;

(b) ''family enterprise'' means any work, profession, manufacture orbusiness which is performed by the members of the family with theengagement of other persons;

(c) ''artist'' means a child who performs or practices any work as ahobby or profession directly involving him as an actor, singer, sportsperson or in such other activity as may be prescribed relating to theentertainment or sports activities falling under clause (b) of sub-section(2).''.

6. Insertion of new section 3A – After section 3 of the principal Act, the following section shall be inserted, namely:—

"3A. Prohibition of employment of adolescents in certain hazardous occupations and processes – No adolescent shall be employed or permitted to work in any of the hazardousoccupations or processes set forth in the Schedule:

Provided that the Central Government may, by notification, specify the nature ofthe non-hazardous work to which an adolescent may be permitted to work under thisAct.''.

7. Amendment of section 4 – In section 4 of the principal Act, for the words "add any occupation or process to theSchedule", the words "add to, or, omit from, the Schedule any hazardous occupation orprocess" shall be substituted.

8. Amendment of section 5 – In section 5 of the principal Act,—

(i) in the marginal heading, for the words ''Child Labour Technical AdvisoryCommittee'', the words ''Technical Advisory Committee'' shall be substituted;

(ii) in sub-section (1), for the words ''Child Labour Technical Advisory Committee'', the words ''Technical Advisory Committee'' shall be substituted.

9. Amendment of Part III – In the heading of Part III of the principal Act, for ''CHILDREN'' substitute''ADOLESCENTS.''.

10. Amendment of section 6 – In section 6 of the principal Act, for the word and figure "section 3", the word,figure and letter "section 3A" shall be substituted.

11. Amendment of section 7 – In section 7 of the principal Act, for the word ''child'', wherever it occurs, the word''adolescent'' shall be substituted.

12. Amendment of section 8 – In section 8 of the principal Act, for the word ''child'', the word ''adolescent'' shallbe substituted.

13. Amendment of section 9 – In section 9 of the principal Act, for the word "child", at both the places, where itoccurs, the word "adolescent" shall be substituted.

14. Amendment of section 10 – In section 10 of the principal Act, for the word ''child'', at both the places, where itoccurs, the word ''adolescent'' shall be substituted.

15. Amendment of section 11 – In section 11 of the principal Act,—

(a) for the word "children", the word "adolescent" shall be substituted.

(b) for the word ''child'', wherever it occurs the word ''adolescent'' shall besubstituted.

16. Amendment of section 12 – In section 12 of the principal Act,—

(a) in the marginal heading, for the words and figures ''sections 3 and 14'' thewords, figures and letter ''sections 3A and 14'' shall be substituted;

(b) for the words and figures ''sections 3 and 14'', the words, figures and letter''sections 3A and 14'' shall be substituted.

17. Amendment of section 13 – In section 13 of the principal Act, for the word ''children'', wherever it occurs, theword ''adolescent'' shall be substituted.

18. Amendment of section 14 – In section 14 of the principal Act,—

(a) for sub-section (1), the following sub-sections shall be substituted, namely:—

"(1) Whoever employs any child or permits any child to work incontravention of the provisions of section 3 shall be punishable withimprisonment for a term which shall not be less than six months but which mayextend to two years, or with fine which shall not be less than twenty

thousandrupees but which may extend to fifty thousand rupees, or with both:

Provided that the parents or guardians of such children shall not bepunished unless they permit such child for commercial purposes in contraventionof the provisions of section 3.

(IA) Whoever employs any adolescent or permits any adolescent to workin contravention of the provisions of section 3A shall be punishable withimprisonment for a term which shall not be less than six months but which mayextend to two years or with fine which shall not be less than twenty thousandrupees but which may extend to fifty thousand rupees, or with both:

Provided that the parents or guardians of such adolescent shall not bepunished unless they permit such adolescent to work in contravention of theprovisions of section 3A.

(1B) Notwithstanding anything contained in sub-sections (1) and (1A)the parents or guardians of any child or adolescent referred to in section 3 orsection 3A, shall not be liable for punishment, in case of the first offence.".

(b) for sub-section (2), the following sub-sections shall be substituted, namely:—

"(2) Whoever, having been convicted of an offence under section 3 orsection 3A commits a like offence afterwards, he shall be punishable withimprisonment for a term which shall not be less than one year but which mayextend to three years.

(2A) Notwithstanding anything contained in sub-section (2), the parentsor guardian having been convicted of an offence under section 3 or section 3A,commits a like offence afterwards, he shall be punishable with a fine which mayextend to ten thousand rupees.".

(c) clauses (a), (b) and (c) of sub-section (3) shall be omitted.

19. Insertion of new sections 14A, 14B, 14C and 14D – After section 14 of the principal Act, the following sections shall be inserted,namely:—

"14A. Offences to be Congnizable – Notwithstanding anything contained in the Code of Criminal Procedure,1973, any offence committed by an employer and punishable under section 3 orsection 3A shall be cognizable.

14B. Child and Adolescent Labour Rehabilitation Fund – (1) The appropriate Government shall constitute a Fund in every district orfor two or more districts to be called the Child and Adolescent Labour RehabilitationFund to which the amount of the fine realized from the employer of the child andadolescent, within the jurisdiction of such district or districts, shall be credited.

(2) The appropriate Government shall credit an amount of fifteen thousandrupees to the Fund for each child or adolescent for whom the fine amount has beencredited under sub-section (1).

(3) The amount credited to the Fund under sub-sections (1) and (2) shall bedeposited in such banks or invested in such manner, as the appropriate Governmentmay decide.

(4) The amount deposited or invested, as the case may be under sub-section (3),and the interest accrued on it, shall be paid to the child or adolescent in whose favoursuch amount is credited, in such manner as may be prescribed.

Explanation:— For the purposes of appropriate Government, the CentralGovernment shall include the Administrator or the Lieutenant Governor of a Unionterritory under article 239A of the Constitution.

14C. Rehabilitation of rescued child or adolescent –The child or adolescent, who is employed in contravention of the provisionsof this Act and rescued, shall be rehabilitated in accordance with the laws for the timebeing in force.

14D. Compounding of offences – (1) Notwithstanding anything contained in the Code of Criminal Procedure,1973, the District Magistrate may, on the application of the accused person, compoundany offence committed for the first time by him, under sub-section (3) of section 14 orany offence committed by an accused person being parent or a guardian, in suchmanner and on payment of such amount to the appropriate Government, as may beprescribed.

(2) If the accused fails to pay such amount for composition of the offence, then,the proceedings shall be continued against such person in accordance with theprovisions of this Act.

(3) Where any offence is compounded before the institution of any prosecution,no prosecution shall be instituted in relation to such offence, against the offender inrelation to whom the offence is so compounded.

(4) Where the composition of any offence is made after the institution of anyprosecution, such composition shall be brought in writing, to the notice of the Court inwhich the prosecution is pending and on the approval of the composition of the offencebeing given, the person against whom the offence is so compounded, shall be discharged.".

20. Insertion of new sections 17A and 17B – After section 17, the following sections shall be inserted, namely:—

"17A. District Magistrate to Implement the provisions – The appropriate Government may confer such powers and imposesuch duties on a District Magistrate as may be necessary, to ensure that theprovisions of this Act are properly carried out and the District Magistrate mayspecify the officer, subordinate to him, who shall

exercise all or any of thepowers, and perform all or any of the duties, so conferred or imposed and thelocal limits within which such powers or duties shall be carried out by the officeras may be prescribed.

17B. Inspection and monitoring –The appropriate Government shall make or cause to be made periodicinspection of the places at which the employment of children is prohibited andhazardous occupations or processes are carried out at such intervals as it thinksfit, and monitor the issues, relating to the provisions of this Act.".

21. Amendment of section 18 – In section 18 of the principal Act, in sub-section (2),—

(i) clause (a) shall be relettered as clause (b) thereof and before clause (b), as sorelettered, the following clause shall be inserted, namely:—

(a) the conditions and the safety measures under clause (b) of sub-section(2) and other activities under clause (b) to Explanation of sub-section (2) ofsection 3;

(ii) in clause (b), as so relettered, for the words "Child Labour Technical AdvisoryCommittee", the words "Technical Advisory Committee" shall be substituted.

(iii) clauses (b), (c) and (d) shall be relettered as clauses (c), (d) and (e) thereofand in clause (c) as so relettered, for the word "child", the word "adolescent" shall besubstituted;

(iv) after clause (e), as so relettered, the following clauses shall be inserted,namely:—

"(f) the manner of payment of amount to the child or adolescent undersub-section (4) of section 14B;

(g) the manner of composition of the offence and payment of amount tothe appropriate Government under sub-section (1) of section 14D;

(h) the powers to be exercised and the duties to be performed by theofficer specified and the local limits within which such powers or duties shall becarried out under section 17A.".

22. Substitution of new Schedule for the Schedule – In the principal Act, for the Schedule, the following Schedule shall be substituted, namely:—

'THE SCHEDULE

(See section 3A)

(1) Mines.

(2) Inflammable substances or explosives.

(3) Hazardous process.

Explanation.— For the purposes of this Schedule, "hazardous process" has themeaning assigned to it in clause (cb) of the Factories Act, 1948.'.

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